D-300 2/23/81

Memorandum 81-12

Subject: D-300 - Periodic Payment of Judgments

Some time ago, the Commission decided to distribute for review and comment the Uniform Law Commissioners model act on periodic payment of judgments. The views of interested persons and organizations were solicited as to whether the model act provided a sound basic approach to the problem of periodic payment of judgments. If there was general agreement that the model act is a sound basic approach, the Commission could then proceed to draft legislation for California based on the approach of the model act.

The comments we received indicated substantial opposition to the concept of periodic payment of judgments and to the basic approach taken by the model act. The comments are attached to this memorandum. Also attached is an article from the December 1980 issue of the American Bar Association Journal taking the view that the model act would force tort victims to accept unfavorable restrictions on payments of their awards.

The staff believes that the Commission should not give further consideration to this matter at this time. The Commission is not, however, required to make any decision whether the concept of periodic payments of judgements is good or bad. The only decision that is required is not to study this matter at this time. Bills will be considered by the Legislature on this matter at the current session of the Legislature, and the Legislature can make its own decision on the merits of the bills.

The staff makes this recommendation because we believe that the Commission has or will soon have under active study a number of topics that are greatly in need of study. A determination as to the merits of periodic payment of judgments would require a great deal of Commission time with little potential for an output that would be of assistance to

the Legislature. The staff believes the Commission should devote its time and resources to activities that will lead to an output that will have a reasonable chance of legislative enactment and thereby result in actual reform of the law.

Respectfully submitted,

John H. DeMoully
Executive Secretary

Structured Injustice: Compulsory Periodic Payment of Judgments

The Uniform Law Commissioners model act would force tort victims to accept unfavorable restrictions on payments of their awards.

By Philip H. Corboy

IN THE June, 1980, issue of the *American Bar Association Journal* (page 734), Roger Henderson, dean of the University of Arizona College of Law, stated the case for the Model Periodic Payment of Judgments Act, which the National Conference of Commissioners on Uniform State Laws has approved and for which Henderson was the reporter. I offer an alternative view that I believe represents as well as any the feelings of the personal injury bar. My conclusion may also reflect, although for very different reasons, the ultimate opposition of the insurance industry, without whose co-operation this legislative system will never work.

I am a personal injury lawyer. I try many cases, but I settle more than I try. When I try a case, the result is a lump-sum payment of damages that my client (with or without my assistance) invests in order to realize the future income that will make his later life as comfortable as possible under the circumstances. In some cases it makes life itself possible. When I settle a case, the damages are often paid in the same way, but in some cases the option to employ structured settlements is available. While that technique will usually tend to benefit the defendants who pay the damages, I enter into a structured settlement because, under all of the circumstances, it will benefit my client or his or her family.

I rarely make such an arrangement to protect an adult client from his own supposed weaknesses, because I rarely see evidence that a client who has received a million dollars in damages thinks that he is now well-off and can afford the things he could not afford before. The money awarded is intended to replace that which would have been earned and to pay the bills due in the future. Given that, victims should be free to choose their own investments and to alter them to optimize their chances for an adequate return, just as others do.

These arrangements are settlements, not judgments. They are voluntary for all parties. They also are always in the best interest of all parties or they simply are not made. There is no coercion, and everyone is served to some extent. The model act is quite a different mechanism, and the trial bar, including the American Bar Association Litigation Section, has formalized its opposition to it.

The prefatory note to the model act begins with a complaint about the typical lack of information as to the victim's actual future condition. This is a problem to be solved by lawyers in court. If they cannot do so, surely no legislature can. The note then specifies three reasons for re-examining the "inherent problems in the lump-sum system:" (1) the size of damage awards and their effect on the cost of liability insurance; (2) the present state of the tax laws; and (3) the way in which successful claimants spend the money they receive through judgments. The note, however, neither elaborates on these issues nor cites a single outside source.

No one would doubt that the size of damage awards has increased, but we should not scrap the common law rule on damages until the proof of an insurance crisis is a good deal stronger. The tax laws are not a persuasive reason to change the present system, because ample tax-shelter devices (municipal bonds, for example) are available to victims, and judgment income spent on medical care is fully deductible. The note is inaccurate in stating that "any income earned on [a personal injury] award is subject to income tax." On the third point, the note says that "the disposition of large lump-sum awards by successful claimants is not a matter than can be ignored when the public is demanding closer scrutiny of government spending, particularly in the welfare area." This statement fairly implies a substantial problem in this area, yet I know of very little hard information on this problem.

In the absence of hard evidence (of the same quality as that which would have to be provided to support claims of a "liability insurance crisis") individuals should not be treated differently from corporations that sue one another. When the litigation between MCI Communications Corporation and AT&T ended recently with a $1.8 billion judgment, no one that I know has suggested that the loser should have 70 years to pay off the damages, or asked if MCI might squander its award, big as it is.

Section 1 of the model act sets out its three purposes—"(1) to 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." While these purposes seem innocuous, there is a sound of steel behind them. The later Section 3(d) turns the purposes of the act against claimants by allowing a party who does not want the act to have compulsory effect on his case to escape by showing that "the purposes of this act would not be served" by conducting the trial under it. But how, for instance, would a plaintiff who did not want the act to govern his claim go about showing that use of the act would not "alleviate some of the practical problems incident to unpredictability"? The "purposes" section thus is not informational. Its generality is part of the over-all scheme of compulsion, and as such it is a violation of the principle of freedom of contract.

Section 3 is one of the most offensive parts of this legislative scheme. It provides for mandatory effect of the act if one party to the lawsuit has made "an effective election" to come under it. While the scheme that sets up the election process looks elaborate, its real effect in most cases will be to allow a defendant to impose the periodic payment device on all other parties merely by showing that security in the amount of $500,000, regardless of the amount of damages or the amount of the claim, whichever is less, can be provided. Virtually the only chance a reluctant party has to avoid this result is to show, under Section 3(d), that the purposes of the act will not be served by employing it in a specific case.

Section 3(e) provides for separate trials when there are multiple claimants, some of whose claims would come under the act and others for whom the act would work an injustice. That would turn a single trial under the present rules into two separate ones, and the impact on judicial economy, while perhaps not severe, would be unnecessary and contrary to the public interest.

