

9/16/80

Memorandum 80-81

Subject: Distribution of Model Periodic Payment of Judgments Act
for Review and Comment

At the last meeting, the Commission decided tentatively to send out the Model Periodic Payment of Judgments Act to interested persons for review and comment. When the comments are reviewed, the Commission will decide whether to submit a recommendation on this subject to the Legislature.

Attached as Exhibit 1 (pink) is a draft of a letter that could be used to send out the Model Act for comment. Also attached is a copy of an article in the ABA Journal discussing the problem and a copy of the Model Act.

The Commission should be familiar with the Model Act before a decision is made to send it out for comment. The Model Act should generally appear to the Commission to be a reasonable solution to the problem if the Commission is to solicit comments on it.

Respectfully submitted,

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LETTER OF TRANSMITTAL

The California Law Revision Commission, pursuant to a directive from the California Legislature, is now engaged in preparation of a comprehensive statute relating to enforcement of judgments. The Commission plans to submit the comprehensive statute for consideration by the 1981 session of the Legislature.

The comprehensive statute does not deal with one important aspect of the enforcement of judgments study--whether and to what extent periodic payment of judgments should be authorized or required. The Commission may submit a separate recommendation on periodic payment of judgments.

The Commission has reviewed the Model Periodic Payment of Judgments Act prepared by the National Conference of Uniform Laws Commissioners. The Commission has made no decision whether to recommend this Model Act for enactment in California as proposed or in a revised form. Instead, the Commission is distributing the Model Act (copy enclosed) to interested persons and organizations for review and comment. Your comments should be in the Commission's hands not later than December 1, 1980.

Your comments will be carefully reviewed when the Commission determines what recommendation, if any, to submit to the Legislature on this subject. The Commission will appreciate your cooperation in this study.

Also enclosed is a copy of an article on this subject which was published in the American Bar Journal.

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734 Periodic Payments of Bodily Injury Awards
Roger C. Henderson

The common law system of awarding damages in bodily injury cases is familiar--the lump-sum payment. The trier of fact must determine at the time of trial all damages, past and future, owing to a claimant. Perhaps this system is the only one the courts could realistically administer when the law regarding damages in bodily injury cases developed. Yet it is not free from problems. One of the more serious problems is the lack of information needed to assess the damages accurately at the time of the trial.

A number of things are relatively uncertain at the time of trial in serious injury cases. Even with the passage of time, we may never know what the claimant would have been like without injury. On the other hand, time will reveal what the seriously injured claimant will be like in the future. We shall also know answers to other questions, such as the state of the economy which now looms as a serious question for the trier of fact in fixing large damage awards for losses that will accrue far into the future.

Although uncertainties affecting damage awards are a major concern, other equally important matters have developed that call for re-examination of how large awards of future damages in bodily injury cases are calculated and paid. First, half-million and multimillion dollar awards have become so frequent in the last few years that they no longer represent the exceptional case. They have a great impact on the availability and affordability of bodily injury liability insurance. The most acute problems have been experienced in the areas of products liability and medical malpractice, which have given rise to some of the most serious injury cases. Second, the income tax laws make it to the benefit of claimants, and even their attorneys, to think about alternatives to the present system. Payment of damages as they accrue in the future can provide substantial tax savings. Third, improvident disposition of large lump-sum awards by successful claimants is not a matter that should be ignored any longer.

Because of the availability and affordability problems in bodily injury liability insurance markets and other factors, a number of states have adopted legislation, mainly in the field of products liability, that permits judgments for damages for bodily injury to be paid in periodic installments rather than in a lump sum. In the main, this legislation has not been thorough and has created more problems than it solves. The problems not only affect litigants living in the adopting states, but, because of the national and international nature of products liability litigation, citizens and businesses throughout the United States.

In 1977 the National Conference of

Commission on Uniform State Laws established a special committee to consider drafting an act that would change the common law system of paying damages. The committee is now in the final stage of completing the Model Act for Periodic Payment of Judgments, which provides an alternative to the system of lump-sum payment of future damages arising from bodily injury by facilitating payment over the period when the losses will accrue. At the election of any party, subject to certain safeguards, a case involving large amounts of damages to accrue in the future will be tried under this act, and when appropriate, the court will fashion a periodic installment judgment. The trier of fact, usually a jury, will fix the amount of damages under current tort law. There must be special fact findings, however, with regard to the amount of damages that will be incurred and payable in each future year. The periodic installment judgment should be fashioned accordingly. The act answers the problems left untended in legislation passed to date at the state level so that each state can tailor various parts of the legislation to its own needs.

There are advantages to both claimants and defendants, as well as to the public, in the act. A claimant's award for bodily injury is not subject to federal income tax under Section 104(a)(2) of the Internal Revenue Code, and the same rule usually prevails with regard to state income taxes. But any income earned on the award is subject to income tax. Under the present lump-sum system, awards for future damages are discounted to present value to take into account the earning power of money. A claimant is paid an amount of money now that will generate income by investment and, in turn, produce the total amount of damages awardable to the claimant. A portion of the claimant's damages thus is taxable under the lump-sum system.

Under the uniform act the entire amount of future damages owing to a claimant will be free from federal income taxation because there will be no occasion to discount to present value. In addition, if the fee of the claimant's attorney is contingent on the payment of damages for losses accruing in the future, the attorney arguably should be able to spread the income over the years in which the fees are paid. The act facilitates but does not mandate that arrangement. The attorney and client are free to contract as they choose.



Under the present system the risk of investment of large lump-sum payments for future damages is forced on the accident victim. Many claimants lack the financial expertise to handle and invest large sums of money. Services of others can be obtained, but there is always a risk of improvident investments and usually a fee is involved. Under the periodic payment scheme of this act, the defendant or the defendant's insurer will shoulder these burdens. They presumably will have easier access to sources of financial expertise and can better absorb the risks and costs involved.

Defendants also will benefit by being permitted to pay large awards for future damages in periodic installments. Many defendants in serious cases are either large, self-insured or solvent corporations, or carry liability insurance. The use of annuities or similar financial arrangements to secure and pay the installments could afford savings because they are in a better position than a single claimant to secure the most advantageous arrangements. In

addition, the act as now drafted contemplates that periodic installments for certain damages that never accrue will terminate on premature death of the tort victim.

The act also eliminates the guesswork and speculation involved in the lump-sum system when the jury is asked to discount awards of future damages to present value and, in an increasing number of jurisdictions, predict future rates of inflation. Since damages will be paid as losses accrue, there is no need to discount to present value. With regard to inflation, the act provides for adjustments in the unpaid installments so that the damages award is not eroded by inflation.

The act leaves it to the adopting state to tailor certain provisions to meet the needs of that state. On the other hand, the problems that give rise to the need for this type of legislation in many instances are national. A model act should be the best vehicle by which to accomplish the changes contemplated. This certainly seems preferable to a solution mandated at the national level with all of its attendant problems.

Although the attempt to avoid much of the uncertainty at the trial in the lump-sum system is a goal of a periodic payment scheme, a number of the problems that plague the jury are shifted to another forum—the legislature. These problems must be addressed in drafting a statutory scheme. Several of the more difficult, not to mention controversial, problems follow.

Through the passage of time we can learn if the victim is hurt as seriously as the evidence indicates to the trier of fact at the time of trial. This would seem to call for a system that would allow for adjustments in the damages award in the future based on new information. Although the range of adjustments and the occasions can be limited to avoid an undue burden on the courts and parties, the dissipation of evidence and impinging extraneous factors on the health of the victim raise a horrible specter to the insurance industry. Placing the victim under the constant surveillance of an insurance company to determine whether there has been a change does not find favor with the plaintiffs' bar either, not to mention the psychological aspects of rehabilitation. The insurance industry asserts that there is no way to cost the liability insurance coverage if the insurance carrier's exposure is open ended. Suggestions for limiting the number of times that a case can be reopened or

placing outside limits on the range of the modifications a court can make do not placate the insurance industry.

A similar problem arises with the premature death of the victim. Although the jury will assess damages under present tort law by using life expectancy tables, the victim may die early from a cause unrelated to the accident that gave rise to a periodic payment judgment. The insurance industry favors terminating all periodic payments not accrued, while the plaintiffs' bar is adamantly opposed. It is clear, however, that some, if not all, of the unaccrued award—for instance, future medical expenses—is a windfall to the victim's heirs if there is premature death.

For better or worse, the present draft of the model act does not allow reopening the case to permit modifying the damages award based on new information, with one exception. That exception involves the premature death of the victim. In that event any awards for medical expenses or pain and suffering that have not accrued terminate. Awards for earnings loss, however, do not necessarily terminate.

Another controversy lies in the issues with regard to inflation and discounting to present value. Courts today are being persuaded that the jury should be able to take into account fluctuations in purchasing power in the future, as difficult as that is to predict. The act contemplates that the jury will assess damages in terms of present dollar value, not taking into account inflation at the time the damages award is calculated. By paying the judgment in periodic installments in the future, there is no occasion for the jury to discount to present value either.

It is still necessary, however, if inflation is to be considered, to have some scheme for adjusting the periodic payments in the future so that the purchasing power of these payments is not diluted. Everyone agrees that adjustments for inflation must be dealt with in the act, but there is less agreement on the method. Does one use a fixed percentage or index factor or a formula that will cause the percentage to change as the economy fluctuates? The latter method has been adopted.

The act adjusts for inflation by utilizing an index factor based on the 52-week United States Treasury bill rate. This is a "floating" index factor much like the consumer price index, because interest rates reflect market expectations or predictions about inflation.

When inflation is high, interest rates are high and vice versa. The reason for adopting this index factor instead of the consumer price index or some other index is that there is no annuity marketed that will take into account inflation on a fluctuating basis and guarantee the principal sum invested. Yet, it will be necessary to secure a periodic payment judgment, or the "principal," with some type of instrument such as an annuity. If this cannot be done, there is a new risk that the victim may not be paid the damage award (or principal) because the judgment debtor or liability insurer obligated to pay the judgment may become insolvent over the period in which the periodic payments are to be paid. The new type of judgment must be secured, but what will suffice?

If a fixed factor were used to adjust the payments for inflation, a standard annuity could be used as security, but a fixed factor in volatile times such as ours would not be fair to either party. In the face of the protests by the insurance industry that an annuity that would guarantee the damages award and also vary according to inflation cannot and will not be marketed, the committee adopted the rate of return for 52-week Treasury bills as the index factor. This would permit a judgment debtor or insurance company to invest in Treasury bills, thereby providing not only the security needed for the judgment but also the income needed to make the adjustments for inflation, since the rate of return on the treasury bills mirrors economic conditions.

