Structured Settlements and Structured Judgements: Do They Work and Do We Want Them?

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I. Introduction

Structured settlements are an alternative to traditional lump sum settlements for personal and fatal injuries claims. Under a structured settlement the defendant, generally a casualty insurer, satisfies all or part of the claim via periodic payments to the plaintiff.

The object of this paper is to investigate the effectiveness of structured settlements to determine the desirability and feasibility of structured judgments. Note that structured settlements are voluntary and courts currently reject any notion that they have inherent jurisdiction to grant damages in any form other than lump sum.

Analysis will be undertaken on both an academic and application basis via scholarly and industry writings as well as interviews with lawyers, judges and representatives of the insurance industry.

II. Structures — why do we need them?

The purpose of personal or fatal injuries damage compensation is *restitutio in integrem*, meaning to place the victim in a position similar to that he or she would have been in but for the tortious act. Traditionally this has been achieved in the form of lump sum damages, the purpose of which is to give the plaintiff a capital amount which if properly invested would generate a fund capable of fully compensating the plaintiff during his or her lifetime for any losses or ongoing expenses resulting from the tort. Exhaustion of the fund is intended to coincide with plaintiff's death.

The inherent risks associated with this form of compensation are evident.

a) Mortality Risk — The plaintiff bears the risk that he or she will live longer than anticipated when the damages were calculated creating a shortfall. Conversely there is the possibility that the plaintiff's estate will enjoy a windfall due to premature death. The crux of the problem is the uncertainty of forecasting future events. In *MacDonald v. Alderson* O'Sullivan J.A. questioned the validity of calculating damages on an estimated life expectancy which could prove to be totally inappropriate.
I have some difficulty with the idea that a lump sum should be calculated in such a way that it will be used up over an assigned life expectancy. Some live shorter and some live longer. It would be imprudent for the recipient of a damage award to invest and spend it on the basis that his award would be exhausted over the period of his assigned life expectancy; if he did so he would be a pauper at the end of the period of his anticipated life; how could he survive if he lived longer than his expected years? ... what is sought to be given to the plaintiff is an amount that is likely to enable the plaintiff to be compensated for as long as he suffers damage from the tortfeasor, over the length of his actual life.4

b) Financial Management — The plaintiff bears the responsibility, risk and expense of “properly investing” the capital amount of the lump sum such that it will adequately provide for the loss. The plaintiff is left vulnerable to the dangers and worries of a dynamic economy. One bad investment could have long-term implications for the plaintiff’s basic care. Some courts and settlements allow a gross-up of special damages for financial management fees. Although this allowance is of some assistance it does not remove the free market risk.

c) Dissipation — U.S. studies indicate that ninety per cent of windfalls are dissipated within a five year period.5 For a seriously injured plaintiff who has lost all or part of his income earning capacity this means that he will become reliant on family and or the state for his basic care needs.

d) Miscalculation — Damages are calculated on uncertain predictions of future needs and losses, the plaintiff bears the risk of miscalculation such that the award will prove inadequate over time. While the defendant bears the risk of being over charged, the implications are far more serious for the individual who has lost income earning capacity than for a casualty insurer or uninsured defendant who maintains this capacity.

e) Income Tax Liability — Although Revenue Canada has taken the position that damages for personal and fatal injuries are not taxable, the interest income generated by such funds is liable to taxation. This is of significance to lump sum awards which are intended to compensate the plaintiff when combined with the resulting interest income. Some jurisdictions in Canada allow a tax gross-up which is intended to offset the anticipated income tax liability.6 Tax gross-ups are only allowed on

4. Ibid., at 399-400.
6. British Columbia has adopted the view that the S.C.C. rejected the concept of income tax adjustments in the Trilogy by not providing for them in those cases, reference Leischner v. West Kootney Power and Light Company, [1986] 3 W.R.R. 97 (B.C.S.C.). Ontario however has
the future care head of damages for personal injuries and for lost support for dependants in fatal injury claims. The average for future care tax gross-ups is thirty five percent.\textsuperscript{7} Tax gross-ups require the court to forecast the future income tax rate, the interest income to be earned, the time period and the future care costs which will be subject to taxation.\textsuperscript{8} Clearly without some adjustment or consideration for tax liabilities the plaintiff will be under compensated.

f) Non-Reviewable — The common law doctrine of finality means that damages are once and for all, the plaintiff cannot return to the defendant for more money. This is incongruent with the ongoing nature of personal and fatal injury claims and forces damages to be assessed on speculative future needs and events.

The inadequacies of lump sum compensation and the need for reform of our tort compensation system has been the subject of many critical comments by both academics and practitioners. One of the more memorable cries came from Justice Dickson, as he was then, in \textit{Andrews};

The subject of damages for personal injury is an area of the law which cries out for legislative reform. The expenditure in time and money in the determination of fault and of damage 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 difficulties are greatest where there is a continuing need for intensive and extensive care and long-term loss of earning capacity. It should be possible to devise some system whereby payments would be subject to periodic review and variation in light of the continuing needs of the injured person and the cost of meeting those needs.\textsuperscript{9}

Justice Dickson’s pleas have gone unmet by the legislatures of Canada, statutes enabling the courts to employ reviewable awards or periodic payment plans have not yet come to pass. However there has been

\textsuperscript{8} Note that some care costs are tax exempt.
\textsuperscript{9} \textit{Andrews}, supra note 2, at 236.
development outside of the court's jurisdiction, parties can and have voluntarily employed structured and reviewable settlements.\textsuperscript{10}

While calling for legislative reform Justice Dickson and the Supreme Court of Canada addressed the arbitrary nature of damage assessment for personal injury cases in what has been labeled "The Trilogy".\textsuperscript{11} The court established an itemized approach to personal injury damage assessment which increased the precision and reviewability of awards. "The Trilogy" also marked a shift in the objective of damage assessment. The itemized heads of damage looked more to the plaintiff's needs versus loss.\textsuperscript{12} Note that a needs approach to damage compensation not only allows greater precision, but is more directly responsive to the basic principle of damage compensation, placing the plaintiff in the position he would have been in but for the injury. However, the uncertainties associated with income tax adjustments: inflation, life expectancy, future care needs, and lost income earning potential, still remain.

There is no doubt that the "Trilogy" has improved lump sum awards, but only insofar as they more closely meet the plaintiff's needs; most of the risks still remain as does the need for a better alternative. The administrative burden has been increased as a result of the "Trilogy", there would appear to be a direct relationship between administrative and evidentiary burden and the precision and fairness of compensation.

III. \textit{History of Structures}

Structured settlements have been viewed by many as the way of the future in personal and fatal injury compensation and structured judgment as the natural consequence of that development. To appreciate the role that structures currently play and could play in the future of our tort compensation system, we must look at the history and adequacy of personal injuries compensation in Canada.\textsuperscript{13}

\begin{itemize}
\item The only reviewable settlement reported to date is \textit{Steeves v. Fitzsimmons} (1975), 110 O.R. (2d) 387 (H.C.), where the injuries sustained by a living child prior to birth were too speculative to be definitively calculated until later years.
\item The itemized heads of damages identified in the "Trilogy" are:
\begin{enumerate}
\item pecuniary loss - full compensation for:
\begin{enumerate}
\item special damages
\item prospective loss of earnings and profits
\item cost of future care
\end{enumerate}
\item non-pecuniary loss - fair and reasonable compensation; includes pain and suffering, loss of life expectancy, loss of amenities of life.
\end{enumerate}
\item Because of the differences in damage assessment between personal and fatal injuries this paper will focus on the former, although it is equally applicable to fatal injuries with slight modification in damage assessment.
\end{itemize}
The history of structured settlements dates back to the early 1950's when they were first employed in Sweden, France, West Germany, Australia and New Zealand. Only Sweden has evolved to a mandatory structured judgment system of compensation.\(^{14}\)

Structures were next seen in the United States, where in 1958 a jury imposed a structured judgment.\(^{15}\) Since that time structures have been used extensively in voluntary settlements and some states have passed legislation enabling courts to impose structured judgments, although this experience has not been altogether successful.\(^{16}\) The ever growing size of damage awards in the United States provides a catalyst for the use of structures because they represent a significant savings to the insurance companies.\(^{17}\) Some of the more notable American cases which employed structures in their settlements were the thalidomide cases of the 1960's and the Ford Pinto cases of the 1970's.