The worst thing about this section, however, of the act as a whole, is that it would bring the full coercive power of the state to bear to keep claimants from exercising their right of contract in settling their own cases—or not—as they wish.

Section 5 would forbid consideration of inflation. It would wipe out at a stroke the trial bar's hard-won victories in recent years to incorporate inflation into damage calculations to achieve the very certainty to which the act aspires.

Section 6 would establish a $100,000 net damages "threshold" to be met before the act would apply. This arbitrary threshold would be subject to all of the equal protection arguments that have been raised against no-fault automobile insurance plans. The threshold would be crossed literally "by accident" and is irrational. Wealthy individuals, who do not need the protection of the act as much as people of more modest means (if anyone does), would find themselves reaching the threshold sooner because their medical care is more expensive.

Act uses index factor based on Treasury bills

The index factor of Section 7—the discount rate for 52-week Treasury bills—is curious. Dean Henderson in his article stated that one of the reasons we need the act is to avoid untoward tax consequences of the payment of a lump-sum judgment. The drafters specifically suggest that any person who wants to secure a periodic payment judgment "can invest the funds necessary in the Treasury bill specified to produce the income to make the required yearly adjustments," thus taking care of security and inflation problems at the same time. Yet that action would precipitate additional tax problems because the income from the Treasury bills would be taxable. And if investment of the funds in Treasury bills would solve the problems of security, inflation, and liquidity (which is a very doubtful aggregate effect), it appears that the act itself would serve no purpose other than to coerce plaintiffs into doing what their lawyers can now advise them to do.

After designing this elaborate system, however, the drafters acknowledge, "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 seems incredible to me that the drafters would go through at least nine drafts of an act and recommend its final approval when its operation hinges on such an elusive contract. A fixed annuity is, of course, available, but the drafters' opposition to any chance windfall to the victim (as shown in Section 11) makes this simple solution unacceptable to them.

While Sections 8 and 9 are generally innocuous, they would allow defendants to post security and satisfy the judgment on the bare showing of "an agreement by one or more qualified insurer or insurers to guarantee payment of the judgment." This would subject the accident victim to a risk of insurance company insolvency, which does occasionally happen.

Section 10 governs the discount rate to be applied to any future damages paid ahead of time. This is the one area where the drafters cite authority for their decisions, and they take pains to show why a discount rate of 3 per cent (representing the "real rate of interest") is appropriate. The analysis is esoteric, however, and it is not unchallenged and does not result in a significant difference in the number of dollars that would change hands. In the interest of fairness, if the victim is to have no allowance for inflation, no control over the investment, no right to keep the award in his estate if he dies prematurely, and a serious injury, he should not suffer a discount to his award to boot!

The authority the drafters cite here (an article by Frederick C. Kirby in the August, 1978, *Insurance Law Journal*) appears to contradict their own premises in three particular areas.

First, they quote Kirby to the effect that the "economically rational person prefers present cash or liquidity to future cash." If the drafters accept that proposition, one must assume that the voluntary acceptance of the terms of the act as a whole would be an economically irrational act and that the imposition of the terms of the act by statute would be enforced irrationality.

Second, Kirby notes that "all borrowers (except perhaps the United States government) have some probability of not being able to repay the loan when due." If this is an acknowledgement that government obligations are inherently safer investments than the other forms of security allowed under the act, then the plaintiff who could be forced to accept a plan secured in some other way would be subjected to greater risk than he would choose on his own.

Third, Kirby acknowledges that "interest rate movements lag behind price level changes." That apparently means that interest rates and hence income from principal invested under the act, even in Treasury bills, will not tend to keep pace with the increasing costs of health care and the cost of living generally. Theoretically, they would remain high for a time after living and medical costs began to drop, but our recent ex-

perience gives us no hope that such costs will drop at any time in the foreseeable future. Security agreements pegged to the rate of Treasury bills will virtually guarantee that the payout provisions of periodic payment plans will be inadequate to maintain accident victims for extended periods in the future. This suggests that the government's estimates of the rate of inflation, not the interest on Treasury bills, should be the index on which Section 7 is based.

Section 11 is probably the most offensive provision of the entire act. It does not merely offend economic theory or logic the way the rest of the act does. It offends elementary ideas of justice and for the worst of all possible reasons: maximization of the insurers' profits. Section 11 would terminate benefits of any periodic payment judgment in the event of death of the victim, to the extent of "health-care costs or noneconomic loss." In effect, it would allow the defendants to bet on the victim's death and reopen the judgment if they won.

Why wipe out compensation for pain and suffering?

While the first (health-care) component of the modification might be defensible on grounds of sheer rationality, and in fact is used in many structured settlements, the second (noneconomic loss) is not. This provision would wipe out compensation for pain and suffering—compensation that is personal to the plaintiff, recoverable by him during his lifetime, and should remain a part of his estate if he has recovered it before his death. The drafters observe that a purpose of the act is to pay for losses as they accrue, stating, "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." The other side of the "windfall" problem is the case in which losses turn out to be higher than expected, not lower.

If symmetry were a goal, the drafters would provide a means for reopening the judgment on behalf of the plaintiff as well as for the defendant, as Section 11 does, and to their credit they once attempted to do so. A provision for additional hearings on increased damages, however, was eliminated from the fifth tentative draft by the commissioners' committee of the whole at their 1978 annual meeting. The comments to Section 11 state: "It was argued there that the insurance industry could not cost its product where a liability was open-ended, court congestion would be worsened, and some injured persons might be motivated to resist rehabilitation and recovery. . . . In short, the conference voted to abandon the suggestion because of the seemingly intractable practical problems involved." In effect, the conference institutionalized part of the guesswork they eschew, and in so doing they violated the first two stated legislative purposes of Section 1.