Security against inflation is a must

While the security aspect is excellent there is a question whether this index is too conservative. At the present time the rate of inflation is exceeding interest rates in general, so that there is a negative real rate of interest. Is there a better solution to the problem? If security that will protect the victim's award and also protect against decreases in the purchasing power of the dollar cannot be provided, the periodic payment concept is in serious jeopardy.

Under the act there will be situations in which a periodic payment judgment will be commuted or "lump summed." For example, if this security should fail, the victim or judgment creditor may move the court to calculate the equivalent lump-sum value of the periodic payments and order that the judgment

be paid in lump sum. In many jurisdictions the jury is not told to use a specific discount figure. Unless this way is to be left with the court (the jury trial already having been concluded), the act must specify a rate or, at least, a method for determining the rate. This decision could depend on the type of investment one believes is readily available to the victim. Based on economic data since World War II, the act suggests adoption of a real rate of interest of 3 per cent.

Another problem centers around whether the act should be mandatory, for example, by making it applicable to any case involving bodily injury damages in excess of a certain figure. It would serve little purpose to make the act applicable to small cases unless the parties consent, but at what level should it be mandatory for some class of cases? In lieu of a mandatory feature, would it be better to set up the framework or procedures by statute or rule of court to permit only voluntary invocation by the parties? The drafters think not and suggest that the act apply only, absent consent of all parties, to cases in which future damages for bodily injury exceed \$100,000.

The Uniform Laws Commissioners debated the provisions of the act at its 1979 annual meeting in San Diego. At the urging of those who felt there needed to be more discussion and interchange with the trial bar and insurance industry, it voted to delay action until the annual meeting in 1980. The purpose of this article is to further debate.

The insurance industry says that it embraces the "concept" in the act, but not this particular act. They say the inflation factor is not workable and the discount rate is too low. The plaintiffs' bar has voiced strong opposition to the provision terminating unpaid installments on premature death, if not to the whole act, but has appeared intrigued over the idea of being able to elect such a method of payment. The drafting committee, while still open to constructive criticism and suggestions, feels that the act is workable and that its time has come.

(Roger C. Henderson is dean of the University of Arizona College of Law. He also is a commissioner of the National Conference of Commissioners on Uniform State Laws and was reporter to the conference's Special Committee on the Periodic Payment of Judgments Act.)

UNIFORM LAW COMMISSIONERS'
MODEL PERIODIC PAYMENT OF JUDGMENTS ACT

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

UNIFORM LAW COMMISSIONERS'
MODEL PERIODIC PAYMENT OF JUDGMENTS ACT
With Prefatory Note and Comments

The ideas and conclusions herein set forth, including drafts of proposed legislation, have not been passed upon by the Commissioners on Uniform State Laws. They do not necessarily reflect the views of the Committee, Reporters or Commissioners. Proposed statutory language, if any, may not be used to ascertain legislative meaning of any promulgated final law.

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PREFATORY NOTE

The common law system of awarding damages in bodily injury cases is that of lump-sum payment. The trier of fact must determine at the time of trial all damages, past and future, that are owing to a claimant. Perhaps this system is the only one the courts could realistically administer when the law regarding damages in bodily injury cases developed. Yet, it is not free from problems. There are a number of things that are relatively uncertain at the time of trial in serious injury cases. Even with the passage of time, we will never know what the claimant would have been like in many of these cases as there has been permanent change. On the other hand, passage of time will reveal the answers to the question of what the seriously injured claimant actually will be like in the future. We will also know the answers to other questions, such as the state of the economy which now looms as a serious question for the trier of fact in ascertaining large damage awards for losses that will accrue far into the future.

In addition to these inherent problems in the lump-sum system, other matters have developed that call for re-examination of how large awards of future damages in bodily injury cases are calculated and paid. First, half million and multimillion dollar awards have become so frequent in the last few years that they no longer represent the exceptional case. Such awards have a great impact on the availability and affordability of bodily injury liability insurance.

✓ The most acute problems have been experienced in the areas of products liability and medical malpractice, situations which give rise to some of the most serious injury cases. Second, the income tax laws are such that it is to the benefit of claimants, and even their attorneys, to think about alternatives to the present system. Payment of damages as they accrue can provide substantial tax savings. Finally, the disposition of large lump-sum awards by successful claimants is not a matter that can be ignored when the public is demanding closer scrutiny of government spending, particularly in the welfare area.

Largely as a result of the availability and affordability problems in bodily injury liability insurance markets, but also because of the other factors mentioned above, a number of states have adopted legislation, mainly in the field of products liability, which permits judgments for damages for bodily injury to be paid in periodic instalments rather than in a lump sum. In the main, this legislation has not been thorough and creates more

problems than it answers. The problems not only affect the litigants in the adopting states, but are exacerbated because of the national and international nature of products liability and similar litigation. Needless to say, the problems of affordability and availability of bodily injury liability insurance are not intra-state in nature either, but also transcend governmental boundary lines.

The Model Periodic Payment of Judgments Act provides an alternative to the lump-sum system of paying large awards of future damages arising from bodily injury by facilitating payment over the period which the losses will accrue. At the election of any party, subject to certain safeguards, a case involving large amounts of damages which will accrue in the future will be tried under this Act and, where appropriate, the court will fashion a periodic-installment judgment. The Act answers the problems left untended in legislation passed to date and does it at the state level so that each state can tailor various parts of the legislation to its own needs.

There are advantages to both claimants and defendants, as well as to the public, in the Act. A claimant's award for bodily injury is not subject to the federal income tax. Under Section 104(a)(2) of the Internal Revenue Code 1954, a claimant can exclude from gross income the amount of any damages received on account of bodily injury. The same rule usually prevails with regard to state income taxes. However, any income earned on such an award is subject to income tax. Under the present lump-sum system, awards for future damages are discounted to present value to take into account the earning power of money. A claimant is paid an amount of money now which will generate income by investment and, in turn, produce the total amount of damages awardable to the claimant. Thus, a portion of the claimant's damages is taxable under the lump-sum system.

Recently, casualty insurers have undertaken to settle very serious personal injury cases by employing annuities and similar financial devices. The insurer of the tort defendant may offer to provide a series of payments to the tort victim extending over the victim's life or a period certain. By paying today's claims with tomorrow's dollars the insurer can offer an attractive package, including cost-of-living escalator clauses and other features, at a lower cost than paying the claim in lump sum. This type of settlement is being referred to in the insurance industry and literature as a "structured settlement." Annuities are often used to fund it. There are considerable income tax and other advantages to this type of settlement as compared to a lump-sum settlement.

In 1979, the Internal Revenue Service issued a ruling stating that the entire amount of the proceeds payable to the tort victim under a structured settlement is tax free where the victim has a right to receive only the periodic payments and does not have the actual or constructive receipt or the economic benefit of the

lump-sum amount that is invested to yield that periodic payment. Rev. Rul. 79-220, 1979 Int. Rev. Bull. No. 30, at 52. The Model Act is designed to provide the same favorable income tax consequences to the tort claimant who receives a periodic-payment judgment where future damages are paid out as the losses accrue. In addition, where the claimant's attorney has a contingent fee contract and payment is to be made on a periodic basis under that contract, the attorney may be able to spread the income for tax purposes over the years in which the fee is paid. The Act facilitates such an arrangement.

Under the present accident loss system, the risk of investment of large lump-sum payments for future damages is forced on the accident victim. Many claimants lack the financial expertise to handle and invest large sums of money. Services of others can be obtained, but there is always a risk of improvident investments. Moreover, there is usually a fee involved for such services. Under the periodic-payment scheme in this Act, the defendant or the defendant's insurer will shoulder these burdens. Presumably, they will have easier access to sources of financial expertise and can better absorb the risks and costs involved. In short, the accident victim should not have to bear the risks and costs associated with the management of large sums of money paid in a lump sum because of the culpable conduct of another.

Defendants will also benefit by being permitted to pay large awards for future damages in periodic instalments as the losses accrue. Many defendants in the very serious cases are either large, self-insured, or at least, solvent corporations, or carry liability insurance. The use of annuities or similar financial arrangements to secure and pay the instalments affords savings because they are in a better position than a single claimant to secure the most advantageous arrangements. In addition, the Act contemplates that awards for certain damages which never accrue because the loss is never suffered shall terminate.

The Act also eliminates the guesswork and speculation involved in the lump-sum system where the trier of fact, usually a jury, is asked to discount awards of future damages to present value and, in an increasing number of jurisdictions, predict future rates of inflation. Since damages will be paid as losses accrue, there is no need for the trier of fact to discount to present value. The Act also provides for adjustments in the instalment payments so that the damages awards are not eroded by decreases in the purchasing power of the dollar.

Overall, the Act contemplates payment of claimants for the actual losses incurred through a system which should be more efficient, all to the benefit of the public. The Act provides the most flexible framework to accomplish this by leaving it to the adopting

However, counsel would be well advised to consult with those who have special expertise in income taxation matters and structured settlements to ensure that the form of a periodic-instalment judgment and the method of securing it conform to Rev. Rul. 79-220 and any subsequent rulings or modifications by the Internal Revenue Service.

state to tailor certain provisions to meet the needs of the citizens of that state. At present, the casualty insurance industry is very interested in the concept of paying large personal injury awards for future damages on a periodic basis, but is fearful that certain problems inherent in such a mandatory scheme have not been satisfactorily resolved. For example, the cost-of-living index factor which is employed in the Act is designed to fluctuate with economic changes. The casualty insurers are fearful that there will be no market for the type of annuity needed to fund a periodic-installment judgment that is adjusted over time for inflation. The Drafting Committee, after hearing from representatives of the banking, as well as insurance, industry, believes that the scheme is workable and that a market will develop. However, because of the uniqueness of some features of the Act and the fact that some experimentation may be desirable, it is felt that a Model Act is the best vehicle by which to accomplish the changes contemplated. ¶ Approximately fourteen states have adopted some type of periodic-payment scheme for certain types of tort cases. (Elligett, The Periodic Payment of Judgments, 46 Ins. Counsel J. 130, at 134 (Jan. 1979).) A Model Act will provide state governments the opportunity to develop and compare experiences with existing legislation and should ultimately lead to the perfection of the statutory schemes for paying large personal injury awards for future damages on a periodic, rather than lump-sum, basis. This process certainly seems preferable to a solution mandated at the national level with all its attendant problems.

UNIFORM LAW COMMISSIONERS'
MODEL PERIODIC PAYMENT OF JUDGMENTS ACT

SECTION 1. [Purposes of Act.]