The thalidomide cases of the late 1960's are generally recognized as the central catalyst introducing structured settlements into North America. In 1968 structured settlements arrived in Canada when eight sets of Ontario parents brought friendly actions to the Supreme Court of Ontario for approval of structures negotiated in the United States in conjunction with thalidomide claims in that country.\(^{18}\) By 1983 structured settlements were being employed in a significant percentage of the large personal injury claims\(^{19}\) and in notable cases such as the fatal injuries claims resulting from the Ocean Ranger disaster.\(^{20}\)

The growth of structured settlements in Canada can be attributed to the increasing number of million dollar awards for personal and fatal injuries. Prior to 1980, such awards were rare, but the “Trilogy” combined with growing future care costs and tax gross-ups have made for a significant increase.\(^{21}\) Further impetus has been derived from the “Insurance Crisis” of the 1980’s, the availability and affordability of

\(^{14}\) Upeneiks, supra note 5, at 395.
\(^{15}\) M & P Stores v. Taylor, 326 P. 2nd 804 (Okl SC).
\(^{16}\) As many as fifteen states within the United States have adopted the Model Periodic Payment of Judgment Act. See Weir, supra note 7, at 36.
\(^{18}\) Weir, supra note 7, at 9-11.
\(^{20}\) “All Could Benefit from Insurance Plans”, Halifax Chronicle Herald, Jan 11/84. $7.1 million dollars was paid out by casualty insurers to fund structured settlements with a potential payout of $23 million dollars to the dependants of victims of the Ocean Ranger disaster.
\(^{21}\) Note that the casualty insurance industry believes that claims for personal and fatal injuries are lower in this region than they are in others such as Ontario, where the average income is higher resulting in a higher claim for lost future earning capacity. Industry writings indicate that the average size of claim is increasing and can mainly be attributed to rising future care costs.
insurance is being threatened by the rising size of damage awards, coupled with depressed investment income in the insurance industry.

In 1980 the Ontario Commission on Tort Compensation (the Holland Commission) acknowledged certain benefits of structures and recommended that the Ontario Courts of Justice Act be amended to allow judges to award structured judgment where both parties consented. This amendment was not passed until 1984 and has yet to be judicially considered. The failure of structured judgments on consent can be attributed to two factors; first, if parties were prepared to consent to a structure they would be inclined to do so prior to incurring the expenses of litigation. Secondly, the availability of tax gross-ups encourage the plaintiff to take the risk that the court will overcompensate them by virtue of a generous tax adjustment. In jurisdictions where tax adjustments are not recognized the plaintiff would be more inclined to structure while the defendants would be discouraged by the absence of the tax gross-ups and resulting loss of relative savings. Further, in a structured settlement the defendant would want to compensate the plaintiff with after tax dollars for lost future income capacity because the plaintiff would not be liable to tax under a structure while a court applying the rule in Jennings might use pre-tax dollars in the calculation of this head of damage.

The year 1986 saw the Ontario Task Force on Insurance (the Slater Report) recognize the benefits of structures and while not endorsing structured judgments, it did recommend a future review of both structured judgments and income tax reform. The Ontario Branch of the Canadian Bar Association filed with the task force a proposal for structured judgments, thereby indicating support of the concept within the practising bar.

An Inquiry into Motor Vehicle Accident Compensation in Ontario (the Osborne Commission) was held in 1987. It too considered mandatory structured judgments, in particular a rather extensive proposal

23. S.O. 1984, c.11, s.129.
25. R v. Jennings, [1966] S.C.R. 532, later affirmed by the S.C.C. in the trilogy. The case held that lost future earning capacity was a capital asset and should be assessed on pre-tax dollars, with the intention that the anticipated tax liability on the anticipated interest income from the lump sum will roughly equate with the difference between pre-tax and after-tax dollars.
was prepared by a company specialized in structured settlements. Further analysis of periodic payment was undertaken by the Law Reform Commission of Manitoba in 1987.28

IV. Structured Settlements — how they work

Structures are intended to avoid the pitfalls of lump sum damages, particularly the mortality, investment, dissipation and miscalculation risks in addition to avoiding the additional expense of financial management and tax gross-ups. Obviously if structures are able to achieve these objectives they are an improvement on our current tort compensation system and should be investigated for further exploitation of their benefits. An analysis of structured settlements, how they work and their effectiveness is the basis for evaluating the desirability of structured judgments.

To recap, structured settlements are voluntary agreements whereby the defendant satisfies all or part of a damage claim for personal or fatal injuries in the form of periodic payments to the plaintiff.29 A settlement has been defined as a business bargain in which the plaintiff sells his claim to a private buyer for the best price he can get and the buyer negotiates for as little as he has to pay. The amount of the settlement will be affected not only by legal principles, but by factors such as the uncertainty of litigation and the extent of the plaintiff's needs.30 Because structures are settlements, they generally occur prior to trial, but after litigation has commenced. Many lawyers find that settlement discussions arise so late in the proceedings that there is no time to prepare or assess a structure alternative. In such cases the trial date could be deferred or the trial could proceed as scheduled with the parties negotiating a structured settlement after a judgment has been rendered for a lump sum. There is nothing in the various civil procedure rules to preclude this alternative. Such a tactic could improve the bargaining position for a structure, especially if there is a collection risk due to the award exceeding the liability limit covered by the casualty insurer or the absence of insurance coverage. Further the judgment would serve as a useful guideline in determining the value of the claim.

Judicial recognition of structured settlements has been limited. By nature, settlement occurs outside the jurisdiction of the courts. However,

29. Note that the defendant is usually not the actual tortfeasor but the tortfeasor's casualty insurer who will accept liability to the extent of the agreed policy limits after which point the defendant tortfeasor's personal assets are subject to recovery.
there are two roles the courts can play in regard to structured settlements. First is in the pre-trial conference, many judges take the opportunity of a pre-trial conference to encourage parties to settle where there is no substantial question of liability. If the case at hand is appropriate for a structure the court could prevent the time and expense of litigation by suggesting the possibility of a structured settlement. The second role for the court is to approve a settlement concerning infants or incompetents. Courts have been receptive to such settlements.

The lump sum and periodic payments of the structure are the subject of an agreement between the parties and cater to the plaintiff's needs as nearly as possible. In effect a structure is a financial package which represents a budget for life for the plaintiff. Tailoring of the structure is achieved by including in the agreement any combination of a number of options. Terms and options of the structure are limited only by the imagination of the parties and the funding available. The following list is representative of options currently employed:

- **Up-front lump sum** — This is used for the out of pocket expenses to date, past lost wages, any necessary remodelling of the plaintiff's living accommodations, special transportation needs, special equipment, lawyer's fees, etc.
- **Rehabilitation payments** — For any special rehabilitation requirements.
- **Medical payments** — Cover all future care costs.
- **Income payments** — Substitute for lost future earning capacity.
- **Education Payments** — Cover any special or post secondary education expenses for the plaintiff or plaintiff's dependants as agreed.
- **Balloon payments** — These are pre-arranged future lump sum payments either for specified capital expenditures such as a new wheelchair or they can be left to the plaintiff's discretion.
- **Reserve fund** — This is a single sum payment which will be compounded until such time as it is required to restructure the income payment, pay for extraordinary medical or other expenses ie: death benefits.

