Structured settlements and interim damages under the NSW Motor Accidents Act 1988

Dr Andrew Morrison RFD, SC, Sydney

The purpose of this paper is to set out the present position as to structured settlements and interim damages under the Motor Accidents Act, 1988 and to indicate likely future changes in this area.

Structured settlements

Structured settlements are not defined in the Motor Accidents Act but clearly refer to periodic payments agreed upon between the parties in place of part or all of a lump sum once and for all verdict.

Prior to the MAA, structured settlements were occasionally entered into. In the early 1980s, the GIO would on occasion enter into a deed with a plaintiff, pursuant to which ongoing payments were agreed. In respect of infants or other disable persons, such an arrangement would require the Court's approval. Such arrangements were relatively rare, in my experience.

The Transport Accident Compensation Act, 1987 ("TransCover") brought in not a form of structured settlement but rather a series of ongoing payments for economic loss (capped at a relatively modest level) with some other forms of compensation. Common law rights and the need for a settlement were abolished.

There has long been a perception that lump sum (once and for all) damages have significant problems for many plaintiffs. The moneys may not be used for the purpose for which they were awarded, may be squandered or may be invested unwisely, so that they do not last the distance. Accordingly, when TransCover was replaced by the MAA retrospectively, the provision was made for structured settlements, with a view to encouraging parties in an appropriate case to take part or all of the moneys by way of periodic payment.

Section 81(1) requires that the section only apply if the plaintiff on the one hand, and the insurer or Nominal defendant on the other, agree. In that event, the Court is given a discretion under section 81(2), applying the criteria under section 81(3) to order that damages determined for future economic loss (which is here said to include future out-of-pocket expenses such as medical, hospital, pharmaceutical bills and payment for future gratuitous services) shall be paid pursuant to such arrangements as the Court determines or approves. As amended in 1989, the section permits the Court to order the purchase of an annuity for the plaintiff on terms. Either party may apply to the Court to vary the orders made.

The fundamental criteria for approving the agreement of the parties is if the Court considers "there is good cause for making the order" under section 81(5).

The section discloses a certain naivety on the part of those behind it. It seems quite unnecessary for the Court to be given detailed criteria to determine the appropriateness of an order which both parties agree to. The parties could after all enter into the same arrangement by deed in any event, without the Court's approval! If the parties do not agree, then the Court is without power. Similarly, the proposition that the Court is given a discretion to determine how the structured settlement will work ignores the fact that consent by either or both parties is likely to be conditional and if the conditions which the Court sought to impose varied significantly from that consent, then there would be no agreement and accordingly, no power within the Court to make the order.

Financial and economic loss

The drafting confusion between future economic loss and future financial loss is further evidence of the lack of consultation and practical input into the drafting of the section. For example, the Court is empowered to award a structured settlement in respect of future gratuitous services but not in respect of future paid care, unless this falls within the description "rehabilitation expenses".

The 9 December 1996 report of the Standing Committee on Law and Justice of the Legislative Council into the Motor Accidents Scheme says that:

"Section 81 it seems, is rarely, if ever used..."

I am personally unaware of any case in which it has been utilised.

Discount tables

There are some good and practical reasons why parties are generally not interested in structured settlements. The Act requires the application of the 5% discount tables. (Section 71). This rate was introduced in 1984 for motor vehicle cases at a time of historically high interest rates. It followed the High Court decision in *Todoric v Waller* (1981) 150 CLR 402 which fixed the rate at 3%. Gibbs CJ and Wilson J preferred 4% but agreed to 3%. Stephen and Murphy JJ thought that no advantage was obtained by the presence of a lump sum and favoured no discount rate. Mason and Brennan JJ favoured a 2% discount rate but agreed to a 3% discount rate. Only Aickin J directly favoured the 3% discount rate, which as a compromise within the Court was adopted.

When the rate was introduced in 1984, Mr Unsworth in his Second Reading Speech of 23 May 1984 said somewhat disingenuously that:

"The High Court were (sic) again divided as to the most appropriate figure, and certain Justices favoured a figure of 4%."

He omitted to mention the majority who favoured 2% or a nil discount rate. He said the 5% rate would operate to restore the position to that previously accepted in the State.

"If, in the future, the rate of inflation or the rates of interest available on investments changed to such an extent that the statutory discount rate is no longer appropriate, provision has been made for an alteration by regulation, thus ensuring that the government will be able to ensure that the discount rate maintains a direct relevance with the circumstances of the day."

Predictably, no review, let alone rate change, has ever occurred. When the Motor Accidents Act, 1988 was introduced, the then Attorney General, Mr Dowd, on 29 November 1988 in the Legislative Assembly merely said that:

"The discount rate of 5% established in 1984 is proposed to be continued. In leading for the Opposition in the Debate [in 1984], I supported the establishment of that rate at that time. Some calls have been made to increase the rate – for instance, to 6% – but the only effect of introducing a higher rate would be to reduce the damages available to seriously injured accident victims."

