Introducing Provisional Damages for Personal Injuries in Canada

Paul Dufays
ARTICLES

INTRODUCING PROVISIONAL DAMAGES FOR PERSONAL INJURIES IN CANADA

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Where a plaintiff in a personal injury action can prove at trial that she has suffered an injury that may be subject to future deterioration, Canadian common law courts make a speculative assessment of any potential future deterioration of the injury and decide damages once and for all. This provides finality for the parties, but potentially at the cost of accurate compensation for the plaintiff whose injuries later worsen. In 1985, the United Kingdom introduced a regime of reviewable provisional damages for personal injury, which allows review of damage awards after trial, improving compensation for the plaintiff without creating indefinite uncertainty for the defendant. This article examines this British reform, including its advantages and disadvantages, and the author concludes it should be adopted in Canadian common law jurisdictions.

Dans les provinces de common law au Canada, lorsque le demandeur réussit, lors d'une action en responsabilité civile, à démontrer qu'il a souffert des dommages corporels, les cours de justice doivent évaluer le préjudice prospectif et doivent accorder des dommages et intérêts définitifs. Accorder des dommages définitifs selon une évaluation du préjudice prospectif offre une certaine finalité au litige entre les parties. En revanche, cette méthode d'accorder des dommages et intérêts risque de s'avérer préjudicielle pour le demandeur lorsque les dommages corporels actuels, se réalisant suivant le jugement, sont supérieurs aux dommages corporels prospectifs tels qu'évalués par la cour. La Grande-Bretagne a introduit une loi en 1985 qui réserve au demandeur le droit de demander des dommages et intérêts additionnels, si sa condition se détériore après le jugement. Cela permet une compensation qui reflète plus exactement le préjudice subit par le demandeur lorsque la condition physique de celui-ci se détériore après jugement sans créer une incertitude indéfinie pour le défendeur. Cet article discute cette loi anglaise et ses avantages et désavantages, et conclut qu'on doit l'adopter dans les provinces de common law au Canada.

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I. INTRODUCTION

Often, a plaintiff in a personal injury action can prove some injury resulted from the wrongful conduct of the defendant, but the full extent of the resulting loss has not crystallized at the time of trial. In these cases, Canadian common law courts, rather than waiting for any future contingencies to occur, will make a speculative assessment of the contingent damages at trial, and grant a lump sum award. This principle is known as the “once and for all” rule.\(^1\) Its stated benefits are finality and certainty for the parties, their insurers and the courts, and limitation of administrative inconvenience and litigation costs.

In order to provide final judgments where a future contingent loss exists, the common law in Canada has developed a proportional damages rule. Where a plaintiff can establish on a balance of probabilities that a risk of future loss has resulted from the wrongful conduct of the defendant, even where the loss is unlikely to occur, the court will estimate the amount of the potential loss, and discount it \textit{pro rata}, based on the quantified possibility that the particular loss will occur.\(^2\) Such an award of proportional damages is thought to provide the best measure of the potential loss of the plaintiff that is possible given the requirement that the court determine the award of damages at trial while the actual value of the loss, or whether it will occur at all, remains unknown.

The principle of awarding proportional damages based on speculation about the future state of a plaintiff’s injury is deficient from the point of view of providing compensation to the plaintiff to put her in the position she would have been in had the wrong not occurred. If the plaintiff’s injury does not worsen, or a future contingency does not occur, the award of proportional damages is a windfall. The plaintiff is overcompensated. If, on the other hand, the injury does worsen, or the future contingency is realized, the plaintiff is under compensated. The award for the injury will be significantly less than the actual financial loss it causes. The only thing that is certain about the award is that it will always provide


\(2\) See \textit{Shrump}, \textit{ibid.}; \textit{Graham}, \textit{ibid.}
inaccurate compensation for the loss, regardless of whether the contingency occurs or not.³

Britain has introduced a procedural rule that can produce more perfect compensation where the loss resulting from a plaintiff’s injury is not known at trial. Legislative amendments passed in 1982 authorize changes to the Rules of the Supreme Court which allow a plaintiff in a personal injury suit to apply for an award of provisional damages.⁴ If the plaintiff can show that her injury may deteriorate in the future, she can ask the court for an award of damages at trial that assumes the potential deterioration will not take place. Then, if the injury does in fact deteriorate later, the plaintiff can apply to the court to have damages reassessed based on this new information.

It is submitted that Canadian common law jurisdictions can considerably reduce speculation by the courts about the future progress of personal injuries by copying this incremental British reform. It would allow for better compensation: if an injury does not worsen, the plaintiff does not receive a windfall. If the injury does worsen, she can receive damages that closely match her actual resulting loss. Although granting plaintiffs the right to apply for a reassessment of their damages does increase administrative inconvenience by allowing another proceeding, granting the right to reassessment complies with the compensation principle which lies at the very foundation of damages in tort. The cost and complexity of reassessment need not increase inordinately, as the right to provisional damages can be limited to those cases where certain injuries exist and specific standards of proof can be met.⁵ Finality is compromised to some degree, but the need for finality is based more on faithfulness to the historically prevailing theory of damages and a desire to avoid departure from precedent than an

⁴ Supreme Court Act 1981 (U.K.), 1981, c. 54, s. 32A, as am. by Administration of Justice Act 1982 (U.K.), 1982, c. 53, s. 6(1).
⁵ The British rules have been interpreted to allow provisional damages only where the plaintiff can present proof of a possibility of deterioration beyond mere speculation. See Hurditch v. Sheffield Health Authority, [1989] 2 All E.R. 869 (C.A.).
actual functional need. The concept of revisiting awards is well-known to family law in Canada, which appears to function without bringing the courts to a halt. There appears to be little evidence that allowing reassessment in a small number of personal injury cases would create any insurmountable obstacle for the administration of justice.

This article will examine the policy issues involved in awarding provisional damages. It will review the present law in Canada concerning lump sum awards for personal injury and the time and methods of assessing future contingent losses, and will examine the British reforms and how they have been received by the courts and by litigants. It will review the reasons for and against modifying the lump sum to allow future reassessment of damages. It will conclude by suggesting how these reforms might be copied in Canada and that such modifications to our rules might create more perfect compensation for personal injury plaintiffs with only a modest increase in administrative inconvenience.

II. POLICY ISSUES RAISED BY AWARDS OF PROVISIONAL DAMAGES

The potential introduction of a system allowing awards of provisional damages in Canada raises a number of policy issues. The tension between better compensation for the plaintiff and containing administrative costs and providing certainty and finality for the parties and the courts lies at the heart of these issues. Any provision allowing a later review of damages based on new evidence about a personal injury will permit a more accurate award for the plaintiff; one that will more closely compensate her for the actual extent of her injuries. Any such provision will also require additional later proceedings, increasing litigation costs for the parties, increasing use of court time at public expense, and creating uncertainty for defendants and their insurers. If we accept the desirability of such a system, we must decide where to strike the balance between these competing factors. Allowing review for a broad set of circumstances will permit more opportunities to better compensate personal injury plaintiffs, but will increase costs and

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6 Bale, supra note 3 at 93-94.
uncertainty. Limiting review to a narrow set of circumstances will reduce costs and uncertainty, but will allow fewer opportunities to properly compensate the plaintiff whose injuries deteriorate. There are a number of parameters involved in such a system which can be defined to be either more or less permissive of claims for provisional damages. How we define them will determine the balance between compensation and complexity that a system of provisional damages will achieve.

1. Initial Injuries

Awards for provisional damages can be permitted for all personal injuries, or can be limited to only those injuries which meet certain criteria. It is possible to limit provisional damages to those plaintiffs who can show either a probability or a possibility of future deterioration in their injury. Another useful limit might be the type of injury: it would reduce complexity to limit provisional damages awards to traumatic injuries whose causation is clear and exclude more systemic diseases or chronic diseases whose causes are unclear or manifold. It might also be reasonable to limit provisional damages, and the accompanying right to later review of damages, to those cases where the potential future reassessment falls under a financial cap.

2. Circumstances Leading to a Review

We could allow a review of damages subsequent to an initial provisional award for any injury which develops that can be shown to have been caused by the conduct for which the plaintiff was originally found liable. On the other hand, it could be required to specify the future deterioration which would allow review in the initial award, and then only permit a subsequent application where the specified deterioration can be shown. Where a review is allowed for any deterioration caused by the defendant’s tortious conduct, it will most likely be necessary for the plaintiff to prove causation, which may be contested by the defendant. Where a review is limited to specified types of deterioration, any causation analysis might be more limited, but could still be contested by the defendant who argues that the deterioration specified had other contributing causes exclusive of her conduct. It is also possible to draft provisions which either permit or mandate a presumption that a specified deterioration was caused by the original conduct of the
defendant. Such a presumption would be rebuttable, but different standards of proof for rebuttal might be possible. At first glance, the review of provisional damages based on later deterioration would seem to be limited to quantum only, but issues of causation may be unavoidable on review.

3. Contingencies to be Considered on Review
The future deterioration of the plaintiff’s injury is the primary future contingency an award of provisional damages addresses, but a later review of damages could take into account other contingencies included in the initial award. The initial award will often speculate as to future contingencies like the plaintiff’s personal employment prospects, the labour market in her industry, the discount rate, the cost of future care, etc. If improving compensation is the main goal of a system of provisional damages, it could be argued that a later review of damages should take societal contingencies like these into account along with any deterioration of the plaintiff’s injuries. Consideration of societal contingencies, however, may be undesirable for practical reasons. It is not unthinkable that every personal injury plaintiff, even those whose condition will not reasonably deteriorate, would make a claim for provisional damages so they would not lose the opportunity of applying for a review in the event of a favourable change in the discount rate or some other societal contingency.

4. Restrictions on Defendants
A reassessment of damages raises the likelihood that a defendant may have to pay additional damages well after the initial award. Most defendants will be insured, so the possibility the plaintiff’s judgment for additional damages will go unpaid is relatively small. However, an uninsured defendant, although able to pay at the time of the initial award, might be judgment-proof at the time of a subsequent judgment following reassessment of damages. This outcome would put the plaintiff in a worse position than if she had received a lump-sum award in the same circumstances. Limiting awards of provisional damages to insured defendants and defendants who have comparable resources removes some choice for the plaintiff, but precludes this possibility.
5. Judicial Discretion and Applications for Provisional Damages
Awards of provisional damages can be based on a specific motion by the plaintiff asking for provisional damages, where the trial judge would have discretion to either grant or deny the application. Alternatively, the application process could be eliminated, leaving the decision as to whether to award provisional damages entirely up to the judge. In contrast, the discretion of the judge can be restricted, requiring applications for provisional damages to be granted as a matter of course unless there are exceptional circumstances.