31. *Taylor v. Bottle et al*, [1982] C.C.H. 88-587 (Ont. Dist. Ct.). The court acknowledged a lack of jurisdiction to award a structured judgment but prior to making an order advised the parties that a structured settlement was appropriate and encouraged them to consider the option. Subsequently a consent judgment was ordered for a structured settlement.

32. Civil procedure rules require that settlements for infants and incompetents be approved by the court. The process is little more than a rubber stamping in most jurisdictions because counsel are expected to have acted with all due diligence on behalf of the infant or incompetent. For a thorough analysis of the evidentiary requirements of a court when reviewing a proposed structured settlement see *Fusch v. Brears et al*, [1986] 3 W.W.R. 409 (Sask.Q.B.).
h) Indexing — This is used to counter inflation and can be fixed or tied to a variable factor such as cost of living or the inflation rate.

i) Reversionary Interest — The annuity can be arranged such that after the plaintiff's death and the minimum guaranteed payout, the defendant casualty insurer receives the balance between the principle paid and any amounts paid out.\textsuperscript{33}

These options, like options on a new car, all increase the cost of the package. As such they are a matter of negotiation between the parties.

Structures are funded by one of three possible financial vehicles, trust fund, self funded or annuity.\textsuperscript{34} In practice, annuities are the only acceptable vehicle because neither the trust fund nor self funded methods satisfy the requirements of Revenue Canada; thus, do not offer the same tax saving advantages.\textsuperscript{35} Further, plaintiff counsel would not be willing to accept a self funded structure because the casualty insurer does not enjoy the same financial integrity of a life insurance company regulated under the Canadian and British Life Insurance Company Act.\textsuperscript{36}

The negotiation of structured settlements requires a certain familiarity with structures and what they are capable of. The primary rule is never agree to a structure without knowing it's principle value because the awesome nature of the figures associated with structures and the diversity of alternative structures makes relative assessment difficult. The principle value offers the only consistent guideline for evaluation between structure alternatives and between structures versus lump sum. Many defence bar resist disclosing this information, but a telephone call to another structured specialist with the details of the proposal will generate an approximate principle value. Needs analysis and structure design are the major components of negotiation, both are critical to achieving a workable and desirable structure.\textsuperscript{37}

The complexity of structures is evident and as in most complex areas of our society, specialists have arisen. Most if not all structures are arranged through and implemented by structured specialists. There are

\textsuperscript{33} This list represents a composite of information gained from various articles and industry material. For an additional reference of options see Leon Lewis, "Tailoring the Structure", Law Society of Upper Canada Continuing Education Material, April 23, 1983.

\textsuperscript{34} For a full explanation of financing options see Weir, supra note 7, at 36-47.

\textsuperscript{35} These requirements are set out in Interpretation Bulletin IT-365R2 and will be discussed later in this paper.

\textsuperscript{36} R.S.C. 1970, c.I-15, s.64(2). Note that no Canadian life insurance company has failed since Confederation, this is in sharp contrast to the United States where there is valid concern for the financial integrity of life and casualty insurance companies and a corresponding concern for the potential default on annuities. See Holland, supra note 19, at 191.

\textsuperscript{37} A complete review of negotiating principles is beyond the scope of this paper, for a comprehensive reference see Weir, supra note 7 and various information distributed by the structure specialists.
three prominent firms in Canada which offer structure services to plaintiff and defendant bar without charge.\textsuperscript{38} These firms act as brokers, earning a commission from the annuities they purchase for the structure. All life insurance companies offer competitive commissions to minimize any conflict of interest for the specialist between his commission and the better interest of the parties. The structure specialist is a non-adversarial role and relies on complete disclosure of the parties to develop appropriate alternative structure proposals.

The structured settlement market is extremely competitive, not only in the pricing of annuities, but in the services specialists provide. The creative initiative which developed structures, continues to develop new and different structure designs to add to the advantages already present. Specialists are also improving their service through the use of computers, for example McKellar’s recently introduced a new “Catastrophic Loss Spread Sheet” which greatly simplifies the analysis of proposed structures for complex personal injuries cases. Further development is evidenced by the use of life insurance for the primary caretaker of the plaintiff. In many cases care is provided by family members at no or greatly reduced expense. A structure can provide an annuity which will pay life insurance premiums on the life of the primary caretaker. If they should predecease the plaintiff then the payout will be used to fund another annuity for the additional cost of a replacement caretaker. This arrangement avoids over compensation in the years when care costs are low, while ensuring that the higher financial burden can be met when and if it materializes.

Specialists support a broad variety of educational undertakings concerning structures. They frequently host in-house seminars for law and insurance firms and associations. They actively participate in commissions and task forces where structures are discussed, putting forward information and proposals for reform. In general the specialists take a very pro-active role in the development and marketing of structures.\textsuperscript{39}

It is important to remember that structures are merely an alternative to lump sum damages, not a replacement. Structures are not appropriate in every case situation, their application is fact specific. Some general guidelines have emerged for situations that would be most benefited by structures:

a) Awards exceeding $50,000 — It is difficult to justify the additional administrative cost of a structure relative to the savings which

\textsuperscript{38} Baxter, Henderson and McKellar are the three structure specialist firms in Canada.
\textsuperscript{39} For examples of specialist involvement in education and reform see the 1987 Osborne Commission and the Insurance Institute of Ontario Structured Settlement Seminar 1988.
could be achieved from an award smaller than $50,000. Situations concerning children are generally excepted from this rule because such cases would involve minor injuries and deferred payment of even a small amount can result in a substantial amount in ten to twenty years time. Amounts as small as $10,000 to $20,000 have been structured for children. A second exception are plaintiffs who are currently in a high tax bracket or would be pushed into a higher tax bracket by the interest from the lump sum thereby incurring significant tax loss.

b) Infants — Cases involving infants are nearly always appropriate. Because of the longer life expectancy period the resulting increase in calculation risks of such damages could be minimized by a structure. The caution here is inflation and some appropriate protection from the payments becoming worthless over the extended period anticipated. While the tax savings aren’t initially as good for children as they are for adults, structures can extend exemption from tax lability beyond age twenty-one. Despite attempts to bring the interest rate provided by the Official Guardian’s Office into line with commercial rates a structure probably offers as good a return if not better.

c) Serious bodily injury — The more serious the injury the greater the future care costs and subsequently the greater benefit structures have to offer either by avoiding the tax gross-up, or where gross-ups are not allowed, by lessening the under compensation of the plaintiff due to income tax liability.

d) Financial management — In cases where the plaintiff is intellectually impaired or an infant they are precluded from exercising good financial discretion and outside management is required. Outside financial expertise is also prudent where the award is of such a size that the average person could not be expected to have the ability to manage it efficiently. Structures have the advantage that they are self managing, avoiding any management cost and guarantee payment and protection from premature dissipation due to poor management or investment.

e) Reduced life expectancy — Sub-standard mortality rates are only available on investments attached to life expectancy such as annuities and they provide a higher rate of return than traditional investment vehicles.

f) Tax gross-ups — This additional expense can be avoided by the use of a structure.

g) Fatal injury claims — These claims are intended to compensate the surviving dependants for their loss of support. This loss is assessed on after tax dollars and is subsequently subject to tax gross-up where available. This expense can be avoided by the use of a structure and the periodic payments will more closely replace the lost support. Further, children do not receive the same special tax exemption for interest
income on fatal injury damages that they do on personal injury damages. This will be discussed under the tax advantages of structures later in this paper.

h) Significant lost future earnings — The *Jennings* case established that future lost earnings were to be calculated on a pre-tax basis and not subject to gross-up.\(^{40}\) The view was that any overpayment of lost earnings created by not deducting the income tax that the plaintiff would have been liable for, would approximately equal the anticipated tax liability for the interest income earned on the lump sum damages. There is a strong argument that this rule would not apply to structures because the plaintiff will receive all payments tax free and to calculate the damages on the basis of pre-tax versus post tax dollars would be to overcompensate the plaintiff, therefore a structure should be able to save the difference of the tax. Any argument that future lost earning capacity is not appropriate for periodic payment is rejected. Although Jennings held that future earning capacity is a capital asset, there is no ready market where such an asset can be liquidated. Further, periodic payment more closely simulates the loss than does a lump sum.

i) Excess limits claims — There are claims where the damages exceed the liability limit contracted between the defendant casualty insurer and the defendant tortfeasor thus leaving the tortfeasor’s personal assets at risk. These cases pose collection expenses and bad debt risk, it is often possible for the claim to fit within the liability limits if it is structured. The structure alternative protects the plaintiff from the expense of collecting against the defendant tortfeasor’s personal assets, if indeed there are any or enough assets and precludes a bad faith suit by the defendant tortfeasor against the defendant casualty insurer.\(^{41}\)

j) Dependants — Structures offer security for both plaintiff and their dependants. They can be especially useful in funding post secondary education of dependants.

k) Deferred Future Loss — Where loss will not accrue for some time the damages can be correspondingly deferred until it is anticipated that they will be required. For example, a plaintiff may be able to continue employment for a period of time prior to their injuries deteriorating their ability to do so.