Despite historic experience during the 1980s, let us suppose that the CPI figure remains low and a low inflation regime of 2% to 3% prevails. If a plaintiff can obtain a 9% rate of return in reasonably safe (and not speculative) investments, half of this would be lost through income tax, the Medicare levy (which is merely another tax), financial institutions duty (State and Federal), combined with transaction charges and capital gains tax liabilities. It follows that such a plaintiff after highly favourable assumptions is left with a net 1.5% to 2.5% return. Yet his future needs have been calculated upon the assumption that his moneys can be so invested as to return 5% after tax and after inflation on a virtually guaranteed basis and without risk. It follows that the money would probably be inadequate on a 3% discount rate and will certainly not last the distance on a 5% discount rate.

Injustice

A good practical example is *GIO v Rosniak* (1992) 27 NSWLR 665. The catastrophically injured plaintiff's life expectancy was found to be 61 years. The insurer's actuary gave evidence in the Court of Appeal that if the moneys were properly invested and expended on the purposes and at the rate for which the trial judge had allowed, the moneys would run out after 25 years. He made certain highly favourable assumptions about the returns to be obtained and about inflation. On differing assumptions, the plaintiff's actuary gave evidence in the Court of Appeal that the moneys would run out after nine years. Meagher JA described this result as *"...at least an anomaly, and at worst a rank injustice" (700).*

That was a case on the 3% discount rate – it can be only imagined how severely disadvantaged a plaintiff is on the 5% discount rate.

Incentives

If insurers were to agree to structured settlements on any significant scale in which they paid the real cost of a seriously injured person's future needs, including hospital, medical, rehabilitation, pharmaceutical expenses and the like, future care, future economic loss etc, with appropriate provision for increase in payments as costs and loss increased, then there would be a vast increase in the ultimate liability of insurers. It is small wonder that insurers, for all their willingness to criticise plaintiffs for allegedly not using verdicts for the purposes of which they were given, are not rushing to enter into structured settlements.

Of course, one reason why a plaintiff may not buy the hydrotherapy pool for which money was awarded is because there is such a shortfall to meet other needs that despite the Court's intentions, he cannot afford to.

On the other hand, plaintiffs have little incentive either. Turning a disabled person into a pensioner may in many cases only add to the damage already done to them. There are paraplegics and quadriplegics who can utilise their lump sums to lead productive, useful and satisfying lives. Turn them into pensioners on a dripfeed of small sums, and you deny them the opportunity which the lump sum gives them.

Annuities by consent

In the United States there has been extensive use of annuities by consent to provide for the future needs of litigants. The Motor Accidents Authority is keen to promote their use here. It is, however, to be noted that in general such annuities first ensure a lump sum payout (which in New South Wales would be calculated on the 5% discount rate), which is then invested so as to produce annual returns, allowing for future needs. In general, there is an increment provided for which ought meet increases in costs.

Of course, this assumes the adequacy of the original sum and for the reasons already given, the discount tables ensure that provision for future needs will be grossly inadequate. Success in the United States has largely been because many states have a nil percent discount rate (in some cases, a positive discount rate) and because of generous tax concessions for annuities. Neither circumstance is available here. There are negotiations with the Federal Government which, if fruitful, give cause for hope that annuities may provide adequately for future care and future financial needs. I have seen figures which would indicate that even starting with a lump sum discounted on the 5% tables, the annuity could be sufficient to meet the real needs of a plaintiff if reasonable tax allowances are made. In this regard, I await the Motor Accidents Authority's negotiations with the Commonwealth Government with interest but with no real optimism.

In any event, an annuity remains inappropriate to those plaintiffs who wish to take their damages by way of lump sum because except (possibly) as to adequacy of amount, the same disadvantages apply in turning plaintiffs into pensioners. The Motor Accidents Authority does not propose that annuities should be compulsory but rather, that they should be an available option and assuming an appropriate tax regime, I would support this proposition.

The Standing Committee on Law and Justice of the Legislative Council has recommended encouraging the use of structured settlements. It has recommended urgent submissions to the Commonwealth Government both in relation to tax liability for personal injury verdicts generally and in relation to tax liabil-

ity on structured settlements. The Committee has recommended that if non-taxable status is achieved, then structured settlements should be available as a voluntary compensation mechanism for the whole or part of a compensation payment. There appears to be no intention to impose structured settlements upon litigants. If a suitable tax structure is achieved, then it is recommended that section 81 be wholly rescinded as otiose. I agree with these proposals.