6. Conclusion
Each of these parameters affects either the breadth of circumstances in which provisional damages will be awarded, or, if they are awarded, the scope and complexity of the application and reassessment process. Collectively, they determine the balance between increased compensation and increased costs and uncertainty found in a system of provisional damages awards. These parameters should be kept in mind when considering the advantages and disadvantages of procedural changes to implement provisional damages awards for personal injury claims.

III. THE PRESENT LAW IN CANADA
The main purpose of damages in tort is to further the principle of restitutio in integrum: to put the plaintiff in the position he or she would have been in if the wrong had not occurred. An often quoted statement of this law is found in Livingstone v. Rawyards Coal Co.:

I do not think that there is any difference of opinion as to its being the general rule that, where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered,  

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Canadian courts have developed significant case law to put this principle into effect. Apart from the general principles of causation and certainty, three specific principles of Canadian law are relevant to the introduction of provisional damage awards for personal injury: the rule requiring lump sum awards, the rule requiring assessment of damages at trial once and for all, and the rule granting proportionally discounted awards for future contingent harm which might possibly result from the wrong.

Damages for personal injury, like all other tort damages, are awarded at trial in a lump sum. In 1978, in a set of decisions that have become known as the Damages Trilogy, the Supreme Court of Canada firmly established the requirement of granting tort damages for personal injury in an aggregate lump sum award including separately calculated heads of damages for various components of the award. In 1989, the Supreme Court of Canada upheld the practice of granting lump sum damages for personal injury, specifically rejecting an award of periodic payments which had been granted to a plaintiff by the Manitoba Court of Appeal.

In some cases, the harm resulting from the defendant's wrongful act may not be known at the time of trial, as it depends on the outcome of some future contingency. Where this is the case, the damages for the injury must be assessed once and for all at the time of trial, even if this requires speculation as to certain future events. This principle applies regardless of whether the future

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8 (1880), 5 App. Cas. 25 at 39 (H.L. (Sc.)).
contingency is one which might become known (e.g. if the range of motion in an injured hand recovers fully or partially) or whether it can never be known (e.g. if the plaintiff would have received a future promotion but for an injury).\textsuperscript{12}

Where assessment of a loss based on such a future contingency is required, the courts have adopted a proportional damages approach. If the plaintiff can prove on a balance of probabilities that the defendant’s wrongful act caused some risk of future loss, the courts will grant damages for the potential loss, discounting the award to reflect the chance the loss will not occur.\textsuperscript{13} For example, if a plaintiff can prove that the conduct of the defendant has injured her back, and the court finds that there is a forty percent chance the injury will worsen requiring surgery, the court will award forty percent of the total financial loss which would occur if the plaintiff’s injury worsens.\textsuperscript{14}

Although the proportional methodology used in calculating such awards is the same whether the future event is theoretically knowable or unknowable, there is some confusion over where the

\textsuperscript{12} A very limited exception to this principle is found in the \textit{Courts of Justice Act}, R.S.O. 1990, c. C-43, s. 116, responding to the recommendation of the Holland Report (which responded to Dickson J.'s comments on the need for reform in \textit{Andrews, supra} note 9). This legislation provides for the later review of a lump sum award of damages or even an award of periodic payment for personal injury, but only where all the parties consent. Not surprisingly, this provision has not been used. In its \textit{Report on Compensation for Personal Injuries and Death} (1987), the Ontario Law Reform Commission wrote (at 177, from dissenting opinion of H. Allan Leal):

Although it is too early at this stage to pass final judgment on the ameliorative effect of [s. 129], since serious injuries involved in most current cases were suffered prior to 1984, it is an educated guess that the section will prove to be a dead letter because its application expressly requires the consent of all affected parties. Disagreement is the stuff of litigation and it would appear to be asking too much that its terminal process be made the subject of unanimity.

\textsuperscript{13} \textit{Shrump, supra} note 1; \textit{Graham, supra} note 1. See also \textit{Janiak v. Ippolito} (1981), 18 C.C.L.T. 39 (Ont. C.A.).

\textsuperscript{14} Although provincial health insurance systems will generally cover most, if not all, of the cost of such surgery, a period of convalescence following surgery can create significant collateral costs for an injured plaintiff: lost wages or business income, extra child care expenses for dependents, travel costs, etc.
line between causation and certainty is being drawn in these two cases. The two cases are different in the theoretical interaction between causation and certainty (or causation and quantum). It is important to explain the difference at this point to provide a background for the discussion of provisional damages below. Cases involving personal injuries that may worsen in the future can be differentiated from the "loss of chance" cases because a future contingent injury, although unknown at the time of trial, is knowable in theory, and damages are awarded for the possibility that a future loss may actually occur. This is unlike the "loss of chance" cases, where the wrongful conduct of the defendant has deprived the plaintiff of an opportunity to do something whose eventual occurrence is now impossible and unknowable. In "loss of chance" cases, damages are awarded for the loss of the chance: not for what may happen, but rather for what might have been.

As discussed above, the "once and for all" principle results in speculation by the courts whenever a plaintiff may suffer a loss in the future as a result of an injury, and this loss is theoretically knowable, but not known at the time of trial. Contrary to the prevailing principle of compensation in damage awards, such speculation will always fail to properly compensate the plaintiff. How can the situation be improved? The law in these areas is well settled, and the courts have been hesitant to change it, even though they acknowledge its deficiencies. The Supreme Court of Canada in Watkins wrote that:

The imperfections of a lump-sum, once-and-for-all award, as a means of providing for a plaintiff’s cost of future care, have often been noted. . . .

The issue here is whether, in the absence of enabling legislation or the consent of all parties, a court can or should order that a plaintiff forgo his traditional right to a lump-sum judgment for a series of periodic payments.

It is argued that the jurisprudence precludes a court from ordering periodic payments adjusted to future needs. The plaintiff, it is submitted, is entitled to receive his

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future-care award as a lump sum; this fundamental principle of tort law cannot be changed by a court, but only by the legislature. . . .

Generally speaking, the judiciary is bound to apply the rules of law found in the legislation and in the precedents. Over time, the law in any given area may change; but the process of change is a slow and incremental one, based largely on the mechanism of extending an existing principle to new circumstances. While it may be that some judges are more activist than others, the courts have generally declined to introduce major and far-reaching changes in the rules hitherto accepted as governing the situation before them.\textsuperscript{16}

In \textit{Andrews}, Dickson J. remarked that:

The subject of damages for personal injury is an area of the law which cries out for legislative reform. The expenditure of time and money in the determination of fault is prodigal. The disparity resulting from lack of provision for victims who cannot establish fault must be disturbing. When it is determined that compensation is to be made, it is highly irrational to be tied to a lump-sum system and a once-and-for-all award.

The lump-sum award presents problems of great importance. It is subject to inflation, it is subject to fluctuation on investment, income from it is subject to tax. After judgment new needs of the plaintiff arise and present needs are extinguished; yet, our law of damages knows nothing of periodic payment. . . .

The apparent reliability of assessments provided by modern actuarial practice is largely illusionary, for actuarial science deals with probabilities, not actualities. . . . It cannot, and does not purport to, speak as to the individual sufferer. So long as we are tied to lump-sum awards, however, we are tied also to actuarial calculations as the best available means of determining amount.

\textsuperscript{16} \textit{Supra} note 10 at 580, 582, 583.
In spite of these severe difficulties with the present law of personal injury compensation the positive administrative machinery required for a system of reviewable periodic payments, and the need to hear all interested parties in order to fashion a more enlightened system, both dictate that the appropriate body to act must be the Legislature, rather than the Courts. Until such time as the Legislature acts, the Courts must proceed on established principles to award damages which compensate accident victims with justice and humanity for the losses they may suffer.\footnote{Andrews, supra note 9 at 458-59.}

The problems inherent in the present lump-sum awards system, in the opinion of the Supreme Court of Canada, are best solved through legislative reform. The solution may be, as the courts and many academics have commented, the introduction of a power in the courts to grant periodic payments. Or, as this paper will argue, the solution may be the option for the courts to grant reviewable provisional damages for personal injury.

\section*{IV. The Reform in Quebec}

The only jurisdiction in Canada which presently offers courts the option of granting provisional damages for personal injury is Quebec. Article 1615 of the \textit{Civil Code of Quebec} provides that:

\begin{quote}
Article 1615. The court, in awarding damages for bodily injury, may, for a period of not over three years, reserve the right of the creditor to apply for additional damages, if the course of his physical condition cannot be determined with sufficient precision at the time of the judgment.
\end{quote}

This provision came into force January 1, 1994. Note that "creditor" in the civil law of Quebec means a judgment creditor, in the sense of a successful plaintiff who has already had liability found against the defendant.

In general, this provision gives the trial judge the discretion, in addition to awarding damages for personal injury, to provide that the successful plaintiff has the right to apply for an increase of those damages within three years should the injury worsen. Such an
award requires that it be impossible to predict with precision the future condition of the victim. Given that the plaintiff who is granted this right may receive an increase in damages later, the judge will likely award more limited damages at trial than would otherwise be awarded.

Baudoin points out that the three-year limitation in this provision is the same as the general limitation on civil actions in Quebec found in Article 2925 of the Civil Code of Quebec. He suggests that three years will generally be long enough to assist most plaintiffs who suffer serious deterioration, but not so long so as to create an indefinite uncertainty for the defendant who may be required to pay additional damages later. A plaintiff who applies for a later increase in damages must prove that a deterioration has occurred or is now likely to occur, according to the generally applicable requirements of proof for personal injury suits in Quebec.

As Article 1615 is a relatively recent addition to the Civil Code of Quebec, it has not been extensively considered by the courts. Requests for the right to apply for a later increase in damages for personal injury have been denied where the court held the injury was not susceptible to further deterioration, and where the injury suffered by the plaintiff has been stable for a significant period of time. In one case, a plaintiff who brought an action against her dentist for negligently performed dental work made a request under Article 1615 for the right to apply for a later increase in damages. Her argument was that the significant amount of metal work that had been installed in her jaw prevented x-rays from properly assessing the damaged caused by her dentist’s negligence and that the full extent of the physical harm might not be known until later. The court held, in obiter dicta, that this was a perfect

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19 Ibid. at 166-7.
22 Sauvageau c. Lussier, [1996] A.Q. No. 761 (Que. S.C.) (QL). See also Gaudet c. Lagacé, [1994] R. de responsabilité et assurance 532 (Que. S.C.), where a request under Article 1615 was denied by the court on the grounds that any compensation required by later deterioration of the plaintiff’s injury was accounted for under the head of damages known as “déficit anatomophysiologique.”
example of a case where Article 1615 should be applied. However, the plaintiff had brought her action prior to the coming into force of Article 1615, and it could not be applied retroactively. Her request in respect of Article 1615 was therefore denied. On the whole, the reported decisions available at this time do not paint a clear picture of how this provision will be applied in the future.