The purposes of this Act are to:

- (1) alleviate some of the practical problems incident to unpredictability of large future losses and to facilitate more accurate awards of damages for actual losses;
- (2) pay damages as the trier of fact finds the losses will accrue; and
- (3) assure that payments of damages more nearly serve the purposes for which they are awarded.

Comment

The problems giving rise to the need for the legislation embodied in the Model Periodic Payment of Judgments Act are detailed in the Prefatory Note to the Act. The purposes of the Act are also discussed there. Since the Notes and Comments are not enacted as part of the legislation when adopted by a state, it was felt that the purposes should be stated at the outset in the Act. The purposes section is to be used by the courts in interpreting the provisions of the Act in general, and is specifically to be used as criteria for preventing abuses in the invocation of the Act.

Any party to an action for bodily injury may elect that the case be tried under the provisions of this Act. When a party objects to the invocation of this Act, that party has the opportunity, but also the burden, to show that the purposes of this Act would not be served by conducting the trial of the claim affecting that party under the Act. In this case, the court must base its decision in resolving the issue on the criteria enumerated in this Section. See Section 3(d). In addition, there are other grounds for objecting to the invocation of the Act. See Section 3(c) (3)(i)---(ii).

SECTION 2. [Definitions.]

In this Act:

- (1) "Bodily injury" means bodily harm, sickness, disease, or death.
- (2) "Economic loss" means pecuniary harm for which damages are recoverable.

(3) "Future damages" means damages arising from bodily injury which the trier of fact finds will accrue after the damages findings are made.

(4) "Noneconomic loss" means nonpecuniary harm for which damages are recoverable, but the term does not include punitive or exemplary damages.

(5) "Past damages" means damages that have accrued when the damages findings are made, including any punitive or exemplary damages allowed by law.

(6) "Qualified insurer" means an insurer, self-insurer, plan, or arrangement approved pursuant to Section 17.

Comment

This Section contains definitions of words and phrases employed elsewhere in the Act.

The Act applies only to bodily injury cases as opposed to cases involving property damage. The definition of "bodily injury" is taken from tort liability insurance policy forms and is one that is commonly used to distinguish personal injury from harm to property. See Section 3(a) for the operative section employing this term.

The Act makes a distinction between "economic loss" and "noneconomic loss." The trier of fact is asked to make specific findings as to the losses in each category. This is not only necessary for the purpose of fashioning a periodic-installment judgment, but is necessary because awards for noneconomic loss and certain economic loss which never accrue because of the intervention of death, lapse. The distinction between the two types of losses is based on whether the harm results in pecuniary losses. Although not a precise line of demarcation, this is the common understanding in the bar and judiciary. The Act does not attempt to change the measure of damages. It is left to the adopting jurisdiction, based on existing law, to determine into which category particular elements of damages fall.

Payment of damages on a periodic installment basis applies only to losses accruing in the future. It is customary to speak of past and future damages and the term "future damages" is used to mean those accruing after the damage findings are made by the trier of fact. These are to be distinguished from "past damages," which are all other damages except future damages, including any punitive or exemplary damages. Past damages will continue to be paid in a lump sum as under the present system.

In adopting a system of paying future damages over the period which they will accrue, a new risk is introduced that the obligor will not be solvent or able to respond at some point in the future. Thus, it becomes important to use reasonable means to secure a judgment containing periodic instalments payable in the future. One of the techniques in

the Act for providing this assurance is to require that only certain insurers will be eligible to secure such a judgment. The responsibility for determining who is so qualified is placed on the insurance regulator in the adopting state. See Section 17. The term "qualified insurer" is used to designate those who are approved under this system.

SECTION 3. [Election for Act to Apply.]

(a) In order to invoke the provisions of this Act, a party to an action for bodily injury must make an effective election in accordance with this section.

(b) The election must be made [in accordance with rules of court] [by motion directed to the court with notice to all parties not less than 60 days before commencement of a trial involving issues of future damages unless leave of court is obtained]. Any objection to the election must be made [in accordance with rules of court] [by motion directed to the court with notice to all parties not less than 30 days after notice of the election].

(c) An election is effective if:

- (1) all parties have consented;
- (2) no timely objection is filed by any party; or
- (3) a timely objection is filed; but

(i) the electing party is a claimant and shows that there is a good faith claim that future damages will exceed [\$100,000] or

(ii) the electing party is a party responding to a claim for future damages in excess of [\$100,000] and shows that security in the amount of the claim for past and future damages or [\$500,000], whichever is less, can be provided under this Act.

(d) If an objecting party shows that the purposes of this Act would not be served by conducting the trial of the claim affecting him under this Act, the court may determine not to try the claim under this Act even though the conditions of subparagraphs (i) or (ii) in subsection (c)(3) are satisfied. [Such determination must be made [in accordance with rules of court] [by the court at least 30 days prior to trial].]

(e) If an effective election is on file at the commencement of trial, all actions, including third-party claims, counterclaims, and

actions consolidated for trial, must be tried under this Act unless the court finds that the purposes of this Act would not be served by doing so or in the interest of justice a separate trial or proceeding should be held on some or all of the claims that are not the subject of the election.

(f) An effective election can be withdrawn only by consent of all parties to the claim to which the election relates.

Comment

The policy underlying this Section is to permit any party to an action for bodily injury to elect that the case be tried under the procedures set out in this Act. If all parties consent or there is no objection filed by any party, the court will proceed to secure the necessary fact findings (Section 4) and determine the type of judgment to be entered (Section 6).

If a party objects to the invocation of the Act, further proceedings must be held by the court. Where an objection is lodged, the court should first determine whether the electing party is a claimant or a party responding to a claim. If the electing party is a claimant, the burden is on that party to show that a good faith claim for future damages exceeding the suggested figure of \$100,000 exists. The Act contemplates that only serious cases involving substantial damages which will accrue after the time of trial should be subject to the Act unless all parties agree. An adopting state is free to choose a threshold figure of more or less than the bracketed figure of \$100,000. The size and prevalence of serious injury cases in a particular jurisdiction should be considered in setting this figure. It should also be kept in mind that the dollar figure in this Section is merely a trigger for trying the case under the procedures of the Act and is not dispositive on the question of whether a periodic-installment judgment will actually be entered. Section 6 determines the type of judgment that will be entered.

If the electing party is a party responding to a claim for future damages in excess of the suggested figure of \$100,000, that party has the burden of showing that adequate security can be posted. This will help prevent respondents from abusing the Act. There also is a sanction where a responding party makes the necessary showing as to the ability to post security and later fails to post security without good cause. See Section 9(c).

The suggested figure in brackets in subparagraph (i) and the first figure in subparagraph (ii) should be the same regardless of the amount finally adopted. There appears to be no justification for using a different triggering threshold depending upon whether the electing party is a claimant or a respondent.

Questions with regard to the type of evidence that is admissible, the burden of adducing evidence, and the burden of persuasion under subsection (c) are left to prevailing rules which govern similar pre-trial matters in the adopting state.

In any event, an objecting party has the opportunity to show under subsection (d) that the purposes of the Act will not be served by conducting the trial of the claim affecting that party under the Act. The court must refer back to the criteria stated in Section 1 in resolving this issue. For example, the objecting party may show that, even though the claimant's damages are in excess of the triggering threshold figure, the claim against him is so different in nature from other claims in the case that it should be tried separately, at least as to the damages issue. This could occur where future damages consist mainly of medical bills and pain and suffering which will accrue in less than one year from the date the judgment is entered.

Subsection (e) deals with multiple claim cases. The court will want to take into consideration the question of whether the trial of the objecting party's claim will somehow interfere with the trial of claims which clearly should be subject to the provisions of this Act. In a case where there are multiple claimants who were injured in one accident, it may not be advisable to try in the same proceedings claims under the procedures of this Act with claims that are not being tried under the procedures of this Act. The Act prohibits expert testimony on future changes in the purchasing power of the dollar whereas such testimony might be admissible on a claim not subject to the procedures of this Act. See Section 5. Thus, instructions to the jury could differ as to the various claimants with regard to inflation. This same disparity would occur with regard to instructions on discounting to present value and on life expectancy. Id.

The confusion engendered by trying the claims with different jury instructions in the same proceeding would be a basis for the court to decide that there should be separate trials. The court could sever the damages issues and dispose of them in separate proceedings or try all the claims or none of them under the Act. It is a matter for the court to determine so that the purposes of the Act are served and no injustice is done to either the electing or objecting party after taking all interests into account. Assuming the interests are equal, however, the electing party prevails.

The bracketed language in subsections (b) and (d), dealing with the time periods within which an election or objection must be filed and when the court must rule, respectively, anticipates the problem in some states as to whether the legislature has the power to prescribe such rules or whether this is solely within the jurisdiction of the supreme court of the state. The adopting state should choose the appropriate language. Also, if the time period suggested is not appropriate, the adopting state should feel free to tailor the provision to its own situation. It should be kept in mind that the trial of a case under the procedures of this Act might entail different methods of preparation and should not give an undue advantage to, or work a hardship on, any party. Time periods should be determined accordingly.

The election to try the case under the procedures of this Act may be made for the first time after a mistrial is declared, a motion for new trial is granted, or a case is remanded on appeal for a new trial. A court may even permit an election to be filed after a severance. Leave of court may be granted at any time to file an election absent an abuse of discretion.

An election or attempted election is not to be taken as evidence that the claim is worth more or less than the figure that is finally adopted in subsection (c)(3), nor should any argument to the jury referring to such be allowed.

If an effective election is filed and the case is tried under this Act but the respondent is unable or refuses to post security under Section 9, the claimant has the option to have a periodic or a lump sum judgment entered. Thus, the claimant can force the respondent to pay the judgment in periodic instalments regardless of whether security is posted. In many cases, the respondent will be covered by liability insurance and the insurance regulator is empowered under Section 17 to take appropriate action against any liability insurer that refuses to post security when it is capable of doing so. There are other sanctions under Section 9(c) in addition.

SECTION 4. [Special Damages Findings Required.]

(a) If liability is found in a trial under this Act, the trier of fact, at a minimum, shall make separate findings for each claimant specifying the amount of:

- (1) any past damages; and
- (2) any future damages, and the periods over which they will accrue, on an annual basis, for each of the following types:
 - (i) medical and other costs of health care;
 - (ii) other economic loss; and
 - (iii) noneconomic loss.

(b) The calculation of future damages for types (i) and (iii) must be based on the costs and losses during the period of the time the claimant will sustain those costs and losses and the calculation for type (ii) must be based on the losses during the period of time the claimant would have lived but for the injury upon which the claim is based.