While neither the commissioners nor I know how an insurer would go about pricing an annuity of uncertain payout over an uncertain period of time during uncertain economic conditions, I do know that that problem does not exist now, as long as parties are free to enter into these agreements without coercion. The problem will only arise if this act is adopted by some state. Some structured settlements and some lump-sum payments, too, will tend to create small "windfalls" if a victim dies prematurely, but good structured settlements anticipate those eventualities by guaranteeing a minimum payment to victims or their families but terminating the payments at the time of death. To claim that a plaintiff's but not a defendant's windfall must be avoided —one of which is bound to occur at the time of the victim's death—shows the true bent of the drafters and the true beneficiaries of the proposed act. The entity that would benefit financially from every one of the act's provisions is the person whose culpable conduct generated the lawsuit or the person who insures the culpable party and so stands in his place for this purpose. In my view, this is simply unconscionable.

Section 13 on assignability of benefits would forbid the recipient from anticipating his payments for all but a few purposes. It is much too restrictive. If accident victims are to be restricted in their use of judgment payments much in the way spendthrift trusts operate, without regard to their real propensity to dissipate assets, why should all of us not be restricted in the same way, so that we, too, will not become a burden to society?

Section 15, in the words of the commissioners, "makes clear that the provisions of the act are available to parties in fashioning settlement agreements and consent judgments." No one needs to look to this act to learn that structured settlements are available. Anyone who represents a personal injury client in negotiating that sort of settlement should guard his client's rights more carefully than this act does.

The Model Periodic Payment of Judgments Act would benefit only one segment of the public, would actually worsen the condition of accident victims, and has as its only real purpose the facilitation of ever-diminished costs of operation for liability insurers. Insurers now have the benefit of a discount when they pay a lump sum. One must assume that they pay even less when they purchase an annuity to fund a structured settlement. This model act would go one step further and impose on litigants, by legislative fiat, several provisions that insurers would like to get but would never be able to force on victims represented by competent counsel. This act would mandate structured judgments, not settlements. The difference between a settlement and a judgment is compulsion.

Beyond the technical and legal doubts I have about this act, it is disheartening to see the Uniform Laws Commissioners clinging to a statute that is based on such uneven scholarship, that would do so little good and so much harm, that would satisfy so few of the interested institutional constituents, and about which the commissioners have serious doubts.

Through eight tentative drafts this act was referred to as a "uniform act." As approved by the commissioners, it is a "model act." According to the 1977 *NCCUSL Handbook*, the term "model act" is reserved for "any act which does not have a reasonable possibility of ultimate enactment in a substantial number of jurisdictions or which the commissioners from a substantial number of states oppose as unsuitable or as impractical for enactment in their states." The conference's change in terminology to "model act" suggests significant reservations on the part of a large number of the commissioners and their bureaucracy. Although Dean Henderson in his article stated that the drafting committee "feels that the act is workable and that its time has come," the reasons why it is still being proposed for passage are beyond the scope of this article and the limits of my imagination. —*Journal*

(Philip H. Corboy practices law in Chicago and is the immediate past chairman of the American Bar Association Section of Litigation.)

CALIFORNIA TRIAL LAWYERS ASSOCIATION

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December 15, 1980

John DeMoully, Executive Secretary
California Law Revision Commission
4000 Middlefield Road
Room D-2
Palo Alto, CA 94306

RE: Consideration of Periodic Payments

Dear John:

Please find enclosed herewith a presentation by Vern Hunt, Chair of our Civil Procedures Committee referable to the proposal being considered by the Law Revision Commssion on periodic payments.

As I have mentioned to you, our association has vehemently opposed similar legislation that has been introduced in the legislature not only this year but in prior years. We hope the enclosed presentation delineating why this type of proposal is against the best interest of the public will convince the Commission not to undertake a study or enactment of legislation in this area.

We appreciate your courtesy and cooperation. If I can furnish additional information, I'd welcome your call.

Yours very truly,

JAMES L. FRAYNE
Executive Director

JLF:asj

cc; Vernon Hunt, Jr., Esq.

December 16, 1980

California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, CA 94306

RE: Model Periodic Payment of Judgments Act

THE PROBLEM

The inadequacy of an award of compensation for damages not then sustained ("future damages") has long been recognized. It would seem indisputable that justice consists of compensating a victim's actual losses - neither more nor less. Thus the goal of justice must be to provide for compensation of actual losses as they are sustained. The problem is how to provide such compensation.

THE PROPOSED ACT

The current proposal purports to provide an answer to this problem. In fact, however, it does not seek to provide for compensation of actual losses. It, like its precedents, only addresses itself to reduction of the victim's compensation. This is inherently and obviously one-sided and unjust.

No matter how it is rationalized or characterized, it is plainly and simply protection for the tortfeasor and insurer. It does not seek to compensate actual losses. No attempt is made to provide for the undercompensated victim whose disability turns out to be greater than found by the jury.

The Preface to the proposal clearly states that the objective is to reduce the tortfeasor's cost by reducing the victims' compensation. In the comment to Section II at page 29 the rationale is given that there is "a windfall to the recipient." The proposed act eliminates that "windfall".

However, it does not eliminate the windfall to the tortfeasor that results when the actual losses sustained by the victim far exceed those awarded, but are nonetheless denied compensation by an unmodifiable trial award.

Nowhere is this injustice remedied. The "windfall" to the tortfeasor remains.

Section 4 expressly provides that the victims future damages shall be awarded by the jury, rather than being determined by actual events.

Thus, the proposed act provides that the victim cannot obtain increased compensation if the award is actually inadequate but the tortfeasor can obtain relief if the loss is not actually sustained.

This is hardly equal protection of the law nor is it justice in any sense of the concept.

Thus, although couched in terms of seeking "Justice", the proposal actually seeks only to protect economic self-interest. It shuns the correction of the injustice done the victim. To protect the tortfeasor but not the victim aggravates rather than alleviates the injustice.

For this reason alone, the proposal should be rejected.

SOLUTION

However, the problem remains and a solution must continue to be sought.

The proposal and the work which has gone into it could be utilized as a base for constructing a system which would fairly compensate the victim as well as protect the tortfeasor.

The major problems arising from including the victim's rights in the modifiable award appears to be (1) the open-ended liability for tortfeasors and their insurers, and (2) the determination of changes in disability and medical needs. Inflationary and other changes are already addressed as are the problems of adequate security. They require additional study which can be done after the major problems are solved. The issues of multiple party and comparative faults apportionment can likewise be addressed later.