Emulating Article 1615 of the Civil Code of Quebec in other provinces would allow Canadian common law jurisdictions to allow awards of provisional damages with a relatively minor legislative amendment. However, considering the lack of judicial consideration of this provision, as well as the potential hazards of removing it from the civilian context of responsabilité civile and transporting it into the common law of torts, this could create substantial uncertainty. A system of provisional damages that has been established in a common law jurisdiction elsewhere will likely provide a more practical model for Canadian common law jurisdictions than Article 1615 of the Civil Code of Quebec.

V. THE PROPOSED MODEL

A regime of reviewable provisional damages has been introduced in Britain. It allows a plaintiff in a personal injury suit, where the liability of the defendant has been proved or established, to apply to the court for an award of provisional damages. The plaintiff is required to prove that there is a chance that he, "... as a result of the act or omission which gave rise to the cause of action, [will] develop some serious disease or suffer some serious deterioration in his physical or mental condition." If this is proved, the plaintiff is given an award of provisional damages which assumes that the specified deterioration will not occur. If the condition or disease then worsens in the future, the plaintiff has the right to apply for a reassessment of damages based on new evidence of her condition.

The Supreme Court Rules were amended by the addition of

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23 Supreme Court Act 1981 (U.K.), 1981, c. 54, s. 32A, as am. by Administration of Justice Act 1982 (U.K.), 1982, c. 53, s. 6(1) [hereinafter Supreme Court Act]. In force July 1, 1985.

24 Supreme Court Act (U.K.), 1981, c. 54, s. 32A.
procedures to be followed when an application for provisional damages is made.\textsuperscript{25}

Prior to this reform, the common law in Britain with respect to the assessment of personal injury damages was substantially similar to the law in Canada.\textsuperscript{26} The main purpose of damages in tort, as in contract, is to return the injured person to the position she would have been in if she had not sustained the wrong: \textit{restitutio in integrum}.\textsuperscript{27} Damages for personal injury in Britain are awarded in a lump sum.\textsuperscript{28} The plaintiff recovers for her loss once and for all in a single action for past, present, and future losses, whether contingent or certain.\textsuperscript{29} At common law, the time for assessment of damages was up to the commencement of the action,\textsuperscript{30} although this has been extended to the time of trial by the Supreme Court Rules.\textsuperscript{31} Where an appeal is filed, the English Court of Appeal has given itself discretion to hear evidence of events which occur up to the time of the appeal.\textsuperscript{32} Where a future contingent loss must be assessed at trial, British courts will award the value of the potential loss times

\textsuperscript{25} Order 37 Part II. See also Practice Note, [1985] 2 All E.R. 895.

\textsuperscript{26} Some differences exist, such as the use of the multiplier/multiplicand method in Britain. However, insofar as those common law rules which are modified or excepted from through the introduction of a provisional damages regime (lump sum awards, once-and-for-all assessment and proportional damages for future contingencies) are concerned, they remain substantially similar to the analogous Canadian rules.


\textsuperscript{30} \textit{Brasfield v. Lee} (1697), 1 Ld. Raym 329; 91 E.R. 1115.

\textsuperscript{31} RSC Order XXXVI r 58. This has been applied in cases such as \textit{Hole v. Chard Union} [1894] 1 Ch. 293 (C.A.) and \textit{Jones v. Simes} (1890), 43 Ch.D. 607; 59 L.J. Ch. 351.

\textsuperscript{32} \textit{McCann v. Sheppard}, [1973] 2 All E.R. 881; [1973] 1 WLR 540 (C.A.). In \textit{Matthews v. Flora} (1989), Times, 20 March (C.A.) Stocker J., May J., and Taylor L.J.J.), the Court of Appeal held that is was often helpful and useful for a plaintiff who had suffered certain personal injuries to be present on appeal, in order that they might be examined.
the probability that this loss will occur. There is a limited power to award periodical payments for the cost of future care in a case of personal injury, but only with the consent of both parties.

Provisional damages were first officially proposed in Britain in 1971. In a working paper, the U.K. Law Commission proposed both a system of periodic payments for tort compensation and a system of provisional damages. After consultation, the Law Commission concluded in its Report on Personal Injury Litigation—Assessment of Damages that, while the introduction of a system of periodic payments was at that time unworkable, the courts should be given the power to make awards of provisional damages.

In this report, the Commission noted the difficulty in making speculative compensation for uncertain future losses. It divided such losses into two categories, “chance” cases and “forecast” cases. It defined “chance” cases as those where an estimate is made of the probability of some future loss occurring, and an award is given based on the amount of the loss and the exact probability that it will occur. The Commission noted that awards in “chance” cases would always undercompensate or overcompensate the plaintiff. It defined “forecast” cases as those where the estimate made is one of a medical condition deteriorating to a certain degree within a certain period of time, causing a particular degree of loss, as opposed to the speculation over whether a future contingency would occur at all. The Commission said that because “forecast” cases did not involve an all-or-nothing speculation about an event, but rather a speculation as to degree, it was theoretically possible for the estimate in a “forecast” case to be exactly correct.

The Commission recommended that the courts be given the power to award provisional damages. This reform was aimed at improving the compensation awarded in “chance” cases where the

33 Chaplin v. Hicks, supra note 15.
34 Burke v. Tower Hamlets Health Authority (1989), Times, 10 August (Q.B.).
36 Ibid. at paras. 254-56.
38 Ibid. at paras. 231-44.
39 The same distinction was made by Lord Diplock in Mallett v. McMonagle, [1970] A.C. 166 (H.L.).
amount awarded was necessarily inaccurate. The system the Commission suggested allowed the courts, upon application by the plaintiff, to award damages without speculation as to the future progress of the plaintiff's injuries. As part of the granting of such an award, the plaintiff would have the right to apply for a future reassessment of damages within a period of time specified in the initial award. In order to eliminate uncertainty about a defendant's ability to pay any future award, the Commission recommended that awards of provisional damages should only be made against public authorities, insured defendants, and certain defendants exempt from motor vehicle requirements under highway traffic statutes.40 The Commission noted that since this change departed from the established principles of damage compensation, it should be implemented through legislation and presumably amendments to the Rules of Court, supplemented by a practice direction.

These recommendations were repeated in 1978 by the Pearson Commission, although in a slightly different form and under a different name.41 This Commission recommended "declaratory judgments," which entailed essentially the same procedure as the 1973 report had for provisional damages. A plaintiff who was suffering from "a serious and lasting injury which is not, at the time of the trial, causing him pecuniary loss" could apply for a declaratory judgment. This judgment would define the relevant injury and any contributory negligence, if applicable. If the injury later worsened causing pecuniary loss, the plaintiff could apply for a review of her original award. The Pearson Commission recommended that these declaratory judgments be restricted to the same classes of defendants specified in the 1973 report. It expressed the opinion that since only a few tort claims are made against individuals, this restriction would apply only rarely. The Pearson Commission also recommended that while such orders would be made by the High Court, they should be reviewed by a Master or

40 Mallett v. McManagel, [1970] A.C. 166 (H.L.) at para 240. The third class of defendant subject to provisional damage awards was "... (c) in road accident cases [a defendant] exempt from the requirements as to insurance of section 143 of the Road Traffic Act 1972 (U.K.) by reason of his making a deposit with the Accountant General of the Supreme Court or otherwise."

the equivalent office. It should be noted that this recommendation was made in the context of recommending a system of periodic payment awards requiring regular review of which the declaratory judgments were an additional feature.

In 1982, the U.K. Parliament passed the *Administration of Justice Act 1982* (U.K.), of which section 6 amended the *Supreme Court Act*. Section 32A, the new section of the *Supreme Court Act*, provides in part:

32A.—(1) This section applies to an action for damages for personal injuries in which there is proved or admitted to be a chance that at some definite or indefinite time in the future the injured person will, as a result of the act or omission which gave rise to the cause of action, develop some serious disease or suffer some serious deterioration in his physical or mental condition.

(2) Subject to subsection (4) below, as regards any action for damages to which this section applies in which a judgment is given in the High Court, provision may be made by rules of court for enabling the court, in such circumstances as may be prescribed, to award the injured person

(a) damages assessed on the assumption that the injured person will not develop the disease or suffer the deterioration in his condition; and

(b) further damages at a future date if he develops the disease or suffers the deterioration.  

Other parts of the amendment create the power to make rules incidental to the function of awarding provisional damages, but limit the interpretation of section 32A, specifying that it shall not be read as affecting any power to make costs or to reduce or limit the total damages recoverable in an action. The amendment also applies by reference to the U.K. county courts. It came into force

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42 *Supreme Court Act* (U.K.), 1981, c. 54, s. 32A(1)(2).
43 *Supreme Court Act* (U.K.), 1981, c. 54, s. 32A(3).
44 *Supreme Court Act* (U.K.), 1981, c. 54, s. 32A(4).
45 *Administration of Justice Act 1982* (U.K.), 1982, c. 53, s. 6(3).
July 1, 1985, and applies to all causes of action determined after this date, even if arising earlier.\textsuperscript{46}

The Rules of the Supreme Court have been amended to create a procedure to be followed in making provisional damages awards. Order 37, Part II of the Rules provides in part:

Order for provisional damages

8.—(1) The Court may on such terms as it thinks just and subject to the provisions of this rule make an award of provisional damages if

(a) the plaintiff has pleaded a claim for provisional damages, and

(b) the Court is satisfied that the action is one to which section 32A applies.

(2) An order for an award of provisional damages shall specify the disease or type of deterioration in respect of which an application may be made at a future date, and shall also, unless the Court otherwise determines, specify the period within which such application may be made.

(3) The Court may, on the application of the plaintiff made within the period, if any specified in paragraph (2), by order extend that period if it thinks it just to do so, and the plaintiff may make more than one application.