Comment

If an effective election is made under Section 3, Section 4 requires that certain types of findings be made by the trier of fact with regard to damages. The purpose is to obtain the necessary fact findings so that a periodic-instalment judgment can be fashioned. Both past and future damages are defined in Section 2. Past damages include any punitive or exemplary damages permitted and a court can require separate findings with regard to the latter. Only future damages are subject to payment in periodic instalments so they must be separated from past damages. The findings with regard to future damages must be further

delineated between those for medical and other health care costs, other economic loss, and noneconomic loss. The period over which these three categories of future damages will accrue and the amounts of each during these periods must be specified by the trier of fact. Special interrogatories to the jury will provide the needed findings.

Subsection (b) brings into focus an issue regarding damages which has not been given thorough attention by the common law. It is commonly said that, in contrast with the English rule, the United States jurisdictions have denied any damages for the reduced life expectancy of an accident victim. To bring the issue into sharper focus, the question is one of whether the trier of fact should use the pre-injury or post-injury life expectancy of the victim in calculating future damages. There is, however, American authority for the proposition that the pre-injury life expectancy is to be used in determining pecuniary losses such as loss of earnings. See Dobbs, Remedies, 549 (1973). The Act recognizes this authority and provides that, in determining loss of earnings, the trier of fact shall calculate future damages on the working life expectancy that the claimant would have had but for the injury upon which the claim is based. Any other economic loss except medical type costs is also governed by the pre-injury life expectancy.

There does not seem to be any American authority for the proposition that medical bills or other health care costs should be calculated on the basis of pre-injury life expectancy. In fact, these damages are nonexistent because death will prevent their accrual. This same argument can be made for noneconomic loss. The clearest case of non-accrual, though, is with regard to medical and other health care costs because the dependents of the victim, whose life has been shortened, would never receive any benefits from the awarding of these damages. Had the victim lived, the money would have been spent for the medical services.

The fact situation contemplated is anomalous only because the common law development with regard to wrongful death claims was truncated. Had there been a cause of action for wrongful death recognized at common law, perhaps the courts would have gone forward and recognized a claim for reduced life expectancy, at least for earnings loss. After all, by definition, the injury has reduced the life expectancy of the victim, and it would be a logical extension to permit the survivors to bring a cause of action which would cover the loss of earnings less the amount that would have been spent on the victim or persons other than the wrongful death claimants.

The common law probably would never have recognized the cause of action for any medical expenses beyond death since these will never accrue. The answer as to whether the common law would recognize a cause of action for pain and suffering after the victim has departed this veil of tears would probably have been in the negative too. One can look to the survival statutes and the wrongful death statutes for support for these conclusions. Under the orthodox survival acts, the deceased's cause of action ends upon death except to the extent that the statute permits the bringing of an action for those damages incurred prior to death. (Even then, in some jurisdictions, damages for such noneconomic loss as pain and suffering do not survive death.) The wrongful death statutes create a cause of action in the dependent survivors for their own losses. Weaving the two statutes together, it is clear that there

is no cause of action for medical expenses or pain and suffering of the deceased beyond death. The Model Periodic Payment of Judgments Act follows this scheme and dictates that post-injury life expectancy be used in calculating damages for health care and related expenses and noneconomic loss.

The trial court, where necessary, may require more detailed findings separating different types of damages and may require findings relative to apportionment or application among the parties. For example, additional findings may be needed to allocate damages among defendants because of rules with regard to contribution, indemnity, or comparative fault. Allocation of damages awards among wrongful death claimants or beneficiaries may be required. Also, more detailed findings with regard to the periods of losses and the amounts incurred during those periods could be required because there may be periods of maximum loss, periods of stabilized loss, requirements for one-time medical procedures or separate medical procedures at different points in the future. Whatever findings are necessary to fashion a periodic-installment judgment, the court is empowered to obtain.

SECTION 5. [Calculation of Future Damages.]

[(a)] In all trials under this Act, evidence of future damages must be expressed in current values and such damages must be calculated by the trier of fact without regard to fluctuations in the earning power or purchasing power of money in the future.

[(b) In all jury trials in which special damages findings are required under this Act, the jury must be informed that with respect to future damages:

- (1) the law provides for adjustments to be made later to take account of future changes in the purchasing power of the dollar;
- (2) the law takes into account the fact that those payments may be made in the future rather than in one lump sum now; and
- (3) the jury will make their findings on the assumption that appropriate adjustments for future changes in the value of the dollar will be made later.]

Comment

One of the main purposes of the Act is to avoid as much speculation as possible with regard to the calculation of future damages and to more accurately tailor awards to actual losses. The thrust of this Section is to require the trier of fact to calculate future damages on the basis of present dollar value or purchasing power. This eliminates the need for expert testimony with regard to general economic fluctuations in the future. It does not eliminate the need for expert testimony with regard

to the particular victim's future earning capacity which would take into account the attributes of the victim and any increases or decreases in productivity that might result from technology or other changes in a particular industry or trade. However, any statistical data that is relied on by an expert as the basis for this type of testimony must be adjusted to eliminate factors which reflect predictions as to fluctuations in the purchasing power of the dollar in the future.

Where future damages are paid in periodic instalments, a cost-of-living adjustment is required under Section 7.

The Section also contemplates elimination of speculation as to the earning power of money in the future, and this is accomplished by paying damages as the losses accrue. Thus, there is no occasion for the trier of fact to consider the earning power of money and thereby reduce to present value awards for losses accruing in the future. When future damages are paid in advance of the period to which they apply, they will be discounted in accordance with Section 10.

No reference is made to income tax consequences. This is left to prevailing rules in the adopting state.

The material dealing with instructions to the jury is bracketed, and an adopting state may include or exclude it. The choice may depend upon the respective jurisdictions of the court of last resort and the legislature as to who has the power to decide such matters. Nevertheless, there is concern that, if the jury is not so instructed, because of their familiarity with the lump sum system or for some other reason, the jury might take the purchasing power of money and the earning power of money into account in their calculations of future damages. Thus, the jury should be instructed on these matters.

SECTION 6. [Basis for Determining Whether Judgment Should Be Periodic or Lump-Sum.]

In order to determine what judgment is to be entered on a verdict requiring findings of special damages under this Act, the court shall proceed as follows:

(1) The court shall apply to the findings of past and future damages any applicable rules of law, including set-offs, credits, [comparative fault], additurs, and remittiturs, in calculating the total amounts of past and future damages each claimant is entitled to recover and each party is obligated to pay.

(2) If the total amount of future damages recoverable by a claimant in a bodily injury action or by all the beneficiaries of a wrongful death action is less than [\$100,000], the court, unless the claimant or beneficiaries elect to receive a judgment for periodic

instalments, shall reduce the amounts payable for future damages in accordance with Section 10 to determine the equivalent lump-sum value and enter judgment for that amount plus the amounts found for past damages.

(3) If the total amount of future damages recoverable by a claimant in a bodily injury action or by all the beneficiaries of a wrongful death action is [\$100,000] or more or the claimant or beneficiaries so elect, the court shall enter judgment as follows:

(i) If a judgment for periodic instalments is entered, it must specify payment of attorney's fees and litigation expenses in a manner separate from the periodic instalments payable to the claimant, either in lump sum or by periodic instalments, pursuant to the agreement entered into between the claimant and the claimant's attorney. If any portion of future damages is payable in advance of the period to which it applies in satisfaction of the agreement, the amount of the damages is subject to discount in accordance with Section 10.

(ii) Upon election of a subrogee, including a workers' compensation employer or insurer, filed within [the time permitted by rule of court] [10 days after verdict], any part of future damages allocable to reimbursement of payments previously made by the subrogee is payable in lump sum to the subrogee and the appropriate reduction of future damages must be calculated in accordance with Section 10.

(iii) The court shall enter judgment in lump sum for past damages and for any damages payable in lump sum or otherwise under subparagraphs (i) and (ii). Any lump-sum payments for future damages reduce proportionately all periodic instalments for future damages.

(iv) After making any adjustments prescribed by the preceding subparagraphs, the court shall reduce the remaining amounts for future damages to present value in accordance with Section 10 to determine the equivalent lump-sum value. If the equivalent lump-sum value is more than [\$50,000] or the claimant or beneficiaries elect to receive a judgment for periodic instalments, the court shall enter a judgment for the payment of the remaining amounts of future damages, without reduction, in periodic instalments in accordance with Section 7; otherwise, the court shall enter a judgment for the equivalent lump-sum value.

(v) In a wrongful death action, the calculation of the equivalent lump-sum value under subparagraph (iv) of the remaining amounts for future damages must be based on the total recovery for all beneficiaries of the action. If the lump-sum equivalent of the total is more than [\$50,000], each beneficiary must be paid in periodic instalments in accordance with Section 7.

(4) Upon petition of a party before entry of judgment and a finding of incapacity to post the security required under this Act, the court, at the election of the claimant or beneficiaries of a wrongful death action, shall:

(i) enter a judgment in accordance with subsection (3); or

(ii) reduce the amounts payable for future damages in accordance with Section 10, unless Section 9(c)(1) applies, to determine the equivalent lump-sum value and enter judgment for that amount plus the amounts found for past damages.

Comment

Even though an effective election to try the case under the provisions of this Act has been made, it may be that a judgment for periodic-instalment payments is not warranted. A policy decision has been made that, if the future damages recoverable by a claimant, after applying any setoffs, credits, comparative fault rules, additurs, and remittiturs, are less than the suggested figure of \$100,000, the court shall enter a lump-sum judgment for future damages unless a claimant or the beneficiaries of a wrongful death action nevertheless prefer to take a periodic-instalment judgment. In other words, the defendant cannot force a claimant to take a periodic-instalment judgment even if the damages award for future losses is relatively small. Although the bracketed figure of \$100,000 is a suggested figure, an adopting state should probably not use a lower figure, in view of the fact that the Section provides for some portions of the award for future damages to be paid in a lump sum. The Act has its greatest utility in the serious injury cases, and anything less than \$100,000 as a threshold would probably result in marginal benefits to the parties and to the public.

If the total amount of future damages recoverable does not meet the suggested figure and the claimant or wrongful death beneficiaries do not elect otherwise, the court is to discount the future damages to present value in accordance with Section 10 and enter a lump sum judgment for all damages recoverable in the action. This includes past and future damages and any other awards such as punitive damages and costs.

If the total amount of future damages recoverable meets or exceeds the suggested figure or the claimant or wrongful death beneficiaries so elect, the court is directed to enter judgment for that portion of the

damages award representing attorneys' fees and litigation expenses as set out in subparagraph (i) of paragraph (3). The Act, however, does not dictate how the attorney is to be paid. This is left, as it is today, to contractual agreement between the attorney and client and the attorney may be paid in a lump sum or in periodic instalments.