The open-ended liability can be solved in two ways.

First, the "windfall" which the tortfeasors eliminate from the victims will compensate the "windfalls" which are eliminated from the tortfeasors. Presumably there are studies indicating the amounts anticipated to be saved by eliminating the victims' "windfalls", and since "windfalls" to either party should be the result of a varience from statistical norms, the end result to insurers paying such claims will remain balanced.

These can be handled actuarily just as casualty and bonding losses are now.

Second, underwriting practices and premium adjustments can provide for imbalances just as they do in workmen's compensation now.

Modification of awards can be handled by modification hearings. Provisions for expenses of expert witnesses and attorneys fees can be made. Presumptions accepting the opinions of the victims treating practitioner can be developed. Limitations on frequency of modifications can be established.

Obviously, a great amount of thought and study must be given to such a proposal. Simplistic solutions will not solve the problem. Neither will one-sided solutions such as the proposed model act. However, it can be done - <u>if we really want to be fair</u>.

It is therefore requested that you recommend against adoption of the proposed act and, further, that you recommend further study of awards modifiable as to the victims as well. CTLA will be more than willing to collaborate in such a study.

Thank you for your courtesy and consideration.

Respectfully,

Vernon Hunt

VERNON HUNT, Chair
CTLA Legislative Sub-Committee on
Courts and Civil Procedures

VH:asj

The Bar Association of San Francisco

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January 15, 1981

Mr. John Demoully
California Law Revision Commission
4000 Middlefield Road
Room D-2
Palo Alto, CA. 94306

Dear Mr. Demoully:

In its meeting of January 14, 1981, the Board of Directors of the Bar Association voted to oppose the proposed Model Periodic Payment of Judgments Act which has been proposed by the National Conference of Commissioners on Uniform State Laws. I enclose a report of our special committee on periodic payments of judgments which sets forth the reasons for this opposition.

If you need any further information, please feel free to contact the undersigned.

Very truly yours,

Joanne M. Garvey

JMG:hod
Enclosure

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January 5, 1981

Board of Directors
The Bar Association of San Francisco
220 Bush Street, 21st Floor
San Francisco, California 94104

Attention: Irving F. Reichert, Jr.

Re: Special Committee on Periodic Payments of Judgments - Model Periodic Payment of Judgments Act

The Special Committee on Periodic Payments of Judgments recommends disapproval of the Model Periodic Payment of Judgments Act proposed by the National Conference of Commissioners on Uniform State Laws.

The proposed act would mandate that judgments in personal injury cases above a specified threshhold figure be paid on a periodic installment basis with respect to losses accruing in the future. While settlements could still be achieved which would pay claimants either on a lump-sum basis or on a periodic installment basis (i.e. "structured settlements"), if a party could show that future damages would exceed $100,000, that party could require the other party to submit to a very complicated process whereby future damages awarded in the judgment would be paid out in periodic installments rather than a lump-sum basis.

The committee strongly opposes the concept of a law which would force plaintiffs in certain kinds of cases to recover their damages in periodic payments rather than in a lump sum upon conclusion of the action. The proposed act would give tremendous leverage to the defendant which could be utilized against the claimant. If the claimant were to settle, he would get a lump sum; but if he deemed the settlement offer inadequate and elected to try the case, he could be forced to accept periodic payments contrary to the claimant's wishes. The committee opposes the involuntary nature of the proposed statute and questions the basic premise

that government can best determine what is in the interests of the individual who has been seriously injured and merits compensation.

The proposed statute applies only with respect to future damages in cases that go to judgment. Accordingly, the so-called beneficial aspects, which have led the Commissioners to conclude that there is a problem which should be solved by legislation, would only apply with respect to a very small percentage of personal injury claims. [1] While the committee would agree arguendo that there might be certain advantages with respect to installment payments, which have motivated claimants and insurers to enter into "structured settlements" on an increasing basis, the disadvantages of mandating the payment of judgments on this basis outweigh the benefits foreseen by the Commissioners.

Some members of the committee expressed the view that the proposed Act is heavily weighted in favor of the insurance industry. If the claimant dies, his beneficiaries receive a minor sum. Yet, if the claimant's physical condition becomes worse, there is no provision for increasing the amount of damages to be paid.

The proposed threshhold for invoking the proposed statute ($100,000) was attacked on the basis that it was too low a figure and also that it might be violative of the equal protection clause. Claimants under the threshhold are treated differently from claimants whose future damages might exceed the threshhold figure.

All members of the committee agreed that the proposed Act would

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[1] These supposed advantages are alleged income tax advantages, the elimination of speculation with respect to future damages to be awarded and the elimination of so-called windfall awards by terminating future damages upon the death of the claimant.

increase the cost of litigation and enormously complicate the jury process. The Act would require the trier of fact to make multiple separate findings with respect to past and future damages; and it would put the burden on a claimant to argue at the claimant's expense an issue which the claimant feels is contrary to his interests. 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. 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. While a claimant coming within the Act would be forced to accept future damages on an installment basis, a subrogee of the claimant, including a workers' compensation employer or insurer, would have an election to recover on a lump-sum basis. Similarly, the attorney would recover his fees on a lump-sum basis, while his seriously injured client would have to wait to be compensated for future damages. The proposed Act provides for adjustment of periodic installment obligations by utilizing the discount rate for 52-week United States Treasury bills, although the Act does not require that the judgment be secured by investing in such instruments. The Committee questions the use of the discount rate for Treasury bills as a basis for adjustment payments for future damages. The inflation rate for hospital and medical services might be substantially greater than the inflation rate for United States Treasury bills; and the claimant would not have the benefit of the funds for investment in order to keep pace with the inflation which is affecting that claimant.

In summary, while the Committee believes that "structured settlements" may be in the interests of plaintiffs, defendants and their insurers in individual cases, the Committee rejects the notion that the state should mandate the payment of future damages by installment payments. We recommend that the California Law Revision Commission be advised that the Bar Association of San Francisco opposes the proposed Model Act. Finally, we do not recommend that legislation

Re: Special Committee on Periodic Payments of Judgments - Model Periodic Payment of Judgments Act

be submitted with respect to mandating the period payment of judgments.