\(^{40}\) *Supra*, note 25.

\(^{41}\) *Pelky v. Hudson Bay Ins. Co.*, [1982] I.L.R. 1-1493 (Ont. H.C.). A bad faith suit by a defendant tortfeasor against his casualty insurer, alleging a failure to reasonably settle within the policy limits. The court considered the insurer’s duty and while they failed to establish any guidelines the case clearly indicates that it would be unreasonable to discard any offer to settle without due consideration.
1) Multiple Parties — Structures can make the best of a situation where there are limited funds to compensate multiple plaintiffs. Similarly, it is useful where there are multiple defendants.

Structures are generally not recommended where there is substantial consumer debt that could not be satisfied by a lump sum component within the structure, for example a house mortgage. These liabilities carry a higher interest liability than an annuity could generate.

The savings made possible through structures varies dramatically according to the award. They have been reported to be as high as fifty percent, but average between ten to forty percent.  

V. Advantages of Structures

Structures offer distinct advantages overcoming many of the pitfalls of lump sum awards.

a) Income Tax Advantages — Relief from the tax gross-up is the most commonly touted advantage because it realizes the greatest financial saving of structures over lump sum. Revenue Canada has traditionally treated damages received for personal or fatal injuries as free from tax liability, but any resulting interest income as liable to taxation. With the introduction of structures, Revenue Canada took the position that the method of payment, periodic or lump sum, was irrelevant to the characterization of the income; thus, periodically paid damages for personal injuries enjoy the same preferred tax treatment as lump sum damages. This policy is not directly expressed in the Income Tax Act, but in Interpretation Bulletin IT-365R2. The following are requirements established in the bulletin:

s. 1(a) limits the special provisions to damages for personal and fatal injuries.

s. 2 clarifies that amounts for special or general damages are exempt from tax liability even if they are calculated with reference to lost income.

s. 3 clarifies that structures funded by an annuity to make periodic damage payments to the plaintiff are not considered to be annuity contracts for purposes of subsections 12.2(3) and 56 (1) and that the payments themselves are not considered to be annuity payments.


44. This bulletin was issued May 8, 1987, replacing IT-365R and Special Release IT-365R May 25, 1984. The latest bulletin did not alter but reaffirmed and clarified Revenue Canada’s earlier position.
However an annuity purchased by a plaintiff with funds received for personal or fatal injuries is liable to taxation.

s. 4 stipulates that no portion of the damages will be liable to tax even if calculated with reference to interest. However where an amount for damages is held on deposit or in trust all such interest income is taxable. Note, this precludes structures funded by trust funds from enjoying the same status as those funded by annuities.

s. 5 defines structured settlements for Revenue Canada’s purposes and lists the criteria that structures must meet:

(a) there must be a claim for damages in respect of personal or fatal injuries.

(b) the claimant and the defendant insurer must have an agreement whereby damages will be paid on a periodic basis.

(c) the defendant insurer must:

(i) purchase a single premium non-assignable, non-commutable and non-transferable annuity which produces payments as agreed between the defendant insurer and the plaintiff.

(ii) make an irrevocable order to pay the plaintiff. Note this protects the plaintiff should the defendant insurer default because creditors would not be able to seize the annuity as an asset of the insurer.

(iii) retain a contingent liability for the payments in case the annuity should default.

Advanced tax rulings are individually binding decisions by the tax department on a particular tax matter. In the early days of structures such rulings were sought as a matter of course, now with IT-365R2 and the prevalence of structures it is not necessary except in cases where compliance is questionable or there is a substantial deferment period prior to payments commencing. The process is relatively inexpensive and expedient. Often, when required, structured specialists will make the application as part of their service.

Revenue Canada’s requirements clearly make the defendant casualty insurer owner and annuitant with the plaintiff as a third party beneficiary. Subsequently, it is the defendant casualty insurer who must report the annuity payments as taxable income, but will not be liable for tax because of offsetting claims and payout expenses.

The implications of the tax treatment is that the interest income generated by the annuity will never be subject to tax. The defendant avoids costly tax gross-ups; the plaintiff avoids under compensation due to tax liability and Revenue Canada underwrites the dollar savings.

While Revenue Canada is forgoing potential taxable income, their position with respect to the non-taxable nature of payments to the
plaintiff under structures is not inconsistent with their traditional policy. Further the social benefits derived from structures represent a potential savings for government, it is argued that the relative loss is minute, if at all existent, because the annuity market creates jobs as well as taxable corporate and personal incomes.45

There has been a lobby in Canada to remove tax liability from interest income on damages payments. To date this scheme has been resisted because it is a marked shift from Revenue Canada's traditional position and now that structures are available to achieve the same end without tax reform the necessity has decreased. It is not clear how administratively feasible such a scheme would be because plaintiffs would have to distinguish the damage principle and interest income from their personal savings and interest income. Politically such a policy would not likely meet with much support because of our current period of fiscal restraint and the fact that on the face of it the insurance industry and not the plaintiff would stand to gain the greatest benefit.

The greatest tax advantages are gained for either very large awards where the tax liability would be significant or for the plaintiffs whose marginal tax bracket would be increased by the interest income generated by the lump sum damages. The benefit for children is not initially as great as it is for adults because paragraph 81(1) (g.1) of the Income Tax Act exempts children up to age 21 years from tax liability for interest income earned on damages for personal injuries. This exemption applies only to children, and only for personal injuries, not for fatal injury damages.46

b) Flexibility — Flexibility is the second most significant benefit of structures, their continuous and flexible nature is more congruent with the plaintiff's needs and the principles of tort compensation.

The flexibility inherent in designing structures was outlined earlier and is a distinct advantage over lump sum damages. However, that flexibility ends when the annuity is purchased and the finality doctrine takes hold. The finality doctrine is of greater significance to structures because unlike lump sum awards where the plaintiff maintains his power of discretion over the damages, under a structure the plaintiff's discretion is sharply limited to the extent of the payments due. There is no right under a structure to claim or control future payments. But how significant is this loss of control? If the damages prove inadequate there is only a short term advantage to full discretion over the fund, at least a structure guarantees that payments will be ongoing. Further, reserve funds described earlier in

this paper are not available for lump sum awards. This fund could be used to cover extraordinary expenses or to restructure an inadequate award. Reserve funds are like a modified review option because they provide an opportunity to review the award and if a review is unnecessary the principle can be reverted to the defendant, avoiding overpayment to the plaintiff and unnecessary expense to the defendant.

c) Guaranteed Payment — Payments are guaranteed under a structure, there is no investment worry, risk or expense. Since annuities are self managing and the payments are tailored to expenses minimizing any build up of capital in the plaintiff's hands, the need for a financial management gross-up is eliminated. The peace of mind associated with freedom from risk and administrative demands should not be underestimated.

d) Periodic Payment — The nature of periodic payments achieves two benefits. First, payments can be matched to anticipated expenses which are usually due on a monthly basis. Investment income is not usually paid out on a monthly basis and where such arrangements can be made there is generally a loss in the rate of return. Thus structured versus lump sum damages are more congruent with the plaintiff's spending requirements.