It would serve no purpose not to permit a subrogee to enforce a subrogation claim in lump sum, and the Act gives a subrogee that election in subparagraph (ii) of paragraph (3).

A lump sum judgment is required for past damages and any other awards so determined under subparagraphs (i) and (ii) of paragraph (3). If punitive damages are awarded, they should also be entered in a lump sum.

Any amounts of future damages which are paid in advance of the period in which the trier of fact has determined that they will accrue must be discounted. See Section 10 and the Comment thereto. This applies to any future damages which are used to pay attorney fees, litigation expenses, or a subrogee in lump sum. The remaining future damages which are to be paid periodically must be reduced, and the Act requires that this be done on a proportionate basis. For example, assume that an attorney and client agree to a lump-sum contingent fee contract which, in part, results in a \$30,000 attorney fee when the percentage figure in the contract is applied to the future damages findings. Assuming further that the future damages findings consist of \$10,000 per year for thirty years, the \$30,000 fee would be applied at the rate of \$1,000 per year to the future damages instalments. Thus, the judgment should specify that the attorney receive an amount which represents \$30,000 discounted to present value in accordance with Section 10 and that the tort victim receive \$9,000 per year for thirty years. It should be noted that the full amount of the attorney's fee is offset against future damages even though the attorney would receive less than \$30,000 once this figure is reduced to present value. If the attorney had contracted for a dollar fee of \$30,000 rather than a contingent fee, it would take more than \$30,000 of future damages to produce that amount because of the discount factor.

After the adjustments discussed above are made, the court shall reduce the remaining amounts for future damages to present value in accordance with Section 10 to determine the lump sum value of these damages. If this lump sum figure is equal to or less than the suggested figure of \$50,000, the utility of paying the award in periodic instalments as the losses accrue is marginal as far as serving the purposes of the Act. However, the claimant or beneficiaries of a wrongful death action are given the benefit of the doubt and are permitted to elect a periodic-instalment judgment even if the threshold figure is not met. Otherwise, the Act requires that a lump-sum judgment be entered. If the lump-sum value exceeds the suggested figure, the court is directed to enter a periodic-instalment judgment for future damages.

There should be but one judgment entered, and it should contain the lump sum amounts entered under subparagraphs (i) through (iii) and the periodic instalments entered under subparagraph (iv), all of paragraph (3). The judgment should also contain any costs, prejudgment interest and other items awarded in the case and must conform to the requirements of Section 7.

Where future damages are to be paid in periodic instalments as the losses accrue, it becomes imperative that these payments be assured insofar as possible. The form of security is set out in Section 8, and the requirement for posting and maintaining security is covered in Section 9. If the required security cannot be posted, there is no point in delaying the entry of a lump-sum judgment if that is what a claimant desires. Paragraph (4) permits a party to show an incapacity to post security so that a lump sum judgment can be entered immediately. However, a claimant may want to have an instalment judgment entered even though there is an incapacity to post security and has that right. If this is the case, a claimant may have the instalment judgment reduced to a lump-sum judgment at a later date under the provisions of Section 9(b).

SECTION 7. [Adjustment of Periodic Instalment Obligations.]

(a) A judgment for periodic instalments must set out:

(1) the findings of future damages for each calendar year; and

(2) a schedule of the base figures for each calendar year for calculating future payments. The base figures are determined by discounting the findings for each calendar year in accordance with Section 10.

(b) On the first day of each calendar year after a judgment for periodic instalments is entered, the schedule of all instalments not previously due must be adjusted by adding to the base figure for each instalment, in the most recently modified schedule, a sum determined by multiplying that base figure by the index factor defined in subsection (c).

(c) If a judgment for periodic instalments has been in effect for

[(1)] one year or more at the time of adjustment, the index factor is the rate of discount per annum for the last issue of 52 week United States treasury bills in the year before the year immediately preceding the year of adjustment [;] [.]

[(2)] less than one year but more than 6 months at the time of adjustment, the index factor is one-half of the index factor defined in paragraph (1); and

(3) less than 6 months but more than 3 months at the time of adjustment, the index factor is one-fourth of the index factor defined in paragraph (1).]

(d) In all other cases, no adjustment may be made.

(e) Unless the court directs otherwise or the parties otherwise agree, payments must be scheduled at one-month intervals. Payments for damages accruing during the scheduled intervals are due at the beginning of the intervals.

Comment

Where a periodic-installment judgment for future damages is entered, there must be some method of adjusting the payments that do not become due until a date certain in the future to take into account fluctuations in the purchasing power of the dollar. This Section deals with that subject.

After considerable experimentation with various indexes and formulas and consultation with people knowledgeable about these matters, the present approach was developed.

The index factor utilized for adjusting for fluctuations in the purchasing power of the dollar is based on the rate of discount for the 52-week treasury bills issued by the United States Government. Any judgment debtor or other person required to secure a periodic-installment judgment, such as a casualty insurance company or corporation, can invest the funds necessary in the treasury bill specified to produce the income to make the required yearly adjustments. The treasury bills chosen provide the maximum accommodation between security and liquidity.

The Section does not require, however, that the judgment be secured by investing in such instruments. It merely requires that the periodic instalments be adjusted on the basis of the specified per annum rate of discount. If the judgment debtor chooses to secure the judgment through investments in other instruments, this may be accomplished if the provisions of Section 8 dealing with the form of security are met.

At present, there does not appear to be a market for the type of annuity that would best secure the periodic-installment judgment contemplated in this Act. It is probable, however, that a market will develop to meet the needs of the casualty insurers and corporations required to secure periodic-installment judgments.

Institutional investors, such as large corporations and insurance companies, are able to make investments providing a greater return than the treasury bills specified and will, in all likelihood, do so. This should provide the profit incentive for the life insurance industry to market an annuity which will allow the judgment debtor to secure the judgment as required under the Act. In the meantime, a judgment debtor is not left to the mercies of the insurance industry in providing a market and can secure the judgment and the adjustments required under this Section by investing in the treasury bills specified.

At least one large commercial bank has expressed an interest in the Act and indicated that the investment of the sums needed to produce the instalment payments and adjustments could be handled through a trust. Thus, it is felt that the fluctuating index factor employed in this Section is not only the most accurate and, therefore, the fairest approach for all concerned, but that it is a feasible system. On the

other hand, it is recognized that a fluctuating index factor is of great concern to some insurers and that some experimentation may need to take place in the settlement arena before such a scheme is mandated by statute.

A state could adopt a fixed index factor initially by simply substituting the following language for that contained in paragraph [(1)] of subsection (c) found at lines 18 through 22: "one year or more at the time of adjustment, the index factor is 8 percent." This suggested substitute language employs a figure of 8 percent which is a realistic, if not low, figure for the present economic conditions. This points up the difficulty in reaching a decision on what figure should be used and the unfairness involved if the figure is not an accurate prediction of future fluctuations or, at least, the average of the fluctuations over time. This is why preference is given in the Act to a fluctuating index factor that is based on actual economic conditions. If the above language utilizing a fixed index factor is substituted, paragraph (3) of Section 17 is no longer needed and should be deleted.

Adjustments for fluctuations in the purchasing power of the dollar are to be made on the first day of each calendar year after a periodic instalment judgment is entered. The Section provides alternative language in subsection (c) to give the adopting state a choice as to whether it will adjust only after a judgment has been effect for a full year or whether it will adjust for initial partial year periods. This is a matter which will arise only on the occasion of the first adjustment. For example, if a periodic instalment judgment is entered on May 1, 1982, should it be adjusted for the first time on January 1, 1983, or January 1, 1984? The adopting state can choose the appropriate language to implement whatever decision is reached on this question.

The Section requires the court to include certain findings in the judgment so that the exact amount due, either in lump sum or periodic instalments, can be easily ascertained. The court is required to include the findings for future damages for each calendar year that losses will accrue. It is also required to include a schedule of the base figures for each calendar year for calculating future payments. The base figures are determined by applying to the findings of future damages for each calendar year the discount factor in Section 10. It is necessary to adjust the findings for future damages in accordance with Section 10 before the index factor in Section 7 is applied. This is so because the index factor in Section 7 is based on the discount rate for 52-week United States treasury bills. The discount factor on the treasury bills represents two predictions by investors about the future: (1) the purchasing power of money and (2) the earning power of money. (The risk of nonpayment is nil for all practical purposes. See Comment to Section 10.) The two together constitute the amount of the discount bid by investors on the treasury bills. An adjustment for fluctuations in the purchasing power of money is all that is required because the damages will be paid as losses accrue, rather than in advance of the period they accrue. Thus, that portion of the discount rate that represents the earning power of money must be eliminated. Otherwise, the judgment creditor will be overpaid just as would be the case if a lump sum judgment were not discounted to present value.

It would be possible to adjust the discount rate on the United States treasury bills so that one could simply multiply the adjusted discount rate times the unpaid instalments at the beginning of every year. However, the illustration below will show that it will be more advantageous to discount the instalment payments in accordance with Section 10 first and then multiply by an unadjusted index factor based on the treasury bills. By doing this, the schedule, as illustrated below, will always show the amount of money due at any one time on a periodic-instalment judgment on a lump sum basis, as well as on a periodic-instalment basis.

Illustration

Assume a jury verdict is returned and judgment is entered on January 1, 1982, awarding future damages of \$20,000 in 1982 and \$10,000 in each year for the years 1983 through 1986. Assume that the index factor defined in subsection (b) of Section 7 and the discount rate of Section 10 are as indicated. As time passes, and adjustments are made, the amounts due can be easily determined. The first step is to divide the findings for future damages by the discount factor to obtain the base figures. Assuming the discount factor is 3% and adjustments are to be made only where the judgment has been in effect one year or more, the amount of \$10,000 to be paid in 1983 is divided by 1.03, the amount of \$10,000 to be paid in 1984 is divided by $(1.03)^2$, etc. The second step is to apply the inflation or index factor.

	Base Figure Schedule (3% discount) 1/1/82	Adjusted for 1982 (Factor 9%) 1/1/83	Adjusted for 1983 (Factor 10%) 1/1/84	Adjusted for 1984 (Factor 8%) 1/1/85	Adjusted for 1985 (Factor 7%) 1/1/86
1982	\$20,000				
1983	9,709	\$10,583			
1984	9,426	10,274	\$11,301		
1985	9,151	9,975	10,973	\$11,851	
1986	8,885	9,685	10,654	11,506	\$12,311
Lump Sum	\$57,171	\$40,517	\$32,928	\$23,357	\$12,311

By examining the illustration, it can be seen that, if security is not posted on January 1, 1982, the judgment creditor can move the court to enter a lump sum judgment and that amount is \$57,171. If security is posted but, by the end of 1983, the security should fail and the judgment debtor moves to have a lump sum judgment entered, it can be easily determined that the amount is \$32,928. On the other hand, the schedule also shows the amount that is due each year once the adjustment is made on the basis of the periodic-instalment scheme. Thus, the utility of using this type of schedule which employs a schedule of base figures calculated in accordance with Section 10 and then adjusting on the basis of the index factor in Section 7(b) is demonstrated.