(4) An order for an award of provisional damages may be made in respect of more than one disease or type of deterioration and may in respect of each disease or deterioration specify a different period within which an application may be made at a future date.

Offer to submit to an award

9.—(1) Where an application is made for an award of provisional damages, any defendant may at any time

\textsuperscript{46} A. Samuels, "Provisional Damages" (1987) 131 Sol. Jo. 187.
(whether or not he makes a payment into court) make a written offer to the plaintiff

(a) to tender a sum of money (which may include an amount, to be specified, in respect of interest) in satisfaction of the plaintiff's claim for damages assessed on the assumption that the injured person will not develop the disease or suffer the deterioration referred to in section 32A [(a) and identifying the disease or deterioration in question]; and

(b) to agree to the making of an award of provisional damages.

(2) Any offer under paragraph (1), shall not be brought to the attention of the Court until after the Court has determined the claim for an award of provisional damages.

(3) Where an offer is made under paragraph (1), the plaintiff may, within 21 days after receipt of the offer, give written notice to the defendant of his acceptance of the offer and shall on such acceptance make an application to the Court for an order in accordance with the provisions of rule 8(2).

Application for award of further damages

10.—(1) This rule applies where the plaintiff, pursuant to an award of provisional damages, claims further damages.

(2) No application for further damages may be made after the expiration of the period, if any, specified under rule 8(2), or of such period as extended under rule 8(3).

(3) The plaintiff shall give not less than three months' written notice to the defendant of his intention to apply for further damages and, if the defendant is to the plaintiff's knowledge insured in respect of the plaintiff's claim, to the insurers. . . .

(6) Only one application for further damages may be made in respect of each disease or type of deterioration
INTRODUCING PROVISIONAL DAMAGES

These Rules have been supplemented by a Practice Direction. It reiterates the requirement that an order for provisional damages specify the disease or type of deterioration that has been assumed will not occur, and provides that the judge will normally specify the period within which an application for further damages must be made. It specifies the form of and order for provisional damages. It also sets out a procedure for the creation of a case file including the order, pleadings, and all medical evidence that must be filed and stored at the Court in expectation of an application for further damages. Such a case file must be made not only where provisional damages are awarded at trial, but also where a settlement is reached as to an initial amount, but the plaintiff retains the right to apply for further damages. Another Practice Direction addresses the procedure to be followed in a claim where provisional damages are pled and the defendant defaults in either giving notice of intention to defend or in serving the defence.

This statutory reform, supplemented by amendments to the Rules and by Practice Directions, has created an exception to the “once and for all” principle of assessing all personal injury damages at trial. The plaintiff must plead provisional damages specifically, and if this is granted, the resulting order is final as to immediate damages. The order assumes that a specified condition or disease will not develop or deteriorate. The plaintiff has the right, within a specified time period, and with respect to only the disease or condition specified, to apply for an award of further damages if the disease or condition appears or deteriorates. The plaintiff must prove a “chance” that their condition may deteriorate in the future and the deterioration must be “serious.”

Note that Parliament did not enact the restriction suggested in the 1973 Law Commission report that only insured and comparably financially stable defendants should be subject to awards of provisional damages. This makes some sense. The

47 Order 37, Part II, Rule 8-10.
48 [1985] 2 All E.R. 895. This has been amended by [1995] 1 W.L.R. 507, which applies most of the 1985 direction to any appeals of provisional damages to the Court of Appeal, mutatis mutandis.
restriction would not have made a difference in the great majority of cases. If the defendant is presently judgment-proof, and presents no reasonable possibility of ever being able to pay damages, then the plaintiff is in the same position regardless of whether she pleads provisional damages or an unreviewable lump sum. She will not be able to recover at all. A restriction on defendants might apply here, but practically serves no purpose in these circumstances. Similarly, if the defendant is financially stable and can reasonably be expected to pay present and future damages (e.g. an insured defendant), the plaintiff can choose to plead provisional damages if it makes sense to do so given the nature of her injuries, and need not consider the ability of the defendant to pay. The restriction would not apply here. The only situation where this restriction would effectively operate is where a plaintiff who can reasonably plead provisional damages brings a claim against a defendant who appears presently able to pay, but may not be able to pay a future award of damages. A plaintiff who was awarded provisional damages against such a defendant might suffer for doing so, as the provisional award would presumably be less than the unreviewable lump sum would otherwise have been; and the plaintiff, while having the legal right to apply for further damages, might not be able to collect the resulting judgment. But this eventuality does not necessarily justify a restriction on defendants who are likely to pay. Under the British Rules, the plaintiff has the choice of whether or not to plead provisional damages. She is in at least as good a position as the court to determine whether the defendant may not be able to pay an award of further damages. If she were making a claim against a risky defendant, she could assess the risk of the defendant’s future inability to pay, and decide whether or not to apply for provisional damages or a conventional lump sum accordingly. If the purpose of the restriction is to protect the plaintiff from not being able to collect, it would appear that she is at least as able to protect herself as an inflexible statutory restriction could.

VI. JUDICIAL CONSIDERATION

Subsequent judicial consideration of the provisions has revealed and to some extent clarified certain ambiguities in the original drafting of the statute.
1. A Chance

In *Mann v. Merton & Sutton Health Authority*,\(^5\) the trial judge noted that “chance” was an unusual statutory word. Another interpretation of “chance” in s. 32A of the *Supreme Court Act 1981 (u.K.)* has echoed this opinion, and has given more certain meaning to the term. In *Patterson v. Ministry of Defence*,\(^5\) Brown J. held that “chance” included a possibility that was not so insubstantial and so negligible as not to qualify as a chance at all. While he had strong reservations about risks well below one percent, a two percent risk was considered enough.

In *Willson v. Ministry of Defence*,\(^5\) the plaintiff, a naval dockyard fitter, injured his ankle at work. The injury left him with continuing disability and pain. Medical evidence suggested that there would be degeneration in the ankle, that the plaintiff would remain prone to injuries in the future, and that there was a possibility of him developing arthritis. The plaintiff brought a claim for provisional damages against his former employers. He argued that he would be entitled to a future award of damages if he developed arthritis to the point that he required surgery. The court held that “chance” in the context of section 32A of the *Supreme Court Act 1981 (u.K.)* had to be a possibility that was measurable rather than fanciful.

Richard Bragg has commented that “in reality, judges have found that, provided there is some risk, it is helpful that they do not actually have to decide between competing medical claims as to its degree.”\(^5\)

2. Serious Disease or Serious Deterioration

Perhaps the leading case in interpreting the meaning of “serious” in section 32A of the *Supreme Court Act 1981 (u.K.)* is *Willson*. The potential deterioration at issue here was the normal progressive deterioration of arthritis. Baker J. wrote that “the courts have not yet worked out the precise circumstances in which awards for


\(^{52}\) [1991] 1 All E.R. 638 [hereinafter *Willson*].

\(^{53}\) Bragg, *supra* note 50 at 654.
provisional damages will be made." He held that serious deterioration in the meaning of the Supreme Court Act was not only a clear and severable risk as opposed to a gradual deterioration, but a deterioration that was beyond the expected norm. The normal progressive deterioration of arthritis did not qualify as a serious deterioration and the plaintiff was awarded damages in a conventional lump sum. Normal deterioration such as was involved in this case can and should be taken into account in a lump sum award.

This decision seems to make implicitly the same distinction between the "chance" and "forecast" cases as was made the Law Commission's report in 1973. The clear and severable risk is analogous to the "chance" cases, where future speculation is required as to a discrete future event which will either occur or not occur. Proportional damages awarded on the basis of this speculation will always either undercompensate or overcompensate the plaintiff. Similarly, normal deterioration is analogous to the "forecast" cases where speculation is made as to the degree of future deterioration and this speculation has a chance, in theory, of being more or less correct. In light of the fact that the Law Commission suggested provisional damages to remedy the "chance" cases and not the "forecast" cases, Willson is faithful to the original purposes of the Law Commission, as it restricts provisional damages to the clear and severable risk cases, excluding cases of progressive deterioration. This makes good sense, as progressive deterioration and any speculation as to the degree of such deterioration can be addressed by the methods used in a conventional lump-sum award. Provisional damages awards offer no special advantage in addressing these cases.

In Cripps v. Bowden, the court refused an order for provisional damages where the risk at issue was premature degeneration of the knee, because the type of deterioration in question could be prevented by corrective surgery.

In response to the ambiguity in the Act about the meaning of the word "serious" in the applicable provisions, the Law

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54 Willson, supra note 52 at 641.
55 (1986) [unreported], cited in Bragg, supra note 50 at 654 [hereinafter Cripps].
56 See also Cronin v. London Borough of Redbridge (1987), 137 N.L.J. 637 (C.A.) [hereinafter Cronin].
Commission in 1992 made a provisional recommendation endorsing the view of Baker J. in Willson that provisional damages should not extend to the gradual deterioration of an injury.\textsuperscript{57}

This interpretation of the statutory provisions and rules of court that authorize provisional damages in Britain has restricted the set of circumstances which give the plaintiff the right to apply for a reassessment of damages subsequent to an initial provisional award. This restriction raises the issue of whether causation has been determined finally in the initial award and any reassessment will only concern itself with the issue of quantum, or whether causation remains a material issue in the reassessment. Certainly, the restrictive interpretation precludes many possible causation arguments in a reassessment proceeding, as it is not open to the plaintiff to argue that any deterioration other than the one(s) specified in the initial award was caused by the defendant, nor is it open to the plaintiff to argue causation with respect to even a specified deterioration that is only gradual. However, this does not necessarily mean examination of causation in the reassessment proceeding has been precluded entirely. Where the plaintiff applies for reassessment on the basis that she has suffered a deterioration that is both specified in the initial award and sufficiently marked and distinct, it would appear to still be open to the defendant to argue that this deterioration was not in fact caused by her conduct. Although such arguments might be rare, a defendant in certain circumstances might be able to argue that the deterioration in question was in fact due to a cause that is independent of the wrongful conduct on which the original action was based.