The second benefit is the discouragement of dissipation. As stated earlier, a pitfall of lump sum damages is that they can be prematurely dissipated due to poor investment or spending resulting in the plaintiff becoming a burden on family and or the state. This possibility is sharply curtailed by the employment of periodic payments because the plaintiff is not in the position to invest or spend any of the award that has not yet become due to him. However, as further insurance against early dissipation the plaintiff's payments cannot be attached or assigned, in practice the plaintiff would likely be able to secure an advance from lending institutions on the basis of guaranteed fixed future income.

e) Shifting Mortality Risk — Shifting of the mortality risk is a significant advantage to both the plaintiff and defendant because the life insurance company selling the annuity is not concerned with individual mortality but aggregate mortality of a like group. Life Insurance companies are in the business of guaranteeing mortality risks and via the life annuities, they, not the defendant or plaintiff bear the mortality risk. This shift means that the damages are calculated on the basis of averages and aggregate mortality tables without any concern for unexpected extended life span. The plaintiff's benefit is guaranteed payments for life, if that is the agreement, while the defendant benefits because their payout is lower than it may otherwise have been because the payments for life removes any contingency payment for unanticipated life extension.
f) Sub-Standard Mortality Rates — Discounted for sub-standard mortality rates can be used by life insurance companies when issuing annuities. Essentially the plaintiff is assigned a discounted life expectancy and treated as older than he is for purposes of calculating the rate of return on the principle invested. This results in higher payments for the same principle because the payout period is expected to be shorter. This consideration is not available for other financial investment vehicles and while a plaintiff could achieve it by purchasing his own annuity, the payments would be subject to taxation.

g) Benefits to Society — Society clearly stands to gain from the increased economic efficiency of structures. In this period of insurance crisis any savings to the insurance industry should have a stabilizing effect on availability and affordability of insurance. It is argued that this stability coupled with increased use of annuities increases economic activity, employment and taxable personal and corporate income. A decreased probability of premature dissipation and increased responsiveness of awards is of value to society because it should result in a decreased burden on state social programs. The only expense of structures to society is the questionable loss of revenue.

VI. Disadvantages of Structures

The benefits of structures must be achieved at the expense of certain disadvantages to the plaintiff and defendant.

a) Loss of Discretion Over the Damages — From the plaintiff’s perspective the cost is freedom of control and discretion over the damages. This is a concern when the agreed payments prove to be inadequate or a plaintiff’s priorities or needs change. For example, should the plaintiff decide he would like to buy a house, in a structured settlement such an expenditure would have to be anticipated; while with a lump sum the plaintiff is able to exercise his own discretion and change priorities and payments at will, but at a greater risk.

Discussions with practising lawyers indicate that some plaintiffs feel the need to control the damages out of a sense of distrust of the defendant or finality of the dispute. Some plaintiffs initially have to overcome an impression of social assistance or welfare. These are perception problems because the plaintiff often does not understand that the defendant is required to pay the full principle at the time of settlement, that the payments are guaranteed and the substantial tax and financial management benefits that periodic payments offer them.

b) Administrative Costs and Contingent Liability — The defendant casualty insurer, while saving money in the end by avoiding management fee and tax gross-ups and taking advantage of sub-standard mortality
rates and reversionary interests where applicable, does incur some disadvantages, in particular, administrative expense and a contingent liability for the life of the structure. Insurers are concerned with finality of a case because the ongoing claims represent not only an unidentified liability, but administrative costs. Structures do not offend the crystallization and finality of the primary liability, but they do require ongoing administrative attention and the contingent liability must remain on the books for the remaining life of the annuity. The contingent liability has the effect of devaluing the insurers assets because while the liability is not likely to crystalize, the liability, not the probability, appears on their financial statements. This could be of importance for smaller insurers who are concerned with their financial image.

c) Trap for the Unwary — The complexity of structures and the awesome nature of the figures associated with them make them a trap for the unwary. This in and of itself is not a reason to avoid structures, rather an opportunity to learn more about them.

Also to be considered in assessing the overall value of structures are those pitfalls of the current lump sum compensation system which structures are unable to avoid. In particular the inherent uncertainty of assessing future care costs, lost earning capacity, inflation, and the absence of reviewable damages.

a) Future Care Costs — These costs are currently increasing at a rate greater than overall inflation, this creates a current valuation problem. Further, the future care needs of plaintiffs cannot be ascertained with any degree of certainty because every case is different. Short of reviewable damages there is no way to avoid the inherent uncertainty of speculating future care needs and costs.

b) Lost Earning Capacity — Lost earning capacity can never accurately be assessed because of all the potential intervening factors such as unemployment, economic depression, rehabilitation, etc. The uncertainties are even more acute when the plaintiff is a child because there is no way to accurately forecast what their career path would have been. The nature of uncertainty in this head of damage is "what could have been", thus not even reviewable damages, which allow the parties to reassess the damages in the future, could completely alleviate the vagary of this head of damage.

c) Inflation — Inflation is a serious consideration for structures because it has the capacity to completely undermine the adequacy of periodic payments. Some authors assert that the fixed payment aspect of structures increases the risk of inflation for the plaintiff because they are not able to take advantage of market changes and are locked into a fixed rate of return and inflation protection, be it indexing, reserve funds or
Structured Settlements and Structured Judgements

balloon payments. Currently lump sums provide for inflation via present value discount rates which are a rough means of determining the current value of future dollars.\textsuperscript{47} This method is not applicable to structures, nor is it viewed as a reliable indicator of inflation. It is true that prudent investment of the lump sum coupled with good fortune may provide a better hedge on inflation, but the risks of imprudent investment and bad fortune should not be underestimated. Safer investments tend to be debt based with a low return and a greater vulnerability to inflation. In addition, structures have the advantage of being non-taxable therefore less vulnerable to devaluation in times of rising inflation.\textsuperscript{48}

Of the alternate inflation fighting methods employed by structures, linked indexing appears to be the best. The disadvantages of lump sum compensation for inflation is that their resulting interest income attracts tax liability and tends to create a catch up situation which defeats the purpose of structures. Indexing represents the most effective and ideologically congruent alternative because the purpose of indexing is to keep the periodic payments in synchrony with the current economic demand. There are two methods of indexing, fixed, which is indexed at a particular percentage or dollar amount per year or linked, where the index is linked to a variable economic indicator such as the Consumer Price Index (CPI), Gross National Expenditure (GNE), the Treasury Bill Rate or any combination thereof.\textsuperscript{49} The problem with these economic indicators is that they are historical in nature and not designed as forecasting tools, but they are variable and are to some degree representative of economic change, unlike fixed indexing which remains constant despite future developments. The hazard of fixed indexing is clearly illustrated by the thalidomide cases of the 1960's which were, based on expert forecasts, indexed at two percent.\textsuperscript{50} Therefore, with it's variable nature, linked indexing offers the best hedge against inflation short of reviewable awards. The difficulty arises in relation to the uncertainty inherent in linked indexing which makes it substantially more expensive than fixed indexing and correspondingly less attractive. Weir in his 1984 publication on structured settlements estimates eighty percent of structures employed fixed indexing.\textsuperscript{51} There is no indication of where this figure stands today, but an alternative chosen by many plaintiffs today is a fixed index plus a periodic lump sum supplement.