Interim damages

Subject to certain qualifications, section 76E of the Supreme Court Act 1970 and section 58 of the District Court Act 1973 allow interim awards of damages in personal injury cases. The Court has a discretion to order a defendant to make one or more payments to a plaintiff where the Court is satisfied that if the action proceeded to trial, the plaintiff would obtain judgment for substantial damages and providing the defendant would not suffer undue hardship. The amounts are credited against the ultimate verdict.

For some unknown reason, these provisions exclude damages under the Motor Accidents Act. There seems no logical reason for such an exclusion and the Motor Accidents Authority is sympathetic to amendment in this regard, although the third party insurers are opposed to any such change.

At present, the only provision allowing interim payments is section 45. It provides that once liability has been admitted or determined (wholly in part) the reasonable hospital, medical, pharmaceutical and rehabilitation expenses must be paid by an insurer if properly verified. Respite care must also be paid in respect of a seriously injured plaintiff in need of long term care.

This section has a number of inadequacies. Insurers may determine what, in their view, is reasonable and adequate, and there is no quick method of resolving such a dispute. In the meantime, the plaintiff goes without medical and other needs. The section is poorly drawn. Care is not expressly provided for in respect of the catastrophically injured. Insurers generally pay for care for a quadriplegic, paraplegic or the brain damaged, but say that they do so voluntarily and as a consequence, any dispute cannot be litigated. If the qualifications of the carer are inadequate or the hours of care are inadequate, then an injured plaintiff may have no remedy. It is arguable that care is included under the broad definition in section 35 of rehabilitation, but the view of insurers such as the GIO (which is currently arguing one such case) is that it is not. Accordingly, the most seriously injured are left at the mercy of insurers in respect of their immediate and critical needs. The only remedy is expedition and an early hearing date, which is of small assistance in a brain damage case or an infant case, where some years must pass in order to make a proper medical assessment.

That this was a drafting oversight is clear from the fact that all insurers voluntarily pay for care (though they do so upon their own terms). However, the insurers oppose any amendment to give a right in respect of care, which would permit plaintiffs to resolve disputes through the courts. The Motor Accidents Authority and the Insurance Council of Australia will lend a plaintiff some support in the more outrageous cases, but essentially plaintiffs are left without remedy against an insurer which wrongly refuses or allows only inadequate care.

In *Stubbs v NRMA Insurance Limited* (Dowd J, unreported 18 December 1996), the Plaintiff was a baby in a vehicle where both of his parents were killed and suffered severe head injuries, leaving him brain damaged and quadriplegic. Since the accident, he has been cared for by his grandmother, such care involving extensive amounts of time and reduction in her earnings. The insurer for a prolonged period declined to pay for any care whatever (though it did pay medical bills), notwithstanding that liability is not in issue.

An application was made for payments under section 45 of the Motor Accidents Act, 1988. On 18 December 1996, Dowd J gave judgment on that application and upon the cross-application for a declaration by the insurer. The Court noted that section 76E of the Supreme Court Act 1970 did not apply to an award of damages under the Motor Accidents Act, pursuant to section 76H, upon the false assumption that section 45 of the Motor Accidents Act, 1988 provided an adequate alternative remedy. The Court noted the obligation upon the insurer under section 45(1) to endeavour to resolve a claim by settlement or otherwise as expeditiously as possible, but held this not to be a justiciable right and accordingly, this provision is unenforceable.

The obligation under section 45(2) to pay the reasonable and verifiable hospital, medical, pharmaceutical, rehabilitation (and some respite care) expenses was held to be unenforceable on the part of the Plaintiff. The Court held that because compliance with section 45 is a condition of the licence (a matter enforceable only by the Motor Accidents Authority) enforcement is not available to individual Plaintiffs. Accordingly, the Court never reached the argument as to whether or not care is included in the definition of rehabilitation.

The insurer is making some interim payments for care pending the Plaintiff's appeal. If, however, his Honour is correct, then there appears to be no effective interim damages under the Act. The result would be a travesty requiring urgent legislative attention.

Conclusion

For my part, I am respectfully unable to see why the fact that the removal of the licence may only be done by the Motor Accidents Authority excludes the ordinary power of a Court to enforce the will of the Legislature at the instance of any party with a direct interest in the outcome. However, even if an appeal in this respect is upheld, the patent inadequacy of section 45 in respect of care and interim damages generally is thoroughly unsatisfactory.

It is submitted that provision for interim damages pursuant to section 76E of the Supreme Court Act 1970 and section 58 of the District Court Act 1973 would improve the situation. So too would adding the cost of reasonable care to the list of obligations upon an insurer under section 45.

Dr Andrew Morrison RFD SC is an APLA member from Wardell Chambers in Sydney and is co-author of LBC's Personal Injury Law Manual NSW.