Even though subsection (b) speaks in terms of "adding to the base figure", this does not mean that there will not be any adjustments downward if we experience a period of deflation in the future in the economy. It is highly improbable that people would want to pay more than the face value of a United States treasury bill. To do so would mean that one must believe that the earning power of a dollar will be

more when the treasury bill comes due than at the date of purchase. One would be better advised to merely retain the money and not invest it at all under these circumstances. Thus, the discount rate for treasury bills will be zero.

However, the instalments for future damages will continue to be paid as losses accrue. These instalments have been discounted in accordance with Section 10 to arrive at the base figures under subsection (a)(2). Since the index factor will be zero in periods of deflation, there will be no adjustment under subsection (b). Thus, there has been a downward adjustment in the periodic instalments because the instalments were discounted under Section 10 and will not be adjusted upwards during periods of deflation.

SECTION 8. [Form of Security.]

(a) Security authorized or required for payment of a judgment for periodic instalments entered in accordance with this Act must be in one or more of the following forms and approved by the court:

- (1) bond executed by a qualified insurer;
- (2) annuity contract executed by a qualified insurer;
- (3) evidence of applicable and collectable liability insurance with one or more qualified insurer or insurers;
- (4) an agreement by one or more qualified insurer or insurers to guarantee payment of the judgment; or
- (5) any other satisfactory form of security.

(b) Security complying with this section serves also as a required supersedeas bond.

Comment

In any system where obligations are to be discharged over a period of time, it becomes important to use reasonable devices to assure that the means for discharging the obligation continues to exist during the time in question. Under a system of paying future damages over the period which the losses will accrue, particularly where the judgment debtor is empowered to make this election, it is crucial to the system that the judgment obligation be secured. Section 9 requires that a periodic-instalment judgment be secured by each party liable for all or a portion of the judgment. Section 8 details the form of the security.

A variety of ways are available to a judgment debtor to secure a periodic-instalment judgment, but it should be noted that the court must approve the form of security. The judgment debtor does not have an unfettered choice in the matter. Four different types of security are explicitly mentioned and will suffice as long as the obligor on the security is a qualified insurer and the court approval is obtained. The

insurance regulator in the adopting state is required to establish rules and procedures for determining what insurers, self-insurers, plans or arrangements are financially qualified to provide the four types of security mentioned in this Section. See Section 17. Subparagraph (5) of subsection (a) gives some discretion to the court to approve other forms of security so long as they are satisfactory in the judgment of the court to provide the requisite financial stability.

A bank might provide the requisite security through a trust. For example, the Act contemplates that U.S. Treasury bills can be used to secure a periodic-installment judgment both as to the lump-sum equivalent of the instalments and as to the amounts needed to make adjustments for future inflation. A judgment debtor could establish a trust with a bank whereby the bank would invest the lump-sum equivalent in U.S. Treasury bills thereby providing the security and the instalment payments. As pointed out in Section 7 and the Comment thereto, other types of investments can be utilized to produce the income necessary to make the cost-of-living adjustments required by the Act. Thus, the trust might invest in other high quality instruments. As long as the court is satisfied that the security is adequate, it could approve such an arrangement.

It should be kept in mind, however, that the security must meet the conditions set out in Rev. Rul. 79-220, 1979-2 C.B. 74 in order for the judgment creditor to receive the instalment payments on a tax-free basis. The ruling dealt with a situation where an insurance company purchased and retained exclusive ownership in a single premium annuity contract to fund monthly payments stipulated in settlement of a damage suit. It was held that the exclusion from gross income by Section 104(a)(2) of the Internal Revenue Code of 1954 applies to the full amount of the monthly payments received by the victim in settlement of the damage suit because the victim had a right to receive only the monthly payments and did not have the actual or constructive receipt or the economic benefit of the lump sum amount that was invested to yield that monthly payment. If the victim were to die before the end of the period over which the payments were to be made, the payments made to the victim's estate under the settlement agreement would also be excludable from income under Section 104. See also Rev. Rul. 79-313, 1979-2 C.B. 75.

Subsection (b) simply provides that any security complying with this Section serves also as a required supersedeas bond since it would be wasteful to require both security and a supersedeas bond where the case is on appeal. If the judgment debtor chooses not to secure the periodic-installment judgment pending an appeal in a method that qualifies under this Section, the regular rules with regard to supersedeas bonds in the adopting jurisdiction will still apply.

SECTION 9. [Posting and Maintaining Security.]

(a) If the court enters a judgment for periodic instalments, each party liable for all or a portion of the judgment, unless found to

be incapable of doing so under Section 6(4), shall separately or jointly with one or more others post security in an amount equal to the present lump-sum equivalent of the unpaid judgment, including past damages, in a form prescribed in Section 8, within 30 days after the date the judgment is subject to execution. Any liability insurer having a contractual obligation or any other person adjudged to have an obligation to pay all or part of a judgment for periodic instalments on behalf of a judgment debtor is obligated to post security to the extent of its contractual or adjudged obligation if the judgment debtor has not done so.

(b) Any judgment creditor or successor in interest and any party having rights under subsection (e) may move that the court find that security has not been posted and maintained with regard to a judgment obligation owing to the moving party. Upon so finding, the court shall order that security complying with this Act be posted within 30 days. If security is not posted within that time, the court shall calculate the lump-sum equivalent of the obligation and enter a judgment for that amount in favor of the moving party.

(c) Upon motion by the claimant, or the beneficiaries of a wrongful death action, the court shall, in the absence of a showing of good cause, enter a lump-sum judgment without applying the discount factor in Section 10 if:

(1) a responding party elects for this Act to apply and makes the required showing as to security under Section 3(c)(3)(ii), but thereafter fails to post security; or

(2) a party fails to maintain security.

(d) If a judgment debtor who is the only person liable for a portion of a judgment for periodic instalments fails to post and maintain security, the right to lump-sum payment described in subsection (b) applies only against that judgment debtor and the portion of the judgment so owed.

(e) If more than one party is liable for all or a portion of a judgment requiring security under this Act and security is posted by one or more but fewer than all of the parties liable, the security requirements are satisfied and those posting security may proceed under subsection (b) to enforce rights for security or lump-sum payment to satisfy or protect rights of reimbursement from a party not posting security.

Comment

If large awards of future damages are to be paid periodically in the future rather than in lump sum, it is important that the judgment be secured to assure the payments. This Section requires that a periodic-instalment judgment be secured. Section 8 prescribes the form of security that will suffice under this Act.

Each party liable for all or any part of a periodic-instalment judgment is required to post security within 30 days after the date the judgment is subject to execution. A party may post security even though an appeal is contemplated and have the security suffice as a supersedeas bond. See Section 8(b). In this event, the security must be posted in the time required in the adopting state for a supersedeas bond. Otherwise, this Section merely requires that the security be posted within 30 days after the date the judgment is subject to execution. This will give the parties sufficient time to arrange for security after the judgment becomes final.

If a defendant is incapable of posting security, either the claimant or defendant may petition the court before entry of judgment for a finding of incapacity to post security required in this Section. See Section 6(4). If the court finds that the defendant is incapable, the court may, at the election of the claimant, enter a lump-sum judgment without regard to any waiting period in Section 9. Unless a party can show incapacity to post security, the judgment debtor is given 30 days to post the security.

The security required must meet the form requirements in Section 8 and must be in an amount equal to the present lump sum equivalent of the unpaid judgment, including past damages. The latter requirement contemplates that the outstanding judgment obligation must always be secured even though diminishing over a period of time. Section 7(a)(2) requires that a periodic-instalment judgment set out a schedule of the base figures for calculating future payments. The base figures are determined by applying the discount factor in Section 10. The base figures are adjusted periodically and, when totaled for a particular year, equal the present lump sum equivalent of the unpaid judgment. Thus, by requiring the base figures to be set out in the judgment, the total amount of the lump sum equivalent of the unpaid judgment is readily identifiable at any particular time. Even though the individual instalments may increase over time due to the adjustment required in Section 7, the total amount of unpaid instalments will decrease. (See the illustration in the Comment to Section 7.) It is the total of the unpaid base figures, including any adjustments, that must be secured to satisfy this Section.

The last line in subsection (a) requires a liability insurer or anyone else who has been adjudged liable to pay all or part of the judgment on behalf of a judgment debtor to post security if the judgment debtor does not. This covers the situation, in addition to that of a liability insurer, where a manufacturer, or someone else in the marketing chain, enters into an agreement to indemnify or otherwise discharge all or part of the obligation of a party adjudged liable, but limits it to situations where there has been a court determination of liability.

Subsection (b) deals with the situation where security is not posted during the 30-day period set out in subsection (a) and the situation where, regardless of when security is posted, the security proves inadequate. The security may prove inadequate because it is not in the requisite amount or, although in the requisite amount, the obligor on the security is no longer qualified to provide security. There may be other situations in addition to these. In the event security is not posted and maintained, the court is required to order that it be posted within 30 days. If security is not posted within that time, a lump sum judgment shall be entered if the judgment creditor so moves. There may be circumstances, however, where the judgment creditor prefers to retain the periodic-installment judgment even though unsecured. Appeals from any rulings with regard to adequacy of security are left to prevailing rules in the adopting jurisdiction.

Subsection (c) provides for a penalty in some of the situations where there is a capricious failure to post or maintain security. For example, where a defendant elects to try the case under Section 3(c)(3)(ii) and prevails over the claimant's objection by showing that adequate security can be posted but later refuses to post security without good cause, the claimant can elect to receive a lump-sum judgment without having the discount factor in Section 10 applied. Using the illustration in the Comment to Section 7 as a hypothetical case, the claimant would be entitled to a lump-sum judgment of \$60,000. Thus, a penalty of \$2,829 would be imposed. Where the election to try the case under the Act is made by the claimant and there is a subsequent capricious failure to post security, no penalty is imposed. However, the claimant can still insist on a periodic-installment judgment and, if the refusal is by an insurance company, the insurance regulator has power to take action against the company. See Section 17(2). The penalty in subsection (c) applies to all failures to maintain security where there is not good cause for the failure.