Respectfully submitted,

Robert A. Seligson, Chairperson
Special Committee on Periodic
Payments of Judgments

RAS/as

P.S. For further criticism of the proposed statute, see Corboy, "Structured Injustice: Compulsory Periodic Payment of Judgments, 66 ABA Journal, 1524, December 1980.

cc: Committee Members:
Paul Cyril, Craig Needham, Catherine Rosen,
Kenneth Rosenthal, Randall E. Smith

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December 18, 1980

Reply To: San Francisco office

California Law Revision Commission
Attention: John H. Demoully,
Executive Secretary
4000 Middlefield Road, Room D-2
Palo Alto, CA 94306

Re: Model Periodic Payment of Judgments Act

Dear Mr. Demoully:

We have been asked by Wells A. Hutchins of the California State Automobile Association to review and comment on the Model Periodic Payment of Judgments Act. Our comments follow.

Initially we believe that consideration should be given to the question of whether a periodic payment of judgments statute is appropriate or desirable at all, quite apart from the question of whether the Model Periodic Payment of Judgments Act is the appropriate vehicle.

The Prefatory Note to the Act details the problems giving rise to the supposed need for this legislation. Essentially this is the perceived desire to protect injured claimants from the vagaries of inflation and to guard against the "improvident disposition of large sum payments" made to claimants. It is suggested that the risk of imprudent investment of large lump sum payments be transferred from the claimant to the tortfeasor's insurer. One's initial reaction to this proposition is to question why it has become necessary to protect this particular segment of society when other segments similarly situated are not protected. Thus, one disabled by reason of illness or disease is not protected from inflation, though certainly his crippling illness or disease would not be of the victim's choosing any more than was the accident giving rise to injury and the suggested application of the Act. Those receiving workers' compensation benefits and other disability benefits are also not substantially protected from the vagaries of the economy and from inflation. The economically heavy burden which the Act seeks to impose on the tortfeasor's

insurer would, if imposed, contribute substantially to higher insurance premiums to the public at a time when the public is ill prepared financially to accept such an additional burden.

If the legislature were to decide nonetheless that this particular segment of society is deserving of special protection where others are not, the question remains as to whether a periodic payments Act is the most appropriate method of implementing that legislative decision. It would appear unwise to adopt the Act simply because a model is there which would require a comparatively minimum of redrafting, if its desirability were accepted, without a thorough consideration of the other possibilities of implementing the goal. Thus, consideration should be given to the adoption of a public trust system, whether publicly or privately administered, in which the investment goals of the trustee could be set and administered under legislative direction. The other side of that coin is that such a solution would create another tax eating bureacracy. A trust could possibly be administered by investment managers, chosen and functioning within the private sector, without the necessity of creating a new governmental agency or department.

There may well be other alternatives as well; the point is, why decide that this Act is the best choice without exploring all other possibilities?

Supposing for the moment that, after due consideration, the legislature were to decide to adopt some form of a periodic payment of judgments Act. The question would then arise whether this particular Act is the appropriate and proper vehicle.

The Act as drafted is cumbersome and unwieldy, not readily susceptible of understanding and would be expensive to administer.

Initially it should be observed that the writer, as a trial attorney, is well aware that the provisions of Section 3 of the Act (ELECTION FOR ACT TO APPLY) would be commonly invoked even though there were little real likelihood as a practical matter of a particular case having a value anywhere near $100,000. The mere requirement of a "good faith" showing by the plaintiff is no real requirement at all.

The cumbersomeness and unwieldiness of the Act become evident in Section 4 where the trier of fact (most commonly a jury in personal injury cases) must, at a minimum, make separate findings as to the elements of damage specified in that section. The further requirement of Section 4 that the calculation of future damages as to medical care and economic loss must be based on the costs and losses during the period of time the claimant will sustain said costs and losses, which will be in the future, will be most difficult for a

lay jury to apply. Juries have enough trouble right now with present loss and present value figures and with the further necessary attempt to winnow the arguments of counsel as to the plaintiff's general future losses, without being forced to become specific as the Act, if adopted, would require. Section 5 of the Act will compound the jury's confusion by mandating that, when they make special damages findings, they must further be informed (so that the information will obviously influence their deliberations) that the law provides for future adjustments for future changes in the purchasing power of the dollar, that future payments will be made periodically rather than in a lump sum now and moreover, (and this will be most difficult for them), that they will make their findings on the assumption that appropriate adjustments for future changes in the value of the dollar will be made later. They are being told in effect that the verdict they will return will not be final and may indeed be drastically revised upward or downward, most likely upward, based on factors not before them and as to which anyone could only now wildly guess. Their verdict then would be nothing more than a starting point.

The problem becomes grossly compounded when, beginning at Section 6 of the Act, the judge is directed to apply various set offs and allowances, determining future damages and then reducing future damages to present value in accordance with a different Section of the Act.

Section 7 of the Act further compounds an already difficult problem to administer by providing for the adjustment of the periodic installment obligations. This section alone will probably necessitate the hiring of actuaries, economists and accountants to aid the court, a further taxpayer expense at a time when money for the expansion of public personnel is increasingly hard to come by. In short, these and other provisions of the Act, which I cite merely by way of example, are going to cause already overburdened trial judges to throw up their hands in horror and in the process, the very purpose of the Act will be defeated. In short, the excessive complication of the determination of value and the enforcement provisions of the Act strike one as logic gone mad rather than a practical approach to a problem facing a numerically small percentage of the population, but doing so at great cost.

Let me briefly address the cost factor. Comment to the Act acknowledges that there is no present market for annuities which will not only guarantee the principal sum and the periodic payments but also guard against the vagaries of inflation. The insurance industry has already pointed out that there is not going to be

such a market, either. The extreme difficulty of costing the operation of the Act would necessitate the hiring of additional personnel within each insurance company to administer it and these personnel would be of a highly specialized nature. Trial time would be expanded in each case to which the Act applied by reason of the necessity of explaining the operation of the Act in the individual case to the jury as well as to the court. This in turn means that the trial attorneys will have considerably more billable time invested in each file. The necessity for additional expert testimony, not heretofore required, will further add to the cost of implementing the Act. Implementation of a periodic payments judgment following the verdict will involve the expenditure of considerable more time and money by all persons involved. The price of all this is going to come from only one source, the insuring public and that by way of increased premiums. The amount of the increase in premium can only be guessed at at this time.