\textsuperscript{47} These rates are generally set in the various provincial civil procedure rules, for example Nova Scotia Civil Procedure Rule 31.10(2).
\textsuperscript{48} Feldthusen, supra note 26, at 22.
\textsuperscript{49} Weir supra note 7, at 69-72.
\textsuperscript{50} Ibid., at 10.
\textsuperscript{51} Ibid., at 72.
d) Reviewable Damages — Although structures are not currently reviewable the use of reserve funds creates a quasi review option. Balloon payments could be used for the same purpose, but they would be paid directly to the plaintiff thus the interest would be liable to tax whereas reserve funds are used to finance an additional annuity held by the defendant and payable to the plaintiff.

Structures would however facilitate a review process easier than would the lump sum system, because the payouts under a structure are not intended for future but current compensation, thus the review would only have to determine if the periodic payments are adequate to meet the current and future needs. There would be no necessity to consider the amount previously paid and if it were properly dissipated, as would be required in any review of lump sum damages.

In the final analysis of advantages and disadvantages of structures versus lump sum damages, it is clear that structures have eliminated some, but not all the uncertainty of damage assessment. Structures provide a net benefit and manageable disadvantages to all parties.

VII. Structured Judgments

It is evident that structured settlements have come to play an important role in our personal and fatal injuries compensation system. The questions, facing us now are: should this role be extended?, should courts be imposing structured judgments?, do they have the necessary authority?, and what advantages and disadvantages could we anticipate?

a) Do we want structured judgments? — There are primarily two arguments against structured judgments.

i) Too Paternalistic — It is asserted that it would be unnecessarily paternalistic of the courts to impose a form of damages that the plaintiff did not want. Structured judgments do not deny the plaintiff's right to damages merely the method in which they are paid. A court might be inclined to order a structure for any of a variety of reasons; fear of premature dissipation due to poor financial management or spending, the uncertainty of tax gross-up or the increased economic efficiency of structures and the resulting benefits for society.

The first of the reasons places the court in the position of big-brother looking out for those it believes cannot take care of themselves. The plaintiff may or may not be financially sophisticated, but that is not for the court to determine because it is not an issue at trial. Some might argue that the gross-up for management fees puts the plaintiff's financial sophistication into issue, but this is not necessarily the case, the sheer size of the award or age of the plaintiff could make
outside financial management a necessary and prudent requirement. Justice Spence stated in *Arnold v. Teno* that:

Even if the plaintiff were an adult and not disabled, she would need professional assistance in the management of such a large sum of money as is being awarded in this case.\textsuperscript{52}

Thus on a purely individualistic level it is paternalistic of the court to impose structured judgments for the mere purpose of avoiding premature dissipation, but there are saving factors. The courts other reasons could relate to the benefits to be derived by society. Premature dissipation of damages translates into a burden on social programs and tax dollars, structures can decrease the probability of such reliance and tailor the damages more closely to the plaintiff's actual needs. This coupled with the other benefits to society as discussed under structured settlements establishes a strong public policy argument in favour of structured judgments.

(ii) Restriction of the Plaintiff's Rights — Social benefits cannot in and of themselves justify structured judgments. There must be no adverse affect on the plaintiff such that he would be prevented from achieving the purpose for which the damages were intended, that of placing him in as similar a position as possible to that he would have been in but for the injury. The only disadvantage to the plaintiff resulting from structured judgment over lump sum damages is the loss of freedom of discretion over the total damage award, but if properly designed the structured judgment does not preclude the plaintiff from being adequately compensated, if anything it ensures that he will be.

Currently the courts go to great lengths to ensure that the plaintiff's needs are adequately compensated and the defendant is liable for significant management and tax gross-ups above and beyond the actual damages, yet the plaintiff is under no obligation to use the damages for the purposes for which they were intended, he has full discretion to spend the funds in any manner he sees fit. While a structure does not guarantee that the funds will be used for their intended purpose it sharply decreases the plaintiff’s access to funds and resulting investment and spending ability. An argument against this restriction of discretion is that it is discriminatory, that other windfall recipients such as lottery winners and testamentary beneficiaries are not limited in control over their windfall. The major difference is that such windfalls were not given with a prescribed purpose, unless of course it was a conditional testamentary gift in which case the courts generally hold the condition to be valid. Further the recipients of such

\textsuperscript{52} *Arnold, supra* note 11, at 328.
windfalls have not lost their future income earning capacity as have many plaintiffs in personal injury cases.

b) Do courts have the authority to impose structured judgments? — In terms of requisite jurisdiction courts generally reject any notion that they have the authority to grant damages in any form other than lump sum. A case which is cited as authority for this position is *Fetter v. Beale*[^53^], which held that after recovery for an injurious act, no action can be maintained on account of any consequences occasioned by that act. Essentially the case affirms the doctrines of finality and *res judicata*, which provides that damages are for once and for all and precludes litigation of the same matter twice. There is nothing in the case which states that damages must be paid in a lump sum or precludes the use of periodic payments. Structures do not offend the finality doctrine because they are final at the time the structure is purchased and neither party can alter the terms. The contingent liability held by the casualty insurer is a contractual term between the insurer and the life insurance company selling the annuity.

*Andrews* is another case cited to support the argument that courts lack the inherent jurisdiction to award structured judgments. A statement from that case quoted earlier in this paper was a plea by Justice Dickson, as he was then, for legislative intervention authorizing periodic awards. This statement implies that Justice Dickson believed the Supreme Court of Canada to be without the inherent jurisdiction to impose damages in the form of periodic payments. The Supreme Court is free to backtrack from this inference especially since the comment was made prior to the *Charter of Rights and Freedoms* and the court's new pro-active role in creating and interpreting law. The *Charter* should offer valid arguments for the rights of plaintiffs and defendants and reasonable limits to such rights under s. 1.

Therefore, adherence to lump sum damages is merely a common law tradition and as such can be ignored except where statutorily expressed as in the Ontario Courts of Justice Act s. 129. This provision allows courts in Ontario to award structured judgment where both parties consent, thereby implying that structured judgments are not otherwise authorized. Other provinces are not restricted by such statutory inferences.

Despite this conclusion courts are likely to uphold the traditional approach and resist the pro-active approach taken by the Manitoba Court of Appeal in *Watkins*[^54^], where the court assumed an inherent jurisdiction to award structured judgments. The most direct and certain

[^53^]: (1702), 91 E.R. 1122.
method to establish judicial jurisdiction for structured judgments would be via legislative reform. This would erase any doubt and put pressure on the courts to consider more closely the alternative of structured judgments and the adequacy of tort compensation for personal injuries. Legislation would also ensure that a coherent structured judgment scheme was uniformly available and applied.

c) What advantages and disadvantages could we anticipate?

(i) There is no reason to believe that any of the benefits of structured settlements would be lost because Revenue Canada does not make a distinction between damage awards versus settlements and the other benefits would not be altered by a change in the manner in which the structure was achieved.

(ii) The real issue is what the concerns of structured judgments will be outside the loss of discretion for the plaintiff. Administration costs and procedures and how our Legal system would deal with structured judgments would be the greatest concern.

There are two possible procedures for imposing structured judgments. First the court could hear evidence and determine in detail the structure to be imposed. Second, the court could determine the principle for which the defendant will be liable and let the plaintiff design the structure most appropriate to his needs. The burgeoning workload and responsibilities of our judicial system demand as efficient a process as possible, thus the evidentiary burdens of a court determined structure would be unreasonable. Rather, since the plaintiff is in the best position to know his needs, he, not the court could most efficiently design an appropriate structure. The risk is that the plaintiff would allocate the payouts in a manner which would defeat the purpose of a structure. This could be overcome through the requirement of a court approval for the proposed structure. The courts could employ the same review procedure established in Fucsh\textsuperscript{55} for the approval of structures for infants and incompetents.

In determining the appropriate principle the court would be required to go through the same calculations and assessments it would undertake to determine a lump sum award except for the calculation of the tax and management fee gross-up. Currently when lawyers are considering a structured settlement in order to determine the principle for an acceptable structure they calculate the lump sum including the tax and management fee gross-ups and discount that figure anywhere from ten to forty percent of the claim.\textsuperscript{56}

\textsuperscript{55} Fucsh, supra note 32.