The penalty in subsection (c) only applies where there is an absence of good cause. It could happen that the failure to post security in the example given in the preceding paragraph occurred when the verdict exceeded the amount specified for an adequate showing under Section 3(c)(3)(ii) and the defendant was financially unable to post the security required for the jury award under Section 9. This would constitute good cause. Other examples can be posited, but in the final analysis the burden is on the defendant or judgment debtor to convince the court that good cause exists.

The last two subsections deal with situations where there are multiple obligors under a periodic-installment judgment. Subsection (d) deals with the situation where one of the obligors is solely liable for a portion of a judgment. In this case, the right to a lump sum judgment for failure to post and maintain security by this obligor is limited to the amount owed by the obligor. The balance of the judgment which is owed by one or more other judgment debtors is unaffected.

Subsection (e) deals with a variety of situations involving multiple obligors under a periodic-installment judgment when one or more of the obligors fails to post and maintain security in accordance with this Section. Situations contemplated include those of joint and several

liability where contribution or indemnity is owed; where there is no joint and several liability, but a right of indemnity is owed as in the case where a manufacturer owes indemnity to a retailer who has sold a defective product originating with the manufacturer; or where an employer is vicariously responsible for the acts of an employee, and the employee, as a third party defendant, owes indemnity to the employer. This subsection provides that any party who is obligated to pay part or all of the judgment, whether primarily or secondarily liable, may post security to satisfy the requirements of this Section. Once posting security, the posting party is entitled to protect any rights that party has against a defaulting party by requesting that security be posted under subsection (b). If the defaulting party persists in failing to post or maintain security, the posting party can obtain a lump-sum judgment. This provides the maximum accommodation in that the judgment creditor is not deprived of the benefits of a periodic-installment judgment merely because one among several judgment debtors fails to post or maintain security. At the same time, it provides protection to those judgment debtors who do post and maintain security. It prevents one judgment debtor from depriving the other parties to the judgment, be they creditors or debtors, of the benefits of this Act.

SECTION 10. [Discounting Future Damages to Present Value.]

If future damages are determined in accordance with Section 5 but are ordered to be paid in advance of the period to which they apply or where base figures are required under Section 7, the court shall apply a discount factor of [3] percent, compounded annually.

Comment

Under the common law system, damages for bodily injury are awarded in a lump sum. In most jurisdictions, the trier of fact is required to reduce future damages to present value. A claimant would be overcompensated if the earning power of money were not taken into account.

Where an effective election is made to try a case under this Act, the trier of fact is told to disregard the earning power of money because the Act contemplates paying future damages as the losses accrue, rather than in advance of the period when the losses accrue. However, in some cases, awards for future damages so determined may not be paid in periodic instalments in the future for a variety of reasons. After taking into account any set-offs, credits, comparative fault rules, additurs or remittiturs, or other portions of future damages that are to be paid in lump sum, such as litigation costs and attorneys' fees and amounts to which others may be subrogated, the final amount of future damages subject to payment in periodic instalments may not meet the threshold monetary figures prescribed in Section 6. Moreover, even though the thresholds are met, security may not be posted or maintained and a lump sum judgment may be entered. Whenever the award for future damages is calculated without regard to the earning power of money and is subsequently required to be paid in a lump sum, it is subject to discount under this Section.

As explained in the Comment to Section 9, the discount factor is also used in arriving at the base figures required to be set out in a periodic-installment judgment.

The discount factor suggested in this Section represents the real rate of interest. Market interest rates reflect two basic components. One component is based upon predictions about increases or decreases in the purchasing power of money over the period the interest rate will be in effect. The second element reflects what the loaning party demands in return for the use of the money and the risk that it will not be returned. The following explanation by Frederick C. Kirby, appearing at pages 449-50 in the August 1978 issue of the Insurance Law Journal, is instructive:

It has long been observed that interest rates tend to be 'high' when prices are rising and 'low' when prices are falling, and that interest rate movements lag behind price level changes. Economic reasoning recognizes inflation as a cost of lending money. Similarly, the borrower recognizes inflation as a gain in borrowing money through repayment of less valuable dollars. The dollars of principal received by the lender upon maturity of a loan will purchase less than the same number of dollars would have purchased at the time of the loan. This purchasing power difference must be compensated for in the price (interest rate) charged for lending money. Thus, inflation is a cost of lending that is included in the price of lending (market rate of interest) according to anticipation of its rate.

Measures of past rates of inflation and relating this to current market rates of interest explains 70 to over 90 percent of the variation in the market rates of interest.

However, the well-known inflationary element of the market rate of interest does not account for the whole market rate of interest nor does the variation in the inflationary element account for the entire change in the market rate of interest. The economically rational person prefers present cash or liquidity to future cash. A borrower must pay a lender a rate of interest, absent inflation, sufficient to induce the lender to part with present cash (liquidity). Additionally, all borrowers (except perhaps the U.S. Government) have some probability of not being able to repay the loan when due. The probability of default is the risk element of the market rate of interest and, absent inflation, a borrower must pay a lender a rate of interest sufficient to induce the lender to accept the risk of default. The time preference element plus the risk element is what economists refer to as the real rate of interest or that rate of interest which would prevail if investors' inflationary expectations were zero. To assume the market rate of interest is offset by the rate of depreciation of real value caused by inflation is to assume, incorrectly, that the real rate of interest (time preference and risk elements) is zero.

Dr. Kirby estimates that the real rate of interest (which includes the time preference element plus the risk element of the market rate of interest) has been approximately 2.56% over the seven years preceding

the publication of his article. His estimate is based on a formula which uses the market rates of interest for corporate and U.S. Treasury bonds and adjusts them to arrive at a figure for the real rate of interest.

In a study for the Special Committee drafting this Act, Dr. William B. Fairley concluded that the real rate of interest, on the average, has been 1% over the period from 1950 to 1978. Dr. Fairley used one-year government bonds and one-week treasury bills as the basis for his study. The difference between the two studies can be attributed in the main to three factors: (1) the different time periods involved in the two studies, (2) the fact that corporate bonds have maturity dates far in excess of one year and (3) the fact that corporate bonds have a greater risk of nonpayment.

The suggested figure of 3% in the Act is probably the highest figure that should be adopted, and there is substantial evidence that it should be lower.

SECTION 11. [Effect of Death.]

(a) In all cases covered by this Act in which future damages are payable in periodic instalments, the liability for payment of any instalments for medical or other costs of health-care or noneconomic loss not yet due at the death of a person entitled to receive these benefits terminates upon the death of that person. The liability for payment of any other instalments or portions thereof not yet due at the death of the person entitled to receive them likewise terminates except as provided in subsections (b) and (c).

(b) If, in an action for wrongful death, a judgment for periodic instalments provides payments to more than one person entitled to receive benefits and one or more but fewer than all of them die, the surviving beneficiaries succeed to the shares of the deceased beneficiaries. The surviving beneficiaries are entitled to shares proportionate to their shares in the periodic instalments not yet paid, but they are not entitled to receive payments beyond the respective periods specified for them in the judgment. In that event, the liability for payment of any portions of the periodic instalments in excess of that owed to the surviving beneficiaries terminates.

(c) If, in an action other than one for wrongful death, a judgment for periodic instalments is entered and a person entitled to receive benefits under the judgment dies and is survived by one or more

qualifying survivors, any periodic instalments not yet due at the death must be shared equitably by those survivors. Amounts due each survivor may not exceed the survivor's economic loss resulting from the death. In that event, the liability for payment of any portions of the periodic instalments in excess of that owed to the survivors terminates.

(d) "Qualifying survivors" means persons who, had the death been caused under circumstances giving rise to a [claim for relief] [cause of action] for wrongful death, would have qualified as beneficiaries at the time of the death according to the law that would be applied in an [action] [claim] for wrongful death by the jurisdiction under which the issue of liability was resolved in entering the judgment for periodic instalments.

Comment

In ascertaining damages under the common law lump sum system, the trier of fact is ill-informed as to two matters. One of these matters can be ascertained with the passage of time and the other will never be known. In permanent injury cases, it will never be known what the victim would have been like had he or she not been injured. Mere passage of time, however, will reveal what the victim will be like. The Act does not attempt to modify the damages award based on revelations with the passage of time with one exception.

A policy decision was made to terminate any instalments not yet due upon death which represent medical or other health care costs and non-economic loss such as pain and suffering. Even though the trier of fact is instructed to use the post-injury life expectancy of the victim for these items of damage (see Section 4(b)), death may result prematurely from causes having no relation to the original injury. Since death precludes the accrual of losses for such items of damage, it was felt that these items would be a windfall to the recipient. Thus, subsection (a) provides that any instalments representing these items not yet due at death terminate.

Attorney's fees do not terminate, even though based on a contingent fee contract and paid periodically. Those fees are to be set out separately in the instalment judgment under Section 6(3)(i) and do not represent amounts owed to the tort victim. This recognizes the common understanding that the attorney is entitled to the fee when the judgment is obtained. Because the fee is owed to the attorney and does not represent damages owed to the tort victim, it does not fall within the operative provisions of this section.

As to economic loss, the trier of fact is to use the preinjury life expectancy of the victim (see Section 4(b)). The Section provides that instalments representing these aspects of damages shall continue to be paid to certain beneficiaries with certain limitations. Subsection (b) deals with the wrongful death case. Where a periodic-instalment judgment provides payments to more than one beneficiary of a wrongful death

claim and one or more, but fewer than all, of the beneficiaries die, the surviving beneficiaries succeed to the shares of the deceased beneficiaries. The surviving beneficiaries are to divide the deceased beneficiaries' shares proportionately. However, the surviving beneficiaries are not entitled to receive the deceased's shares for any period longer than they are entitled to receive benefits in their own right.

Subsection (c) deals with cases other than wrongful death where a person receives a periodic-installment judgment, but the person subsequently dies. If there are qualifying survivors, any periodic installments representing economic loss not yet due at the death must be shared equitably between the survivors. The survivors are not entitled to receive benefits in excess of their losses which result from the death of the judgment creditor.

The term "qualified survivors" is used to designate the recipients of these benefits under subsection (c). The wrongful death act or law of the jurisdiction whose law is dispositive of the liability issue in the action giving rise to the periodic-installment judgment is employed to define the recipients. Thus, if the action giving rise to the periodic-installment judgment is filed in State X, but the law of State Y governs the disposition of the liability issue, the wrongful death act or law of State Y also determines who is a "qualified survivor." This technique avoids the necessity of each state having to define the eligible recipients and adopts what would more than likely be the outcome in most states in any event under conflict of law principles. If litigation arises over eligibility to receive benefits or the amounts of benefits to be received, rights will be enforced as they otherwise would be in a wrongful death action.