3. Interaction with \textit{Fatal Accidents Act 1976}

Section 1(1) of the \textit{Fatal Accidents Act 1976 (u.k.)} provides that:

\begin{quote}
1.—(1) If death is caused by any wrongful act, neglect or default which is such as would (if death had not ensued) have entitled the person injured to maintain an action and recover damages in respect thereof, the person who would have been liable if death had not ensued shall be
\end{quote}

liable to an action for damages, notwithstanding the death of the person injured.\textsuperscript{58}

This provision has been interpreted to mean that the right to make a claim under the \textit{Fatal Accidents Act} is lost if the deceased made any claim for the same injury while alive and that claim was settled or gone to judgment.\textsuperscript{59} If a plaintiff in a personal injury action is granted an award of provisional damages and then dies from the injury specified in the order, it is unclear whether the initial award is considered a claim “gone to judgment” which operates to preclude her dependents from bringing a claim under the \textit{Fatal Accidents Act}. The u.k. Law Commission argues that “... it cannot be said that the immediate award of provisional damages determines once and for all the rights of the parties.”\textsuperscript{60} Because other provisions\textsuperscript{61} specifically exclude any damages for income in the lost years from any surviving cause of action that vests in the estate of the deceased, if the dependents are also precluded from making a claim under the \textit{Fatal Accidents Act} regime, compensation for the lost years may be denied entirely. In contrast, a lump sum award made in the same circumstances, would likely be able to take into account the possibility the plaintiff might die from her injuries.

This issue arose in \textit{Middleton v. Elliott Turbomachinery Ltd.}\textsuperscript{62} The Court of Appeal considered whether a previous award of provisional damages by a deceased person prevented her dependents from making a claim under the \textit{Fatal Accidents Act}, but because this was not at issue between the parties, it declined to express a view, and the law remains uncertain on this point.

This case also raised the related issue of whether the estate of a plaintiff who was awarded provisional damages and then dies from the injury or condition specified in the award is precluded from claiming earnings for the lost years, as required by the \textit{Law Reform (Miscellaneous Provisions) Act}, or if a situation involving provisional earnings is involved.

\textsuperscript{58} \textit{Fatal Accidents Act} 1976 (u.k.), 1976, c.30 [hereinafter \textit{Fatal Accidents Act}]
\textsuperscript{59} Read v. The Great Eastern Railway Co. (1868), L.R. 3 Q.B. 555.
\textsuperscript{60} U.K., Law Commission (1992, No. 125), supra note 57 at 83.
\textsuperscript{61} \textit{Law Reform (Miscellaneous Provisions) Act} 1934 (U.K.), 1934, c. 41, ss. 1(1),(2) as am. by \textit{Administration of Justice Act} 1982 (U.K.), 1982, c. 53, s. 4(2) [hereinafter \textit{Law Reform Act}].
\textsuperscript{62} (1990) \textit{The Times}, October 29; \textit{The Independent}, November 16 (C.A.) [hereinafter \textit{Middleton}].
INTRODUCING PROVISIONAL DAMAGES

 damages is treated differently. The Court of Appeal, in obiter dicta, suggested that in such a situation the estate would be able to claim earnings for the lost years.

In response to this ambiguity, the U.K. Law Commission recommended in a 1994 Command Paper the enactment of a statutory provision which specifies:

Where a person who has been awarded provisional damages later dies because of the act which caused the injury for which damages were awarded, the damages awarded shall not bar an action relating to the death under the Fatal Accidents Act 1976; but any of the damages intended to compensate for future pecuniary loss shall be taken into account by the court when assessing any loss in relation to any dependency claim brought under the Fatal Accidents Act, where it is just to do so.63

4. Agreement as to Settlement of Initial Claim

Rule 9 of Order 37, Part II64 creates a procedure whereby a plaintiff who has applied for provisional damages can reach what is essentially a provisional settlement with the defendant. The defendant offers a sum of money in satisfaction of the plaintiff's initial claim for provisional damages. If the plaintiff accepts, she must apply for an award of provisional damages. If the court grants the application, the parties will inform the judge of the amount of the settlement. The court will then give judgment for provisional damages in that amount. The order will specify the disease or deterioration for which, if it occurs, the plaintiff will have the right to apply for an award of further damages.

In Hurditch v. Sheffield Health Authority,65 the plaintiff worker had been exposed to asbestos in both his previous and his present employment. When he developed asbestos-related health problems, he brought an action against his present employers claiming provisional damages. The employers made an offer in satisfaction

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64 See supra note 47 and accompanying text.
of the claim on October 20, 1986. It was accepted on November 12, 1986 (22 days later). The plaintiff applied for judgment according to Order 37, Rule 9. The application included a medical statement about the plaintiff's present condition and potential for future deterioration. The defendants disputed part of the medical statement and argued that their letter was not an offer to submit to provisional damages. The trial judge held that there was no agreement under Rule 9. The Court of Appeal allowed the appeal of the plaintiff. It held that all that was required to make an award for provisional damages under section 32A of the Supreme Court Act and the Rules were an offer, acceptance, the amount for an award, and the specified disease or condition in respect of which the award is to be made. The disagreement about the medical statements was only over evidence of future deterioration, which was held not to bear on a provisional award in respect of the plaintiff's existing condition. An agreement for an award of provisional damages was found under section 32A and Rule 9.

VII. COMMENTS BY PRACTITIONERS

Detailed academic commentary on the provisional damages regime is hard to find, presumably because it is essentially a procedural change and not a substantive one, and has therefore not attracted the attention of academics.66 However, shorter commentary from publications for the practicing U.K. bar has revealed certain trends in the application of the system by the courts and argues that there are several shortcomings in the regime as enacted.

A 1987 article suggested that "[t]he defendant may be expected normally to oppose provisional damages because of the administrative work and expense of a second or deferred trial."67 However, it points out that if the present injuries are relatively limited, and the bulk of the claim lies in uncertain future deterioration, a defendant might prefer to take her chances with a provisional award of damages. It suggests that judges will exercise

66 Academic discussion in Canada of reforms to the lump sum award for personal injury claims has focused strongly on periodic payment schemes or comprehensive public tort funds, to the exclusion of reforms involving provisional damages that can be later reassessed.

67 Samuels, supra note 46 at 187.
their discretion not to award provisional damages in cases where future deterioration is either highly likely or highly unlikely, as a conventional lump sum is better suited to these situations. Provisional damages were more likely to be awarded in cases where the future deterioration might or might not happen. It suggests that medical staff who prepare reports and give evidence should be instructed to consider all possible future occurrences that might arise out of the present injury and to distinguish between those and the present condition of the plaintiff. Because a future award can only be given if a specified type of deterioration occurs, the plaintiff's counsel should try to encourage the judge to describe the potential future deterioration as broadly as possible in the order. It concludes by citing case law that establishes the professional duty of lawyers to take proper advantage of new procedures such as this for their clients.68

A more recent article points out an intriguing case about the specification of the conditions or diseases about which the assumption is made in awarding provisional damages.69 The claim was for asbestos-related personal injuries. There was considerable doubt on the part of medical experts as to whether certain conditions should be specified in the award, as it was uncertain whether they were actually caused by exposure to asbestos. The judge decided to specify them in the award, reasoning that medical knowledge would improve before the time of a subsequent hearing and might well settle the issue by then. This article also examined the practice of the courts with respect to setting time limits for subsequent applications. In general, courts were hesitant to set short periods, presumably because they did not want to deprive the plaintiff of her right to future damages. Several cases were cited where the judge had chosen not to specify at all. In one case, the Court of Appeal lifted the twenty-year period imposed by the trial judge and substituted an unlimited period.70 Another saw a limit set of thirty years, which was deliberately beyond the life

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69 Mann, supra note 50 at 654.
70 Middleton, supra note 62.
expectancy of the plaintiff.\textsuperscript{71} In another case, the court specified the period for subsequent applications as the life time of the plaintiff.\textsuperscript{72}

Whatever form a proposed amendment allowing awards of provisional damages takes, it is best preceded by a thorough examination of the advantages or disadvantages of modifying the present system to allow reviewable damage awards.

\section*{VIII. ADVANTAGES OF REFORM}

\subsection*{1. Improved Compensation}

The compensation principle is the main principle of modern damages assessment.\textsuperscript{73} The emphasis on compensation of the Supreme Court of Canada in its leading decisions on personal injury damages is clear.\textsuperscript{74} The present system of lump sum awards, once-and-for-all assessment at trial, and proportional damages for future contingent losses provides poor compensation. This shortcoming has been noted by many commentators.\textsuperscript{75} The Osborne Report stated that "[t]he tort system's lump sum payment necessarily requires a present prediction (which may well be wrong) about future compensable losses."\textsuperscript{76} John Fleming argues that:

\begin{quote}
It is plain that any global amount awarded may either be too large or too small. The plaintiff may be in receipt of $1 million or more. If he dies within a year or so, his family or strangers will reap a windfall benefit. If on the other hand, the plaintiff survives, it may well be that the fund is exhausted long before his life's end.
\end{quote}

See "The Role and Function of Judges" (1979) 14 L.S.U.C. Gazette 138 at 149.

\textsuperscript{71} Mann, supra note 50.

\textsuperscript{72} Cronin, supra note 56.


\textsuperscript{74} Andrews, supra note 9; Watkins, supra note 10.

\textsuperscript{75} In a speech given after the Trilogy decisions were reported, Dickson J. (as he then was) said,

See "The Role and Function of Judges" (1979) 14 L.S.U.C. Gazette 138 at 149.

assessing future losses calls for speculation about events that the flux of time will render certain, such as ups and downs in the victim's physical condition.

As to these we are therefore invited, nay compelled, to predict—more bluntly: to guess. The shortcomings of the process are lamentable beyond imagination. It would be bad enough if the choice were between guessing either right or wrong; but our methods virtually assure that the choice must turn out wrong. For the accredited approach is to compromise, that is, neither to award the whole amount nor yet to refuse all, but instead to assess and award the value of the chance.

It is not therefore the case (as stated earlier) that once-and-for-all awards may, but that (in the nature of things) they must result either in under- or over-compensation of the plaintiff.

Similarly, Gordon Bale argues that:

If compensation is awarded for the "medical chance" that, for instance, a head injury may result in epilepsy, the compensation is bound to be wrong. If there is a 10% probability that epilepsy may result from the injury and if one awards 10% of the future loss of earnings should epilepsy develop, no individual will be properly compensated, In approximately 90% of the cases the claimant will be over compensated and in approximately 10% of the cases the claimant will be very seriously under compensated. A lump sum system which compensates for "medical chance" uncertainty is inevitably bound to be wrong.

A system of provisional damages improves the compensation provided by awards for personal injuries by eliminating speculation about the future progress of the plaintiff's condition. The award given is based on the assumption that the plaintiff's condition will not deteriorate (or develop at all, in the epilepsy example). If the condition does not actually deteriorate, no compensation is given.