\textsuperscript{56} Savings associated with structures have been reported to be as great as 50%. See Weir supra note 7, at 67, “Structured Settlements, the Claims Persons View”, For The Defence, May 1988, at 29.
Inflation would have to be considered by any proposed structured judgment scheme. Since the court does not have to worry about bargaining power, as do the parties of the dispute, the court could freely employ the more expensive option of linked indexing. The legislation enabling structured judgments could specify the appropriate linking factor or it could be left to the court to determine on evidence presented at trial. The court’s use of linked indexing would encourage parties to voluntarily consent to this more representative method of indexing over the inflexible fixed method.

All heads of damage would have to be calculated on an after tax basis to avoid overcompensating the plaintiff. This is particularly important for lost future earning capacity which under the *Jennings* rule is calculated on pre-tax dollars in order to compensate for anticipated tax loss, because there is no tax loss associated with structures this rule should not apply.57

Any recommended scheme for structured settlements must include judicial discretion. This is necessitated by virtue of the fact that structures are not appropriate in all cases. The objective of the court should be to provide *restitutio in integrum* in whatever form would be appropriate in the particular case at hand.

There are several reasons to believe that structured judgments are viable today. Both the courts and the practising bar are familiar with the concept and structures that have been employed over a long enough period that their results can be evaluated. The “insurance crisis” of the 1980’s has heightened the need for a more economically efficient compensation system. Further the needs compensation objective of damages can be more closely achieved through the use of structures, and finally the government is being lobbied for structured judgments by some very influential groups including the insurance industry and the practising bar.58

d) Canadian case law on structured judgments — A discussion of structured judgments would not be complete without a careful analysis of the case law. *Watkins v. Olafson*,59 was the first of only two reported structured settlements in Canada. In *Watkins* the Manitoba Court of Appeal imposed a structured judgment while varying damages awarded at trial for a motor vehicle accident which rendered the thirty-three year old plaintiff a quadriplegic. The appeal was not heard until nine years after the accident, during which period interim payments were made.

58. Refer to structured judgment proposals by the Ontario branch of the Canadian Bar Association to the Slater Commission and the proposal by MacKellar to the Osborne Commission.
Two facts were found by the Appeal Court to be of particular importance, first, the province of Manitoba was a defendant party in the matter, second, while the plaintiff expressed an interest to live independently he had spent a cumulative total of six of the last nine years in hospital under the free care of the provincial health plan.

The appeal was launched by the defendants against the quantum of damages awarded under all heads of damages except non-pecuniary and special damages. While allowing the appeal and varying the damages the court took an admittedly innovative approach and applied a structured settlement to the future care head of damages awarding lump sum for all other heads. By employing a structure they were able to avoid the concerns regarding the uncertainty of tax gross-up, anticipated life expectancy and inflation.

The court did not stop at the conventional structured scheme, but modified the continuous payment aspect by stipulating a condition precedent. The government of Manitoba was ordered to pay into court annually a sum sufficient to cover the maximum payments for that year, the fund was then to be controlled by a trustee who would make monthly payments to the plaintiff once it had been established that he was living independently and not under the provincial health care program. Any remaining balance in the fund was to be credited to the province.

The judgment does not mention an annuity, thus compliance with Revenue Canada requirements and subsequent tax benefits are questionable, and if they are available would they be available to a private defendant under a similar structure?

The court did not have any difficulty in awarding the structure in relation to future care only. This is of particular importance because there were substantial interim payments made to the plaintiff which the court held against the lump sum award, this would not have been possible if the structure were viewed as an all or nothing means of damage payment and could have discouraged defendants in the future from advancing interim payments.60

In effect the court imposed a reviewable award subject to collateral benefits enjoyed by the plaintiff. Currently, most collateral benefits are clearly excluded in calculating lump sum damages61 and under structured settlements they are a matter of negotiation between the parties, noting that if the matter went to trial they would not be considered. Ideologically, collateral benefits should be considered when compensation is made on a pure needs versus loss basis; however, our tort system

60. Interim payments are an important means of minimizing claim liability. See C.J. Horkins, “Tactics to Limit You Exposure”, Without Prejudice, April 1988, at 49.
even with its new needs perspective has not yet abandoned its protection of collateral benefits and is unlikely given their traditional view that the consideration of collateral benefits leads to an unwarranted windfall for the defendant and would discourage individuals from providing themselves with insurance pensions and other such collateral benefits. As such it would seem unfair and inconsistent to consider collateral benefits under structured judgments when they are not treated similarly under lump sum damages. In the very least, collateral benefits should be treated equally under both forms of compensation.

The judgment clearly states that the structure was feasible because of two conditions; the province was a defendant in the action and they also bear the financial responsibility for the provincial health care system. The motivation for the award would appear to be protection of government coffers by preventing a plaintiff from claiming future care costs from the same defendant who would in a different capacity be required to provide free health care. The problem with this is that it ignores the provincial health care program's right to subrogation for health care provided in relation to a tortious act. This sets a dangerous precedent which could be extended beyond the limits which the court intended. Clearly hospital services have no better or worse right to subrogation because one of the defendants is itself. What if the federal government were a defendant to the action, would they receive special treatment? There is little doubt that if the defendant were a private insurance company the plaintiff would not have been limited in his claim for future care costs, he would have been able to collect the full amount despite his living independently or under provincial health care.

The court states that it is their duty to keep damages to as reasonable a level as possible without under compensating the plaintiff, because they must protect the public interest and because the legislature has failed to respond to the times. This is a valid argument, but there is a counter argument that they have indeed under compensated the plaintiff by refusing him his full claim to future care damages merely by incidence of who the defendant was rather than by any other legal principle.

This decision rejects lump sum damages as unworkable in adequately compensating plaintiffs for future care costs because of the uncertainty of tax gross-ups, life expectancy, future care needs, rate of return on investments and the discount rate to be used. The court noted that lump sum awards are growing larger to compensate for the additional expenses they attract, such as management fees and tax gross-ups. Such expenses

62. The particulars of subrogation are beyond the scope of this paper, but as a matter of course provincial health plans do subrogate health care expenses in insurance and workmen's compensation cases. See *Ontario Health Insurance Plan*, infra note 64.
do not relate to the plaintiff's compensation, but if not considered in the
award the plaintiff will be under compensated and the court's efforts to
determine the appropriate award are in vain. The court saw structures as
a means of avoiding many of the pitfalls of lump sum while still being fair
to all parties. It is important to note that all three justices sitting on the
Appeal Bench agreed with the structured judgment and the form in
which it was imposed.

In terms of jurisdiction the court took the view that they had the
requisite authority because they were not barred by statute or any
principle of common law. I agree with this argument although many
writers would not. This particular issue is discussed in greater detail
earlier in this paper.

In summary Watkins is a promising case in that the court recognized
the benefits of structures and the need for courts to employ this form of
compensation. However it is a graphic illustration of the need for
legislative intervention to set in place a coherent structured judgment
scheme to avoid arbitrary application of the remedy. It should be noted
that the case has not been appealed and does not represent an
authoritative precedent for other courts.

Webber v. Crawford,63 decided in July 1988, is the second and most
recent structured judgment. In that case the defence proposed a structured
judgment to the court and on a complete canvass of the issue the court
endorsed and applied the Watkins decision. The court did not invoke the
same review option that Watkins created, rather they prescribed the
appropriate future care for the plaintiff and ordered the defendant to
purchase an annuity to provide the necessary funds on a continuous basis
until the plaintiff's death. The structure was only for the future care head
of damages with lump sums being awarded for past and future lost
earnings.

It is interesting to note that the decision was rendered in a jurisdiction
which does not allow tax gross-ups, therefore the savings factor would
not be as great as it would be for other jurisdictions, but the adequacy of
compensation would be improved. This would indicate that the savings
are not the only persuasive argument for structured judgments.