Surely there must be a better way.

I appreciate the opportunity to have been able to express some thought on this interesting but highly complicated question.

Frank E. Preston
FEP/drb
cc: Wells A. Hutchins, Vice President and General Counsel,
California State Automobile Association

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07 January 1981

California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, Ca 94306

Re: Enforcement of Judgments

Dear Commission Members:

I note with interest your circulation of the Model Periodic Payment of Judgment Act, in connection with your mandate to revise California's enforcement of judgments law. I think that the Model Act is a laudable attempt to bring order into an increasingly chaotic field, and I applaud it. I am, however, pessimistic as to the odds of achieving a legislative compromise that will be even marginally acceptable to all groups.

My main concern is with enforcement of judgments, both small and large, against low-income persons. While I recognize that they are seldom sued for amounts in the $100,000+ range that is the subject of the Model Act, in cases where the defendant cannot post the required security the Act allows the judgment creditor to still have an installment judgment entered (Section 6(4) and Comment thereto). How would this affect the defendant's right to declare bankruptcy and make a new start? I do not see where this problem is addressed.

In the context of your larger task of enforcement revision, I urge you to carefully preserve the right of a judgment debtor not to face incarceration for non-payment of debts. The problem would arise in the context of a court-ordered periodic-payment scheme for small judgments, such as for consumer goods transactions or family expenses. If non-compliance with such a court-mandated payment schedule could be punished as contempt, the result would be a potential "debtor's prison" situation where those unable or unwilling to pay civil judgment debts could face incarceration as a result. I strongly urge the Commission to avoid any such results in your revision efforts, while maintaining some flexibility for a court to order periodic payments at a judgment debtor's request such as is done in lower courts now. This forces the creditor to accept reasonable payments on the judgment, rather than going after it all at once through garnishment, execution and sale, etc.

Also, I hope that the Commission recognizes the philosophical difference between commercial inter st rates in a bargained-for transaction and involuntary interest rates on a judgment. If market-rate post-judgment interest is imposed, a proposal made by some, it will prvent many low-income persons from ever satisfying judgments, and exacerbate the financial problems of low-income persons.

Very truly yours,

Charles Scott

CS:sa

LEONARD DIEDEN
JUDGE

SUPERIOR COURT
STATE OF CALIFORNIA
COUNTY OF ALAMEDA
COURT HOUSE-OAKLAND 94612

December 18, 1980

California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, California 94306

Attention: John DeMoully

Gentlemen:

I have reviewed the material that you sent to me concerning the Model Periodic Payment of Judgements Act, and enclose some notes relative to the same.

As a settlement conference judge, I have had some experience with so-called structured settlements. They require much special knowledge and negotiating technique in order to arrive at a settlement. They are used almost exclusively in cases of catastrophic injury or in death cases. Very few judges possess the experience necessary to negotiate this type of settlement. I do not say this in any self-praise sense, but merely that I have worked in enough of those to gain some knowledge.

I hope that these comments may be of some assistence to you.

Yours very truly,

LD:mk
Enc.

NOTES RE REVIEW OF MODEL PERIODIC PAYMENT OF JUDGMENTS ACT

1. In a motion for election for trial under the Act, the grounds upon which a plaintiff can resist defendant's proposed election are stated to be " . . . the purposes of this act would not be served . . . ." (Section 3(d)). It appears that little guidance is given to the court from other provisions in the Act and that the court has considerable discretion to deny a defendant's motion for election. This type of discretion should be avoided since it can lead to deterioration of the purposes of the Act. Once the injury has been demonstrated to fall within the scope of the Act and adequate security as defined in the Act has been posted, no discretion as to application of the Act should exist. If a plaintiff wants to resist application of the Act, he should be bound by a pretrial agreement that his damages will not exceed $100,000 or whatever figure the State has determined to be the breakoff point for application of the Act.

2. Attorney's fees are only mentioned one time in the Act. They appear in Section 6(3)(i). No provision is made for review of attorney's fees by a court in the event the prevailing plaintiff is a minor.

3. Once "security is posted" pursuant to Section 9 (this could take the form of purchase of an annuity contract), the defendant is discharged from further liability.

   Currently, structured settlement negotiations occasionally include an agreement that the defendant guarantee the liability of the life insurance company writing the annuity.

General Comment

If this, or similar legislation, is adopted, it places great responsibility upon the trial judge who receives little guidance from counsel involved in the case. Many trial judges and trial lawyers simply do not have the economic knowledge and background that is presumed by implementation of the Act. I believe that if the Act were adopted in California, it should be accompanied by a program set up by the Judicial Commission (or some other appropriate body) specifically designed to furnish trial judges with the economic education and background necessary for their vital participation in making the Act work. Such a program should be conducted annually to include newly-appointed judges or judges who

have been transferred from other areas into civil trial work. It should also include a system for updating information available to trial judges currently working with the Act.

It appears to me that the cornerstone of the Act is the trial judge who will not be in a position to rely upon the attorneys for the information he needs in instructing the jury, providing special findings, interpreting the jury's findings and establishing payments due under the Act.

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AN ASSOCIATION INCLUDING A PROFESSIONAL CORPORATION

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November 14, 1980

California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, California 94306

Gentlemen:

Thank you for requesting my comments relative to the study being undertaken of the Model Periodic Payment of Judgments Act. I am certain that you will be receiving much eriudite and intelligent comment from the organized trial bar and insurance industry groups most subject to be affected by implementation of the Act. Perhaps, my few comments will be of some interest, nevertheless.

A. It might be wiser to have the Act apply only if all parties consent. If periodic payments are unilaterally elected, might not a jury, particularly one aware of the unilateral election feature of the Act, infer that because the Act applies, the plaintiff must necessarily have a legitimate and viable "big" case. What is the effect of the usual California situation on the election process where there are multiple comparative negligence and equitible indemnity claims and parties. The apportionment could be troublesome, particularly if some parties are securable and others are not. What then?