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77 Fleming, supra note 3 at 302.
78 Ibid. at 303.
79 Bale, supra note 3 at 117.
for the deterioration. Conversely, if the condition does deteriorate or develop, compensation will be given for the resulting loss, based on a retrospective examination of evidence. In either case, the compensation given is considerably more accurate than would be given in a prospective, once-and-for-all lump sum.

Some explanation is required here of the change that using an award of provisional damages makes to the interaction between causation and certainty in determination of a subsequent award upon reassessment. The use of a restriction on provisional damages that limits reassessment to only those deteriorations that are foreseeable at the time of the initial award and specified there (like the British system), removes many opportunities for causation analysis as part of a reassessment. It is not open to the plaintiff to argue that the wrongful conduct of the defendant was the cause of any deterioration that was not specified in the initial award even if it was in fact caused by the defendant’s conduct. However, it is still open for the defendant to contest the assertion made in a review of damages that her wrongful conduct was a necessary and contributing cause of the deterioration specified. It is possible that an initial award of provisional damages could specify a particular foreseeable deterioration that could occur in the plaintiff, and that this deterioration actually occurs, but is caused by factors independent of the defendant’s conduct. For example, a plaintiff whose hand had been injured by the fault of the defendant could receive an initial award of provisional damages which specified a marked onset of arthritis in the hand as a basis for possible future reassessment. If the plaintiff is aged and is particularly predisposed to arthritis, it is possible she might develop arthritis in the hand of the nature specified in the initial award, but that is caused by factors unrelated to the injury caused by the defendant. In these circumstances, it is not just to require the defendant to pay damages for a loss which she did not cause and it should be open for the defendant to contest causation. It appears then, that even the narrow limits set in the British system do not eliminate causation analysis completely from a subsequent reassessment of provisional damages.

Given that causation analysis will still remain a part of a subsequent reassessment of damages, what principles should apply in determining causation with respect to the deterioration at issue, considering the relationship between causation and certainty
involved in calculating damages for personal injury? It is submitted that the same principles used to determine damages for personal injuries that are already known at the time of trial should be used for a subsequent reassessment of provisional damages for personal injury. These principles are (a) use of a but/for test to determine necessary causes on a balance of probabilities; and (b) proof of specific loss, also on a balance of probabilities. After all, the functional purpose of provisional damage awards paired with later reassessment is to mimic a trial where the injuries are known: to allow, through the passage of time, the retrospective calculation of damages for personal injuries as losses that are known and specifically provable instead of requiring speculation about future contingencies and proportional discounting of the award of damages to reflect the approximate chance the contingency will not occur.

This choice of principles can be demonstrated through the discussion of three different types of circumstances. The first type is past known events. Past known events are losses which have manifested themselves prior to a proceeding. They can be specifically proved. No speculation is required to calculated damages related to past known events. Damages for past known events are calculated, as above, using a but/for test to determine necessary contributing causes on a balance of probabilities and proof of specific loss, also on a balance of probabilities. The second case is future contingent events or “actual future contingencies.” These are possible future events which may or may not occur, but if they do, the cause will be the defendant’s wrongful conduct. The defendant's fault has created a risk that the event will occur in the future. These are referred to here as actual future contingencies.

Apportionment of damages based on fault between multiple necessary causes of the injury is also one of the principles which should be included here, but it is omitted from the text for the sake of clarity. In the context of the present discussion, this apportionment of fault could be easily confused with the proportional damages awarded for future knowable contingencies. This confusion should be avoided in all circumstances, as these principles go to different aspects of damages analysis. The apportionment of fault goes to the relative proportional contribution of multiple causes which are each proved to be necessary causes on a balance of probabilities. Proportional damages goes not to causation but rather to quantum: it is the discounting of the amount of damages for a future contingent event which may or may not occur whose causation is (generally) clear, if it actually does occur.
because they may actually occur in the future. It is simply not known at present if they will. “Causation” is sometimes a confusing term when used in reference to actual future contingencies, as it is not certain that the actual event has been “caused.” When we say that “causation” is clear in a case of an actual future contingency, what we mean is that the causal source of the event is known, if the event does in fact occur. Calculation of damages for actual future contingencies, assuming that their causal source is clear, is done by calculating the likely loss from the event if it occurs and discounting this figure to reflect the possibility that it may not occur.

The effect of an award of provisional damages paired with a reassessment of damages after a contingent future deterioration has occurred is to transform an actual future contingency into a past known event by delaying assessment until after the deterioration occurs. Since the deterioration is a past known event at the time of the reassessment, damages for the deterioration should be calculated using the same principles used in a trial for calculating damages for past known events. There may be some issue of causation if there is more than one alleged cause of the deterioration, but this should be dealt with using the but/for test to identify necessary causes on a balance of probabilities. There is no longer an issue of certainty with respect to speculation as the event has already occurred.

Past known events and actual future contingencies should be differentiated from “loss of chance” cases. These first two categories of events are not “loss of chance” cases because those cases involve known or knowable events, as opposed to “loss of chance” cases, which are concerned with past hypothetical events whose outcomes are unknowable. Damages are awarded in “loss of chance” cases to compensate the plaintiff for the loss of an opportunity to take certain actions at all caused by the conduct of the defendant. It is submitted that the situation of a physical injury that may worsen in the future is in no way a “loss of chance” case, as it deals with an actual future contingency (whose outcome is knowable) as opposed to a past hypothetical event (whose outcome is unknowable). In most “loss of chance” cases, the causal source of the potential loss is clear and the issue is really whether the known

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81 What has been caused is a risk that the future contingent event may occur.
cause actually resulted in any damage (quantum). The real question there is whether the loss of a chance to participate in an activity is worth anything, not whose fault the loss of a chance is.

All causation issues aside, it can be said in conclusion that given that the principal purpose of a tort award is the compensation of the plaintiff, a system of provisional damages presents a significant improvement over an once-and-for-all lump sum award in that it provides much better compensation. This improvement becomes even more significant in light of the fact that damage awards for personal injury are becoming larger, and presumably the errors in compensation that can be eliminated through the use of provisional damage awards are also becoming proportionally larger.

An incidental benefit of more accurate compensation is the reduction of psychological stress for the plaintiff. Fleming notes the

83 In Lawson v. Laferrière (1991), 78 D.L.R. (4th) 609, the Supreme Court of Canada heard the civil law case of a patient who was not informed by her doctor that she had cancer and who subsequently died of that cancer. It was not certain whether any treatment she might have chosen had she been informed of this diagnosis would have improved her chances of survival at all. The central legal issue was whether this should be dealt with as a “loss of chance” case (the patient was arguably deprived of the chance to try other treatment by her doctor’s failure to disclose his diagnosis) or whether it was merely a case of a past known event where the loss was certain (the patient’s death) and the issue was one of causation: whether the doctor’s failure to disclose caused the patient’s death. Gonthier J., writing for a 6-1 majority, held that “[i]n such cases, classical principles of [civil law] causation suffice . . . ” [at 620]. One of the major factors in this conclusion was the fact that in most medical cases, “the chance is not suspended or crystallized as is the case in the classical loss of chance examples; it has been realized, and the morbid scenario has necessarily played itself out. It can and should be analyzed by means of the generally applicable rules regarding causation.” [at 656].

It is foreseeable that a reassessment of damages for personal injury following an award of provisional damages and a subsequent deterioration might involve a retrospective analysis of damages for a known deterioration where there are multiple alleged causes, one of which may be action by the defendant which prevented the plaintiff from taking some measure that might have reduced the risk of deterioration—a convoluted causation scenario, certainly. While Lawson v. Laferrière was a civil law appeal, it supports the proposition that even a causally complicated reassessment of a provisional damage award following a deterioration in a common law Canadian jurisdiction should use the same causation principles as would be used in a trial for an injury which has previously manifested itself. The same reasoning applies as applied in that case: since the loss is actual and has manifested itself, the normal causation principles should apply.
real possibility of accident neurosis, "a largely uncontrollable anxiety state of the victim pending adjudication of his claims." A plaintiff who may develop a condition in the future but has only been awarded a proportion of the total loss it may cause, can be subject to considerable anxiety about whether the event will occur, leaving her with an uncompensated expense. A plaintiff who has as yet received no amount for a future event, but a right to ask for further damages if it does occur, has less reason to feel anxious about the future.

2. Early Disposition of Claim

In general, a claim for provisional damages can be disposed of more quickly than a comparable lump sum claim. The actual proceeding itself is made much more compact by the assumption that certain future contingencies will not occur. Provisional damages allow an earlier, shorter trial, as "[a] lot of detailed speculative evidence and argument about the future is unnecessary." Proceedings for provisional damages also give parties less reason to delay to see if a medical condition will change. Fleming states this as a disadvantage of the lump-sum award:

... by tempting one or the other party to postpone the final and irrevocable assessment as far as possible in the hope of a development favourable to him, it encourages delay with its whole galaxy of attendant ills, ranging from clogging of court lists, legal chicanery, and waning mental recall by witnesses, to the denial in the meantime of any compensation whatever to the needy victim.

The Holland Report also noted this phenomenon:

The argument is that a once-and-for-all system of lump-sum damage assessment compels the plaintiff to delay the trial as long as possible in order to gather the best possible evidence of the long term effects of his injury. If the plaintiff knew that the assessment could be re-opened

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84 Fleming, supra note 3 at 309.
85 Samuels, supra note 46 at 187.
86 Fleming, supra note 3 at 303-4. Fleming points out that the courts have long been aware of this phenomenon. See Fitter v. Beal, supra note 29: "It is the plaintiff's fault, for if he had not been so hasty, he might have been satisfied for this loss of the skull also."
INTRODUCING PROVISIONAL DAMAGES

if unexpected complications ensued, he would have no incentive to delay . . . ." 87

Reduction in the length of trial and delay prior to trial will also reduce litigation costs for the parties, as well as reduce court costs and the demand for court time. However, these savings may be largely mitigated, or even outweighed, by the litigation costs and court use involved in the claims for later reassessment that the plaintiff receives the right to make in awards for provisional damages. 88

3. Efficient Economic Allocation of Risk

An economic analysis of tort law suggests that a tort system can contribute to an efficient use of resources in a society by allocating the cost of preventing an accident to the party who can avoid it most cheaply (where the person suffering the loss and the person who can avoid it most cheaply are different). 89 This assumes that the true cost of the accident is transferred to the most efficient cost-avoider. A system of provisional damages provides a more accurate allocation of the actual cost of an accident than a speculative lump-sum award made in the same circumstances would provide. Therefore, provisional damages will operate to help a more efficient use of resources than a lump-sum award would in the same circumstances.