The survivors described in subsection (c) also may have a cause of action under a wrongful death act or law separate and apart from the rights given to them by this Act. See Sea-Land Services, Inc. vs. Gaudet, 414 U.S. 573 (1974). In this case, the Supreme Court held that the fact that the decedent had previously recovered damages for loss of wages, pain and suffering and medical expenses would not interfere with the independent cause of action for wrongful death in the survivors resulting from the same injury. The wrongful death action was not precluded by the prior recovery under the doctrine of res judicata. The potential for double liability coming from the awards to the decedent for loss of future wages and to the survivors for loss of support was held to be controlled by the law of collateral estoppel. The Act does not attempt to deal with this matter, but leaves it to be resolved under the law of the adopting state regarding res judicata and collateral estoppel.

Serious consideration was given to including provisions for modifying an installment judgment when it is learned after the verdict that the tort victim's damages are greater or worse than found at the trial. A suggested section in an early draft would have permitted a court to hold a limited number of additional hearings after a trial and to modify a judgment for future damages based upon later events affecting the judgment creditor's damages. This proposed section was eliminated from the Fifth Tentative Draft by a vote of the Committee of the Whole at the annual meeting of the Conference in 1978. It was argued there that the

insurance industry could not cost its product where liability was open-ended, court congestion would be worsened, and some injured persons might be motivated to resist rehabilitation and recovery. Difficulty in determining the cause of subsequent medical and other changes in the tort victim were also cited. In short, the Conference voted to abandon the suggestion because of the seemingly intractable practical problems involved.

Under the present system, the trier of fact predicts the dollar value of all future damages, reduces them to present value, and awards a verdict in a lump sum. If the victim's injuries prove to be different than as predicted, there is no remedy for either the tort victim or the judgment debtor. The undercompensated victim may have a partial remedy through resort to social programs provided for the needy which are paid for by taxpayers. On the other hand, damages paid for losses which are never suffered are clearly a windfall to someone. The cost of this windfall is generally spread among those who pay insurance premiums. In products liability cases, this cost is usually passed on to consumers. The Drafting Committee has concluded that the elimination of this windfall, which has the potential for reducing liability insurance premiums, is not unjust even though a viable solution to the problems of the undercompensated victim cannot be woven into this Act. It must not be overlooked in Section 11 that only liability for unsuffered noneconomic damages and unincurred medical and other health care costs is totally eliminated upon the premature death of a judgment creditor. Survivors may still recover portions of the unpaid future instalments to which they have a rightful claim. Moreover, the tort victim is advantaged by tax savings, inflationary adjustments, and other features of the Act. It is believed that the Act is balanced and that it fairly addresses those problems that are subject to solution without completely reforming the method by which tort victims are compensated. See Variable Periodic Payments of Damages: An Alternative to Lump Sum Awards, 64 Iowa Law Review 138 (1978).

If a state decides to eliminate Section 11 on the basis that neither problem should be resolved unless solutions are offered to the undercompensated victim as well as those who pay damages that are never suffered, then it would appear that all unpaid future damages should be lump-summed and paid to survivors upon the death of each judgment creditor. To continue paying the decedent's unincurred medical expenses and noneconomic damages to survivors in instalments merely underscores the windfall nature of the payments and carries out no desirable policy.

SECTION 12. [Liability Insurance Policy Limits.]

(a) In determining whether or to what extent a judgment for periodic instalments exceeds limits under liability insurance policies, the total of the base figures calculated in accordance with Section 7(a)(2) must be added to the lump sum damages in the judgment. The sum so calculated is compared to applicable limits under such policies.

(b) If the sum so calculated in subsection (a) does not exceed applicable limits when the judgment is entered, amounts due by reason of the adjustments required under Section 7 are entirely within those limits.

(c) If the sum so calculated in subsection (a) exceeds applicable limits when the judgment is entered, the adjustments required under Section 7 are distributed proportionately to amounts within and amounts in excess of those limits.

Comment

This Section determines how adjustments in periodic-installment payments under Section 7 are to be applied towards liability insurance limits. It was thought best to spell this out in the Act, rather than leaving it to the insurance industry to draft policy language, which may not be in the best interest of the insured or the victim, or to leave it to litigation under present policy language.

Under subsection (a), the total amount of the judgment is reduced to a lump sum basis. This is done by taking the total of the base figures as calculated in Section 7(a)(2) and adding this figure to the amount of lump sum damages in the judgment. The base figures are determined by discounting the instalment payments in accordance with Section 10. The sum of the discounted instalment payments or base figures and the lump sum damages is then compared with the policy limits. If the sum does not exceed the policy limits when the judgment is entered, subsection (b) states that all the adjustments required under Section 7 are contained within the limits. If the sum exceeds the policy limits at the time the judgment is entered, subsection (c) states that the adjustments are distributed proportionately to amounts within and amounts in excess of the limits.

ALTERNATIVE A

[SECTION 13. Assignment of Periodic Instalments.]

An assignment of or an agreement to assign any right to periodic instalments for future damages contained in a judgment entered under this Act is enforceable only as to amounts:

(1) to secure payment of alimony, maintenance, or child support;

(2) for medical or other costs of health care to the extent they are for the cost of products, services, or accommodations provided or to be provided by the assignee; or

(3) for attorney's fees and other expenses of litigation incurred in securing the judgment.]

ALTERNATIVE B

[SECTION 13. Assignment of Periodic Instalments for Medical and Other Costs of Health Care.]

An assignment of or an agreement to assign any right to periodic instalments for medical or other costs of health care is enforceable only to the extent the assignment or agreement is for the cost of medical or other health care products, services, or accommodations provided or to be provided by the assignee.]

[Comment]

[One of the purposes of the Act is to pay out losses periodically in the future to assure that the awards serve the purposes for which they are made. In furtherance of this purpose, this Section places limitations on the assignability of periodic instalments. Two versions are presented, both bracketed to indicate that the jurisdiction should consider adopting one or neither of the versions.

Alternative A is the most restrictive and under it assignments may be made only to secure familial obligations of support; to secure needed medical and related services; and to obtain legal services and pay for litigation expenses in securing the periodic-instalment judgment in question. Alternative B freely permits assignments with one exception--periodic payments for future medical expenses may not be assigned unless the assignment is for the purpose of securing medical and related services. The medical services do not have to relate to the injury, however, which produced the periodic-instalment judgment.

This Section is not meant to affect a workers' compensation insurer's right of subrogation or other similar subrogation rights whether created by a statute, contract or under the common law.]

SECTION 14. [Exemption of Benefits.]

Periodic instalments for future damages contained in a judgment entered under this Act for loss of earnings are exempt from garnishment, attachment, execution, and any other process or claim to the extent that wages or earnings are exempt under any applicable law. [Periodic instalments for all other future damages are exempt from garnishment, attachment, execution, and any other process or claim except to the extent that they may be assigned under Section 13.]

Comment

This Section complements Section 13 and is based on the same policy grounds. Periodic instalments representing loss of earnings are treated as earnings are otherwise treated in the adopting state.

If Alternative A of Section 13 is adopted, periodic instalments for medical and other health care costs and noneconomic losses are exempt except to the extent that they may be assigned under Section 13.

If Alternative B of Section 13 is adopted, the last sentence of Section 14 should be changed to read: "Periodic instalments for medical and other costs of health care are exempt from garnishment, attachment, execution, and any other process or claim except to the extent that they may be assigned under Section 13."

If no limitation is placed on the ability to assign periodic instalments for future damages, the last sentence of Section 14 should be deleted.

SECTION 15. [Settlement Agreements and Consent Judgments.]

(a) Parties to a claim for bodily injury may file with the clerk of the court in which an action on the claim is pending or, if none is pending, with the clerk of a court of competent jurisdiction over the claim, a settlement agreement for future damages payable in periodic instalments. The settlement agreement may provide that one or more sections of this Act apply to it.

(b) Upon petition of the parties, a court of competent jurisdiction may enter a consent judgment adopting one or more of the sections of this Act.

Comment

This Section merely makes clear that the provisions of the Act are available to parties in fashioning settlement agreements and consent judgments. Such agreements and judgments may incorporate the provisions of this Act or adopt them by reference.

SECTION 16. [Satisfaction of Judgments.]

If security is posted in accordance with Section 9 and approved under a final judgment entered under this Act, the judgment is satisfied and the judgment debtor on whose behalf the security is posted is discharged.

Comment

In many states, a judgment when entered creates a lien on the judgment debtor's property. The Act, however, requires that security be posted under Section 9 for all the damages, past and future, due under

the judgment. The security serves the same purpose as the lien and is a more suitable method of assuring payment of this type of judgment. Accordingly, this Section provides that the judgment is satisfied where the requisite security is posted. Since the judgment is satisfied, there is no lien created under the laws of the adopting state.

SECTION 17. [Duties of [Commissioner] of Insurance.]

The [commissioner] of insurance shall establish rules and procedures:

(1) for determining which insurers, self-insurers, plans, or arrangements are financially qualified to provide the security required under this Act and to be designated as qualified insurers;

(2) to require insurers to post security under Section 9 whenever found by the court to be obligated and capable of posting security; and

(3) for publishing prior to January 1 of each year the rate of discount per annum set out in Section 7(c).

Comment

This Section establishes certain obligations on behalf of the insurance regulator in the adopting state. Since securing a periodic-installment judgment is crucial under this Act, the insurance regulator in the adopting jurisdiction is required to establish rules and procedures to facilitate the provision of such security and to make sure the entities providing the security are financially responsible. The insurance regulator in the adopting state is the most logical person to discharge this responsibility.

It is also the obligation of the insurance regulator to establish rules and procedures to assure that liability insurers admitted to do business in the state post security on behalf of their insureds when they are capable of doing so. It should not be within the power of the liability insurer to defeat the purpose of the Act and thwart the benefits under the periodic-installment judgment system flowing to the judgment creditor and judgment debtor. The insurance regulator is in the best position to adopt rules and procedures to prevent abuses by liability insurers.

Finally, the insurance regulator is responsible for publishing the index factor to be used in Section 7 in making cost-of-living adjustments on unpaid installment obligations. This will facilitate the making of the adjustments by those who are obligated to do so. If a fixed cost-of-living adjustment factor were to be adopted as explained in the Comment to Section 7, there would be no need for paragraph (3) and, in such event, it should be deleted.

SECTION 18. [Severability.] If any provision of this Act or its application to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

SECTION 19. [Repeal.] The following acts and parts of acts are repealed:

- (1)
- (2)
- (3)

SECTION 20. [Time of Taking Effect.] This Act takes effect
..... All causes of
action filed after this date are subject to the provisions of this Act.