Another case to be noted is Ontario Health Insurance Plan v. United
States Fidelity and Casualty Insurance Company.64 This case did not
impose a structured judgment but dealt with the issue of subrogation by
the provincial health plan against the defendant casualty insurer. The
plaintiff in the case accepted a structure within the policy liability limits
for a claim that if settled in a lump sum would have far exceeded the

liability limit. The Ontario Health Insurance Plan wanted to subrogate against the balance of the liability limit. The court applied the rule that the right to subrogation does not arise until the plaintiff is fully compensated and held that the plaintiff had settled for less than full compensation and the right to subrogation did not arise. The importance of this decision stems from the fact that either directly or indirectly the court protected the dollar savings incentive of structured judgments. It would be difficult to entice many defendant liability insurers to agree to a structure or support structured settlements if they did not receive some savings to offset the administrative costs and ongoing contingent liability.

These cases combined indicate that courts are becoming impatient with the legislatures and are weary of making the best of the current lump sum system of compensation. The courts’ careful application and integration of structures indicates that they are exercising discretion and are not prepared to abandon the current system entirely, but extend it to include structures.

VIII. Perspective of Bench, Bar and Casualty Insurance Industry

Interviews with lawyers indicated a general support for structured settlements, but a split in support for structured judgments. Most used or were aware of structured settlements and were fairly knowledgeable about the benefits and pitfalls of structures. Some felt structured judgments would be beneficial, enabling cases appropriate for a structure, but for some reason resistant, to enjoy the increased economic efficiency and adequacy of the periodic payment. Others felt the plaintiff has a right to dissipate the damages as they see fit and that it would be too paternalistic of the court to impose a duty on the plaintiff.

Although only one judge was interviewed, the response was consistent with what would be expected of the bench. Primarily there was a concern with regard to jurisdiction of the court to award damages in any form other than lump sum. Secondly, there was a concern that the court would be going too far in the arrangement of the personal finances of the plaintiff — essentially too paternalistic. There was also a concern for the administrative implications of such a system, the criteria upon which a structured judgment should be imposed, the extent of the courts involvement in structure design and the corresponding demands on the court’s time. The bench was not dismissive of structures, they felt that they should be encouraged at pre-trial, but would be unwilling to impose a structured judgment without some action by the legislature or the Supreme Court of Canada.

In general, casualty insurance companies are very supportive of structured judgments to maximize the benefit to be achieved by this form
of damage compensation. One significant casualty insurer in Nova Scotia stated that it was their objective to structure all personal and fatal injury claims. Six Five years ago their success rate was approximately one percent, today it is hovering over fifty percent with a greater success rate for claims over a million dollars. A recent example of a successful structure concerned a twenty year old girl from a wealthy Ontario family who suffered a broken neck while working on a Katimavik project here in Nova Scotia. The young woman was a bright student with prospects for a career in law. The plaintiff's claim was handled by a top Toronto litigator who accepted on behalf of his client a two point seven million dollar structure on a lump sum claim valuation of four million dollars.

Indications from structured specialists, insurance industry and plaintiff bar indicate there are approximately six claims per year in Nova Scotia that exceed one million dollars, with a significantly larger number falling within the one hundred thousand dollar to one million dollar range. There are no statistics on a provincial or national basis, which substantiate this estimate. Nor are there any statistics available for Nova Scotia or elsewhere in Canada, indicating the prevalence of structures. A 1987 American study stated that structures were used in fifty percent of personal and fatal injury claims in the United States and at a growing, but unidentified rate in Canada.

From the defence bar perspective structures are easier to negotiate now because there are a limited number of lawyers practicing in the insurance area in Nova Scotia and they have developed a competent level of knowledge and familiarity with the structured concept. Indications are that this is true in other areas of the country and that a direct relationship exists between the familiarity with the structure concept, the prevalence of structures and ease of negotiation.

The first hurdle that structures meet are the prejudices and practices of the practicing bar. All structured specialists believe that a lack of awareness and resistance of the unknown stunt the application potential of structures. The fact that structures have been around for some time now and the visibility of their results have decreased this problem. Some lawyers have suggested that it would be negligent for a lawyer practicing in the area of personal and fatal injuries to not consider the structure alternative.

The second hurdle remaining is the plaintiff himself. Lawyers and structured specialists now focus on educating plaintiffs about structures and the advantages they offer. Most plaintiff resistance stems from

65. This objective excludes discretionary claims such as whiplash.
ignorance of the concept and or an inappropriate allocation between up-front and periodic payments. This highlights the need to identify the plaintiff's needs and wants accurately and design the structure appropriately. Lawyers generally acknowledge that their presentation of the structure concept has significant influence on the plaintiff. Because of the weight of their presentation and the awesome nature of the figures associated with structures, most plaintiff lawyers prefer to review the structure alternative themselves, prior to showing it to the client.

IX. Conclusions

It is evident that structured settlements are beneficial in personal injuries claims, with a direct relationship between the advantages and the increasing severity of the injury and resulting future care needs. Structures benefit not only the parties involved but society as well. The advantages of structures vary with the circumstances and are not always better than lump sum damages. The need for structures, and their advantages, are based on the pitfalls of lump sums; if these pitfalls could be corrected the need and advantages of structures would decrease correspondingly. Until that time, structures facilitate the shift from compensating the plaintiff's loss to compensating their needs in personal and fatal injuries compensation. If the shift to needs compensation is to be complete structured judgments must be used to ensure that plaintiffs in jurisdictions without tax and or management fee gross-ups are adequately compensated and protected from erosion of their awards from these variables. Structures by their periodic nature provide a more adequate and fair remedy for personal and fatal injury claims because they replace any loss of continuous income and pay for future care needs as they arise without placing great responsibility and risk on the plaintiff to invest and spend the damages wisely.

Although structured settlements have enjoyed increasing success, as awareness of and experience with structures grows there will always be cases where structured settlements would be appropriate, but are refused. Structured judgments give the courts the opportunity to reclaim the advantages of structures where they would otherwise be lost. There is no worry that structured judgments would kill off the use of structured settlements, quite the reverse, the loss of control by the parties resulting from litigation in addition to the resulting expenses would encourage parties to settle out of court and use structures where appropriate because if even one party wanted a structure and the case was appropriate for a structure, they could force the matter to court and achieve there what they could not in negotiated settlement. Although dated, a 1965 study indicated that less than five out of one hundred personal injury claims
reached litigation, the balance were settled. The ever rising costs of litigation have only served to reinforce this settlement trend. Most litigators would state that the majority of clients are better served by settlement than litigation and their objective is to only litigate in the relatively small number of cases where litigation is beneficial, for example where a principle or liability is at issue.68

In these days of the Charter the most common argument which is mounted against structured judgments is the imposed loss of the plaintiff's freedom of discretion over the damage award. This argument is made despite any advantages to the plaintiff, but as discussed earlier such limitations should be found reasonable under s.1.

Judges and counsel will have to be educated about structures and where they are most effectively employed. A judicial procedure will have to be designed to maximize the efficiency and advantages of structures.

There would be little hope of the judiciary developing a coherent and consistent system of structured judgments without legislative intervention because some courts and counsel would resist the new alternative. Legislative reform would offer the greatest uniformity of procedure and availability of this remedy.

One of the best features of the tort compensation system is the ability to tailor awards to the specific case. Historically the courts were concerned with appeasing the plaintiff to avoid retributive acts, later the goal was to compensate loss and today the concern is for the plaintiff's future needs. It is only logical that one method of compensation could not adequately achieve these various goals. Lump sum damages are no longer generally suitable for personal and fatal injuries compensation. Structures are better suited to the current objective of needs based compensation. To not empower the courts to employ this proven tool is to handicap them in their attempt to fairly compensate the plaintiff without overburdening the defendant, and to ensure that damage awards for personal and fatal injuries will be unnecessarily complex and expensive.

68. Weir, supra note 7, at 23.