The economic advantage of provisional damages in improving the accuracy of cost allocation in the tort system would be mitigated if accompanied by an increase in transaction costs through a need for increased litigation. As discussed above, provisional damage awards allow for a shorter initial proceeding but will sometimes require a second proceeding whose additional length may or may not outweigh the benefit in reduced litigation from a shorter initial proceeding. It is unclear on the whole whether provisional damages awards would involve transaction costs greater than lump-sum awards in similar circumstances.

88 See Part IX, section 2, on increased costs, infra.
4. Choice for the Plaintiff

Legislation authorizing provisional damages can be drafted to give the plaintiff the choice of whether a lump sum or provisional damages are better for her. An award of provisional damages and potential reassessment can, on the whole, give the plaintiff more or less compensation relative to a lump sum award depending on the circumstances. The difference lies essentially in the magnitude of the possibility of future deterioration in a given case. A system of provisional damages that must be specifically pleaded by the plaintiff will allow her to assess the relative benefits and risks of the alternative methods of damage assessment and to choose the method which best suits the circumstances and her tolerance for risk. (The choice by the plaintiff will not be determinative of the method used, as the award will likely be discretionary.)

If we accept that the compensation of the plaintiff is the main goal of an award of damages and that plaintiffs are good judges of what is best for them, a system which gives a plaintiff a choice between methods of calculating that compensation provides an advantage over one which does not.

5. Only an Incremental Change

As a relatively minor reform to the procedure of damage awards, a system of provisional damages is easier to introduce than a more fundamental change. Academic lawyers and government commissions in Canada have written extensively on the deficiencies of the lump-sum system of damages. The solutions they have suggested are periodic payments,90 a tort fund,91 or comprehensive accident fund such as the one instituted in New Zealand.92 To date, none of these has been introduced. Presumably, this is because the magnitude and complexity of these reforms creates significant

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91 Bale, supra note 3.
legislative inertia, which prevents bills implementing them from being passed. These reforms are comprehensive enough that they require legislation by the provinces. If any related tax provisions are required, Parliament must also be convinced of the need for reform. However, there has been insufficient political will to this point in time to get this legislation passed.

A system of provisional damages is much less comprehensive than these reforms and will encounter far less legislative inertia or resistance from the legal profession in order to be enacted. The legislation required to enact the change in Britain fits on a single page or two, and the supporting Rules of Court are not much longer. (On the issue of whether the change will require legislation in Canadian jurisdictions will require legislation, see Introducing the Reform in Canada, below.) Rather than replace the present lump-sum tort system entirely, a system of provisional damages provides a new choice of how certain personal injury damages may be calculated. It does not abrogate the “once-and-for-all” rule entirely; it merely provides a specific statutory exception. The exception applies only to general damages and only applies to loss of income where it is caused by a subsequent deterioration. The basic theory of loss of earning potential as a capital asset is unchanged; only the time for assessment of this asset is different. For all these reasons, a system of provisional damages presents an alternative to lump sum awards that can realistically be introduced in the relatively near future.

IX. DISADVANTAGES OF REFORM

1. Lack of Finality

An award of provisional damages, with its accompanying right for the plaintiff to apply for further damages based on a future contingency, does not provide finality for the defendant. There is considerable value for the defendant in being able to “close the books” on a lawsuit. A lump sum allows “the defendant (usually an insurer) [to] close the file and accurately assess all costs. Premiums can be adjusted and policy cover altered if necessary such decision
informing the public of the true costs of risk-spreading." The Manitoba Law Reform Commission argues that:

The possibility of review would make estimating the full extent of liability and calculating appropriate premiums and reserves extremely difficult. Inevitably, insurers' costs would rise and liability insurance premiums would increase.

The possibility that the plaintiff might apply for further damages creates a lingering uncertainty for the defendant. Fairness to the defendant should be considered. A lump-sum award, in contrast, allows the defendant to dispose of the claim once and for all.

A lack of finality also has disadvantages for the plaintiff. For her, there remains the uncertainty that her condition might deteriorate, but she might not be successful in a reassessment of damages, either for a lack of funds to initiate litigation, or for an inability to meet the standard of proof. New medical knowledge that did not exist at the time of the original award might challenge the notion that a given subsequent deterioration was actually caused by the wrongful conduct of the defendant. There is a significant risk that the defendant may be insolvent and unable to pay a further award of damages.

A lump-sum award gives the plaintiff her compensation all at once; none of it is left to the uncertain future. The plaintiff can devote all her energies to rehabilitation. A further application for damages also subjects the plaintiff to the psychological stress of a second proceeding.

Other negative effects coming from the delay between proceedings are possible, but not as certain. There may be an incentive for the defendant to engage in surveillance of the plaintiff after the initial award of provisional damages to ensure the plaintiff is not failing to take measures to recover from her injury in the hope that some deterioration will lead to more money on reassessment. This incentive may exist to some degree but it is mitigated where, as in the British system, reassessment is limited to a marked and

93 U.K., Law Commission, supra note 57 at 4.
94 Manitoba, Law Reform Commission, supra note 90 at 65-6. This comment is made in reference to reviewable periodic payments, but it is submitted that this reasoning applies to provisional damages, as well.
95 U.K., Law Commission, supra note 57 at 4.
96 Ibid.
substantial deterioration and not a gradual one. It is also mitigated by the fact that additional damages awarded in a reassessment are only supposed to compensate for increased expenses resulting from any deterioration—hardly a net windfall for the plaintiff. In light of these mitigating factors, it seems that plaintiffs who would be willing to "let themselves go" in the hope of suffering substantial deterioration to have their damages reassessed are likely rare. Further, this motivation is not necessarily worse than it is for a comparable lump-sum personal injury award. In a lump-sum award, plaintiffs also have an incentive to delay or neglect rehabilitation up to the time of trial so that they might be able to prove more serious injuries and ensure a larger award of damages for themselves at trial.

2. Increased Costs

Any application for a reassessment following an award of provisional damages involves additional litigation costs for all the parties. An application involving substantial expert medical evidence regarding the extent and causation of any deterioration will create significant costs. The plaintiff will incur this cost without any guarantee of an additional award. Such costs are not necessary where damages have been awarded once and for all in a lump sum in a single proceeding.

Applications for further damages create significant public costs and administrative inconvenience by increasing the burden on the courts. A second proceeding adds to an already overcrowded court docket. As mentioned above, expert medical evidence is not only expensive for the parties, it requires a significant amount of time in court. This is a significant additional public expense which will not occur where the initial claim is for a conventional lump sum with no right to a further award.

The amount of additional evidence required in the reassessment proceeding can be substantial, as the issue of causation may not be entirely disposed of in the initial award. This is the case even in the British system where reassessment is limited to deterioration specified at the time of trial. As discussed above, even where the specified deterioration can be proved by the plaintiff, it appears to still be open to the defendant to argue that the deterioration was not caused by the fault of the defendant, but by an independent, intervening cause. If such an argument were sufficiently grounded
in fact, the evidence required to settle the issue of causation alone could be substantial. Expert medical evidence would almost always be required in this process. As well, the issue of quantum, the conventional domain of the reassessment proceeding, remains to be addressed exclusive of causation. This can also require substantial expert evidence.

The number of cases where submissions on the issue of causation in a reassessment proceeding are necessary could potentially be even greater in a system that allowed reassessment for not only deterioration specified in the initial award, but rather for any deterioration which could be shown on a balance of probabilities to have been caused by the original injury. An argument can be made based on the compensation principle that reassessment should be available on this broader basis. The limit on reassessment in the British system to only cases where the specified deterioration occurs does not appear to be based in theory, but is most likely a practical limit designed to keep the use of reassessment proceedings in check. The introduction of a system of provisional damages in Canada might well want to favour compensation and remove this limit to reassessment. If so, the frequency, length, and complexity of reassessment proceedings will likely increase, imposing additional public and private costs. These increased costs must be considered in deciding the practical limits to be placed on any system of provisional damages.

It should be noted however, that reviewable awards are quite common in family law and seem to be handled by the courts without the entire system grinding to a halt. Although significant resources are allotted to family court, and the practical and theoretical bases of the reviewable awards are quite different in family cases than in personal injury cases, the prevalence of reviewable awards in family law demonstrates that the practicalities of administering reviewable awards are neither foreign to nor completely objectionable to our courts.

3. Only Marginal Improvement

The introduction of a system of provisional damages addresses only one of the numerous problems with speculation in lump sum awards. Although it eliminates the need to speculate on the future progress of the plaintiff's injuries in certain cases, this is only one of many bases for speculation inherent in assessing lump sum damages
for future loss. All other contingencies must still be "crudely translated into a present value." An award of provisional damages will do nothing to help the court avoid or improve its speculation with respect to future inflation, future interest rates, future employment prospects, future income, or the future cost of medical care. Nor will it decrease the possibility of dissipation of the award by the plaintiff. And, as stated above, it applies only to general damages and only applies to loss of income where it is caused by a subsequent deterioration. On the whole, it may not be worth the additional expense, inconvenience, and uncertainty of implementing a reform whose advantages are quite narrow in terms of the entire spectrum of speculation presently required in lump sum awards.

It can be argued however, that aside from contingencies concerning the plaintiff's injury, all other speculation in a lump sum award considers factors that will change for society as a whole. The injury of the plaintiff is something that will change, if at all, only for her. This allows us to distinguish it from other future contingencies on two bases: first, it gives us a more personal reason to revisit the award (compensation of a specific plaintiff); and second, a more personal basis for doing so (verification of her individual situation and not of general societal economic factors). If we are to choose only one of the many bases for speculation in lump-sum awards to eliminate, the progress of the plaintiff's injury is a good choice, as it delivers better individualized justice through more accurate personal compensation.

This argument does not necessarily carry the day on the theoretical front. If the main argument in favour of a system of provisional damages is improving compensation to the plaintiff, then it follows that the best compensation such a system could provide would occur if the plaintiff were allowed to have damages reassessed on all and any contingencies which had changed to her detriment since the initial award of damages. The initial award will speculate as to future contingencies like the plaintiff's personal employment prospects, the labour market in her industry, the discount rate, the cost of future care, etc. There is still a compelling argument based on the compensation principle that the plaintiff

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should be able to see her damages reassessed with respect to all speculation which turns out later to have made the initial award smaller than it would have been had information which later became available been available at the time of the initial trial.