An "all or no one" apporach might be preferable to a unilateral approach as suggested.

B. The attorney fee payment question hits closer to home than some and poses some problems. I imagine defendants may very well have a difficult time being forced to be bound by plaintiff's contract with his attorney concerning fees. I am not certain that is a meaningful approach to take or a proper one. If there is a periodic payment judgment, it should apply accross the board and to attorney fees as well. The fees should be paid out of the plaintiff's recovery, not in addition to it, and logically should cease when the payments to a plaintiff cease.

C. The index factor for adjustment should be carefully evaluated. I am not at all certain that a Federal T-Bill rate is either indicative of the real world or of local conditions. Is adjustment really necessary at all? Does the Model Act attempt to completely eliminate all risk of change? I do not think a plaintiff would be very happy when his payment amount is adjusted downward in the next crash. It is possible.

These are just a few concerns that come to mind. They are admitedly personal. Perhaps, they are worthy to note. Thanks again for your interest in my opinion.

Very truly yours,

HANDELMAN & KENT

By Allen J. Kent
ALLEN J. KENT

AJK/vg

STATE OF CALIFORNIA
COURT OF APPEAL
SECOND DISTRICT—DIVISION FOUR
3580 WILSHIRE BOULEVARD
LOS ANGELES, CALIFORNIA 90010

ROBERT KINGSLEY
ASSOCIATE JUSTICE

November 3, 1980

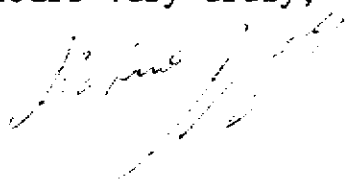
California Law Revision Commission
4000 Middlefield Road
Room D-2
Palo Alto, California 94306

Gentlemen:

I have before me your communication of October 15th concerning the proposal for periodic payment of judgments.

So far as I can see the principal argument for the proposal is that plaintiff may, unwisely, spend the portion of a judgment awarded for future loss and expenses, leaving them, at a later period, without funds to meet those expenses. I have great doubts as to the wisdom of enacting a law whose chief value is to impose a governmental Big Brother on litigants.

Yours very truly,



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OUR FILE NUMBER _____

October 30, 1980

California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, California 94306

Gentlemen:

I have your Letter of Transmittal dated October 15, 1980 and the attached materials, all relating to a study of the periodic payment of judgments. As I have never been involved, except once many years ago, in a personal injury case in which a large judgment was rendered I am perhaps not qualified to respond to or comment on the study. However, I have a few thoughts, for what they might be worth, viz:

1. We do, of course, already have a minor statutory scheme of a sort which provides for the payment of judgments in installments, in the form of Section 85 of the Code of Civil Procedure. It might be that some changes in this provision would suffice for at least some of the intended purposes. Simply allowing this procedure in the Superior Courts would alone be a significant development in this area.

2. Since the form and nature of the security provided to assure future payments is of critical importance in any such scheme the law would have to provide that the security would be exempt from attachment, etc. and the claims of creditors of the insuring company (or self insureds) in bankruptcy, receivership and statutory liquidation proceedings.

3. The ABA article says that personal injury awards are not taxable income under Section 104(a)(2) of the IRC. That is not, I believe, entirely correct. My recollection is that the portion of any such award which is intended to compensate a claimant for lost wages or earnings is indeed taxable. Since judgments in personal injury cases rarely if ever specify which portion is allocable to pain and suffering, which to reimbursment of medical expenses, which to loss of wages, etc. the IRS, so far as I know, almost never audits this aspect of such awards. I would expect that if periodic payments become commonplace the IRS would, especially in cases involving the permanent disability of a wage earner, give more attention to what might be taxable and what is not.

4. I suspect that in cases of serious injuries with expected significant continuing disability or loss juries, in one way or another, do in fact take into account (or at least attempt to) such factors as prospective inflation, the commuted value of the earnings of invested capital, etc. If the theory of such an Act is that insurers might then be less resistant to large judgments I doubt that it will serve that purpose at all, and I cannot see how it could in any case. The possibility of a large judgment, even if payable on an installment basis, surely will not result in less of an effort to secure a verdict for the defendant. And what benefit will the public get? Is there a guarantee of a reduction in insurance premiums?

5. I note in the material what seems to be some concern as to the "improvident disposition of large lump sum awards by successful claimants". As a philosophical matter, I would strenuously object to any further governmental encroachment on individual freedom - and that would certainly include any attempt to impose restrictions on how or when a person might dispose of an award in a personal injury case. In any event, we already have adequate laws relating to the protection of estates of minors and the mentally and physically incompetent.

6. Finally, unless periodic payments are made compulsory such an Act would serve no real purpose other than to provide guidelines for the court and counsel who are involved in such a matter. Claimants and insurers have always been free to negotiate and agree on such arrangements and have done so as a matter of fact on occasion.

Yours very truly,

Sherman B. Lans,
of Ambrose, Malat & Lans

SBL/Ldef

November 18, 1980
58 Cadillac Drive
Apartment 122
Sacramento, California 95825

California Law Revision Commission
4000 Middlefield Road
Room D-2
Palo Alto, California, 94 06

Dear Commission:

This letter is in response to the Daily Recorder article on your consideration of the Model Periodic Payment of Judgments Act.

My position is that the Model Act does not go far enough, especially in the case of an injured child. My views are set forth in my law review comment, "Children Take Their Lumps -- The Sorry State of Children's Tort Recovery," 12 U.C. Davis L. Rev. 797 (1979). My comments on the Model Act appear at note 98 and following pages.

I am enclosing a reprint of my article. I hope that you find it useful. Thank you for your time.

Sincerely,

Bruce A. Markell

Bruce A. Markell

LAW REFORM COMMITTEE OF SOUTH AUSTRALIA

FROM THE CHAMBERS OF THE CHAIRMAN:
THE HON. MR. JUSTICE ZELLING, C.B.E.,
JUDGES' CHAMBERS,
SUPREME COURT,
ADELAIDE S.A. 5000
PHONE: 217 0451 EXT. 724

22nd January, 1981.

The Secretary,
California Law Revision Commission,
4000 Middlefield Road, Room D-2,
PALO ALTO:
California. 94306.
United States of America.