The best reason not to allow such a broad reassessment of damages is practicality. If plaintiffs who were granted awards of provisional damages were allowed to apply for reassessment based on any change in societal contingencies that disadvantaged them, every personal injury plaintiff would apply for provisional damages, as it is always foreseeable that the discount rate might decrease or the labour market in a particular industry might improve. No reasonable plaintiff would want to miss out on the right to hedge their damage award against the occurrence of this sort of unforeseen circumstances. The frequency of applications for provisional damages would be extremely high and the original purpose of the system, to provide better compensation for injured plaintiffs whose injuries may deteriorate, would be lost in a sea of motions. This outcome is undesirable and avoiding it provides good justification for limiting the basis of reassessment to deterioration of the plaintiff’s medical condition caused by the original injury.

4. Reassessment Only Benefits the Plaintiff

Reassessment of an award of provisional damages can be seen as unfair, as it is a one-way reassessment: additional damages can be awarded, but the initial award cannot be reduced. This unfairness criticism can be made in those cases where an injury or condition exists at the time of trial and the future contingency is not whether it might deteriorate, but rather whether it might improve. A system which only allows reassessment initiated by the plaintiff allows for her to apply for more damages in the case of deterioration, but does not allow the defendant to apply for a reduction in the case of an improvement. This contradiction cannot be reconciled on a theoretical level.

98 A similar situation arises where the initial award for a severely disabled plaintiff includes a large sum for the cost of future care, and the plaintiff dies soon thereafter, creating a windfall for her estate. The defendant cannot apply for a partial repayment here, either.
There are however, a number of practical reasons to bar the defendant from applying for a reduction of provisional damages. The U.K. Law Commission argues that this would be undesirable, as the plaintiff may not be in a position to repay part of the initial award.\(^9\) If, as in most cases, the defendant is an insurer, it will be able to pool the extra cost of what turns out to be overcompensation for the plaintiff with all the other similar risks it insures. The plaintiff, in contrast, is an individual and would have to bear the cost of any subsequent repayment personally.\(^10\) Fleming argues that the possibility of reduction in an award would not only increase the likelihood of accident neurosis in the plaintiff, it would also give the defendant (insurer) an incentive to spy on the plaintiff if it suspected her of faking an injury or condition.\(^11\) The Holland Report also argued that “[i]f it will pay the defendant to prove that the plaintiff is less disabled than he claims or that he is earning more than he admits, it may pay the defendant also to investigate the plaintiff’s affairs in search of evidence.”\(^12\) The invasion of privacy that such a practice would entail is undesirable, particularly in light of the fact that the plaintiff may already be under emotional strain from her injuries.

5. Problematic Interaction with Other Statutes
The British model recommended by this paper has created the possibility that an initial award of provisional damages may preclude the estate or the dependents of a plaintiff who later dies from the injuries specified in the award from claiming damages for loss of income for the “lost years”: the time the plaintiff would have lived, but for the injury. Canadian statutes providing a right of recovery for dependents in fatal accidents,\(^13\) or those which allow the estate of the deceased to make a claim,\(^14\) may not provide such rights where the injuries in question have been the subject of a previously determined claim. A great deal turns on whether the

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99 U.K., Law Commission, supra note 63 at 97.
100 Ironically, it might be possible for the plaintiff to purchase some insurance to cover this eventuality.
101 Fleming, supra note 3 at 309.
103 E.g. Fatal Injuries Act, R.S.N.S. 1989, c. 163.
104 E.g. Survival of Actions Act, R.S.N.S. 1989, c. 453.
initial award of provisional damages—which assumes that the fatality (the ultimate deterioration) would not occur—is considered a previously determined claim. Given that the assumption in the initial award works to exclude future contingencies from the assessment of damages, compensation for the lost years can slip through the cracks. To date, the law remains uncertain in Britain on this issue. The U.K. Law Commission has recommended statutory reform and it appears that a minor amendment will remedy the problem.

The applicable statutes in Nova Scotia, the Fatal Injuries Act and the Survival of Actions Act, in their present form would not appear to disallow a claim for the “lost years” under a system of provisional damages where the injury which gave rise to the initial award eventually resulted in the death of the plaintiff and the deterioration in question was a permissible basis for reassessment. However, any jurisdiction intending to implement this reform should consider carefully how the proposed legislation might affect other related claims and endeavour to prevent any undesirable ambiguities.

6. Problematic Interaction with Insurance Systems

It is not entirely clear how a system of provisional damages with possible subsequent reassessment would interact with a combined tort-insurance system, such as a no-fault or workers’ compensation system, where certain personal injury actions are statute-barred. This ambiguity is entirely dependent on the particular nature of legislation in a given jurisdiction, but it has the potential to be problematic in the implementation of a system of provisional damages.

One suggestion that would appear to eliminate most cases of ambiguity is drafting and interpretation of legislation authorizing awards of provisional damages such that it does not create rights to either an initial award of damages or a reassessment in cases where an ordinary lump-sum award is precluded by statute. Any system of provisional damages should only allow awards in cases where an action is otherwise allowed. It should be seen as creating an

105 R.S.N.S. 1989, c. 163, s. 3.
106 R.S.N.S. 1989, c. 453, s. 2.
additional option for the awarding of damages by judges in appropriate circumstances and where tort claims for lump-sum awards would be allowed, and not as creating any wholly original causes of action or rights of recovery.

X. WEIGHING THE ADVANTAGES AND DISADVANTAGES

On the whole, a reform which allows provisional damage awards for personal injury will further the main goal of damage awards by allowing more accurate compensation of the plaintiff whose injuries may or may not deteriorate in the future. It will also allow for earlier compensation of the plaintiff who applies for provisional damages than would otherwise occur with a lump-sum award. The use of these awards will certainly create a lack of finality in certain cases and will impose increased court costs and administrative inconvenience in others. However, the lack of finality will not occur generally, but only in those cases where an award of provisional damages is granted. Similarly, the increased administrative costs of a further application for damages will not be incurred in every case where such an award is granted. They will only be incurred in the subset of such cases where the specified deterioration actually occurs and the plaintiff brings an application for further damages. Thus, the disadvantages of such a system are reasonably limited.

It is submitted that while the increased cost of introducing a system of provisional damages may be substantial, it is unlikely to outweigh the considerable improvement in compensation for the plaintiff, both in the amount of damages and the time in which damages can be obtained. If we are genuine in our claim that compensation for the plaintiff is our main concern, then the introduction of provisional damages to our courts is worthwhile.

XI. INTRODUCING THE REFORM IN CANADA

It is submitted that a system of provisional damage awards such as has been introduced in Britain can and should be introduced in Canadian common law jurisdictions. This will be a relatively simple change. Since our court structure is modelled on the British court system, it is possible to adopt such a system using the same structure it has used: amendments to the Rules of Court.
The U.K. Parliament passed a specific statutory amendment authorizing new provisional damages rules. A statutory amendment may or may not be necessary to authorize such a system in Canadian jurisdictions, depending on the breadth of the statutory authorization in the main court statute to make rules generally. For example, in Nova Scotia, section 46 of the *Judicature Act* provides:

46 The judges of the Court of Appeal or a majority of them may make rules of court in respect of the Court of Appeal and the judges of the Supreme Court or a majority of them may make rules of court in respect of the Supreme Court for carrying this Act into effect and, in particular, . . .

(b) regulating the pleading, practice and procedure in the Court and the rules of law which are to prevail in relation to remedies in proceedings therein, . . .

(e) prescribing and regulating the proceedings under any enactment that confers jurisdiction upon the Court or a judge; . . .

(i) regulating the means by which particular facts may be proved and the mode in which evidence thereof may be given in any proceeding or on any application in connection with or at any stage of any proceeding:

(j) generally for regulating any matter relating to the practice and procedure of the Court, or to the duties of the officers thereof, or to the costs of proceedings therein and every other matter deemed expedient for better attaining the ends of justice, advancing the remedies of suitors and carrying into effect the provisions of this Act, and of all other statutes in force respecting the Court.\(^\text{107}\)

New rules allowing application for awards of provisional damages and subsequent reassessment proceedings would probably all fall under one or more of these provisions. An exception to the "once and for all" rule of damage assessment could be made under section 46(b) ("rules of law . . . in relation to remedies in proceedings"), a rule allowing the presumption that specified

\(^{107}\) R.S.N.S. 1989, c. 240, s.46.
deterioration would not take place could be made under section 46(i) ("the means by which particular facts may be proved"), and other aspects of the required amendments to the rules could likely be made generally under section 46(j).

However, it is probably more appropriate to establish a system of provisional damages through a statutory amendment to the main court statute in a given jurisdiction (e.g. the Judicature Act, in Nova Scotia). This allows political debate in the provincial legislature over this reform before it is passed. This is appropriate given the substantial fiscal and legal effects that a system of provisional damages would have for the courts, the public, and the insurance industry. On the other hand, if it is seen that there is significant legislative inertia preventing an amendment to the governing court statute and a rapid introduction is desirable, it does not appear that there is anything preventing the introduction of provision damages through the Rules of Court alone.

It is submitted that the substantive provisions of the U.K. Supreme Court Rules which govern provisional damages and the Rules of Court that regulate their use should and can be copied in Canadian jurisdictions. The British reform seems to work effectively, except for a few ambiguities which have mostly been corrected since 1985. Any adoption of this system in Canada should certainly include modifications to eliminate these ambiguities. Specifically, they are: the standard of possibility of future deterioration required to qualify for provisional damages ("a chance"), the standard of future deterioration required to qualify for provisional damages ("serious deterioration" meaning clear and severable or unexpected deterioration versus normal progressive deterioration), whether successive applications for further damages based on the same specified condition or deterioration arising on more than one part of the plaintiff's body and how an award of provisional damages should, if at all, affect claims and/or damages under fatal injuries or survival of actions acts should the plaintiff die from the condition or disease specified in the award.

Introducing a system of provisional damage awards in Canadian jurisdictions would allow the courts better compensation for certain victims of personal injury who might otherwise find themselves substantially under compensated when an injury resulting from the fault of someone else deteriorates. Although this will result in an increase in court use and potentially in overall
litigation costs for the parties, there are a number of parameters involved in the drafting of provisions and rules authorizing such awards which allow considerable control over the balance that is achieved between increased compensation and control of public and private costs and disadvantages. On the whole, if we accept that compensation is the prime value underlying the tort system, it is desirable to introduce a system of awards provisional damages and accompanying rights of reassessment in personal injury claims.