Dear Sir,

I have your letter of October 15, 1980 relating to periodic payment of judgments in bodily injury cases. South Australia was I think the first State in Australia to experiment on these lines by inserting Section 30b into the Supreme Court Act by amendment in 1967. The amendment to the law has worked very well in practice and I enclose herewith for your use a copy of that section.

I am sorry that a reply could not have been sent to you by December 15 but your letter only reached Adelaide this week.

Yours faithfully,

(Chairman).

Enc.

Power to make interim assessment of damages.

30b. (1) Where in any action the court determines that a party is entitled to recover damages from another party, it shall be lawful for the court to enter declaratory judgment finally determining the question of liability between the parties, in favour of the party who is entitled to recover damages as aforesaid, and to adjourn the final assessment thereof.

(2) It shall be lawful for the court when entering declaratory judgment and for any judge of the court at any time or times thereafter -

(a) to make orders that the party held liable make such payment or payments on account of the damages to be assessed as to the court seems just;

and

(b) in addition to any such order or in lieu thereof, to order that the party held liable make periodic payments to the other party on account of the damages to be assessed during a stated period or until further order:

Provided, however, that where the declaratory judgment has been entered in an action for damages for personal injury, such payment or payments shall not include an allowance for pain or suffering or for bodily or mental harm (as distinct from pecuniary loss resulting therefrom) except where serious and continuing illness or disability results from the injury or except that, where the party entitled to recover damages is incapacitated or partially incapacitated for employment and being in part responsible for his injury is not entitled to recover the full amount of his present or continuing loss of earnings, or of any hospital, medical or other expenses resulting from his injury, the court may order payment or payments not to exceed such loss of earnings and expenses and such payment or payments may be derived either wholly or in part from any damages to which the party entitled to recover damages has, but for the operation of this proviso, established a present and immediate right or except where the judge is of opinion that there are special circumstances by reason of which this proviso should not apply.

(3) Any order for payment of moneys on account of damages made hereunder may be enforced as a judgment of the court.

(4) Where the court adjourns assessment of damages under this section, it may order the party held liable to make such payment into court or to give such security for payment of damages when finally assessed as it deems just.

(5) When damages are finally assessed credit shall be given in the final assessment for all payments which have been made under this sectio and the final judgment shall state the full amount of damages, the total of all amounts already paid pursuant to this section and the amount of damages then remaining payable, and judgment shall be entered for the last-named amount.

(6) Where the court adjourns assessment of damages under this section, any party to the proceedings may apply to any judge of the court at any time and from time to time -

(a) for an order that the court proceed to final assessment of the damages;

or

(b) for the variation or termination of any order which may have been made for the making of periodic payments.

On the hearing of any such application the judge shall make such order as he considers just: Provided that, in an action for damages for personal injury, upon an application for an order that the court proceed to final assessment of damages, the Judge to whom such application is made shall not refuse such order if the medical condition of the party entitled to recover damages is such that neither substantial improvement nor substantial deterioration thereof is likely to occur or if a period of four years or more has expired since the date of the declaratory judgment unless the judge is of opinion that there are special circumstances by reason of which such assessment should not then be made.

(7) If it appears to the court that a person in whose favour declaratory judgment has been entered has without reasonable cause failed to undertake such reasonable medical or remedial treatment as his case might have required or require, it shall not award damages for such disability, pain or suffering as would have been remedied but for such failure.

(8) If at any time it appears to a judge that a person in whose favour declaratory judgment has been entered and who is incapacitated or partially incapacitated for employment, is not sincerely or with the diligence which should be expected of him in the circumstances of his case, attempting to rehabilitate himself for employment any payment or payments under subsection (2) of this section shall not include by way of allowance for loss of earnings a sum in excess of seventy-five per centum of such person's loss of earnings.

(9) (a) Notwithstanding anything in the Survival of Causes of Action Act, 1940, when damages are finally assessed under this section for the benefit of the estate of a deceased person where the deceased person died after action brought and declaratory judgment has been entered in favour of such person, the damages finally assessed may include such damages in respect of any of the matters referred to in section 3 of that Act as the court deems proper.

(b) Where a party dies after declaratory judgment has been entered in his favour but before final assessment of his damages in circumstances which would have entitled any person to recover damages, solatium or expenses by action pursuant to Part II of the Wrongs Act, 1936-1959, it shall be lawful for the executor or administrator of the deceased to proceed in the same action for the recovery of such damages, solatium or expenses for the benefit of such person notwithstanding the declaratory judgment or that the deceased has received moneys thereunder, provided, however, that in any such proceedings all moneys paid to the deceased pursuant to the declaratory judgment in excess of any actual and subsisting pecuniary loss resulting to him from the wrongful act of the party held liable shall be deemed to have been paid towards satisfaction of the damages, solatium or expenses awarded pursuant to the Wrongs Act, 1936-1959, and no further damages shall be payable in respect of the injury sustained by the deceased. In any proceedings hereunder, the declaratory judgment and any finding of fact made in the course of proceedings consequent thereupon shall enure as between the party held liable and the executor or administrator of the

(c) Where a party dies in the circumstances referred to in the preceding paragraph of this subsection except that the death of the deceased is not wholly attributable to the personal injury, the subject of the declaratory judgment, but was accelerated thereby, it shall be lawful for proceedings to be taken and for the court to assess damages, solatium or expenses as in the preceding paragraph but such damages, solatium or expenses shall be proportioned to the injury to the person for whom and for whose benefit the proceedings are taken resulting from such acceleration of death.

(d) The court may, if the justice of a case so requires, assess damages under paragraph (a) of this subsection notwithstanding the commencement or prosecution of proceedings under paragraph (b) or (c) of this subsection and the damages so assessed shall be for the benefit of the estate of the deceased and no damages shall be awarded under paragraph (b) or (c) of this subsection.

(10) In the exercise of the powers conferred by this section the court shall have regard to the facts and circumstances of the particular case, as they exist from time to time, and any allowance, or the final assessment, as the case may be, shall be such as to the court may seem just and reasonable as compensation to the person actually injured or to his or her dependants as the case may be.