

Louisiana Law Review

Volume 44 | Number 5

Ruminations on Tort Law: A Symposium in Honor of

Wex Malone

May 1984

Periodic Payment of Damages for Personal Injury

Marcus L. Plant

Repository Citation

Marcus L. Plant, *Periodic Payment of Damages for Personal Injury*, 44 La. L. Rev. (1984)

Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol44/iss5/11>

This Article is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Louisiana Law Review by an authorized editor of LSU Law Digital Commons. For more information, please contact kreed25@lsu.edu.

PERIODIC PAYMENT OF DAMAGES FOR PERSONAL INJURY

*Marcus L. Plant**

[*Editor's Note:* The editors regret to inform our readers of the death of Professor Plant subsequent to his completion of this, his last, article. We deeply mourn the loss of this great teacher and scholar.]

It is a high privilege and great pleasure to write in an issue of the *Louisiana Law Review* honoring Professor Wex S. Malone. Each of his many admirers has his or her own special reason to be grateful for the opportunity of knowing him, working with him as a colleague, or being under his tutelage as a student. One of the many reasons I have long been a devotee of Professor Malone is that in his distinguished career as an academician and as a leader in the Association of American Law Schools and the American Law Institute, he has been a dynamic force for the modernization and improvement of law and legal education. His influence has been especially notable in that body of ideas, principles and doctrines we call the law of torts.¹ For this reason, I have chosen to write briefly on a cognate aspect of torts, one which is evolving rapidly and may well constitute the wave of the future. Recent developments in this area have the potential to bring about important changes in the operation of the legal system governing personal injuries, and perhaps to revolutionize the system.

The basic concept of periodic payment of monetary reparation for personal injury is not new. In some European countries it has long been an established practice.² In this country, it is characteristic of workers' compensation laws.³ Installment payment of judgments by defendants of limited means has existed for decades.⁴ The aspect of periodic payment of damages that is new is the rapidly increasing use of this concept by imaginative lawyers and their creative consultants in an effort to solve the practical problems brought about by the explosion of litigation in certain areas, notably products liability and medical malpractice.

Copyright 1984, by LOUISIANA LAW REVIEW.

* Professor of Law, University of Michigan.

1. For examples of the influence of his thought with respect to the duty aspect of the negligence action and the resulting reduction of the confusion associated with the doctrine of "proximate cause," see *Hill v. Lundin & Assocs., Inc.*, 260 La. 542, 550, 256 So. 2d 620, 623 (1972); Malone, *Ruminations on Dixie Drive It Yourself Versus American Beverage Company*, 30 LA. L. REV. 363 (1970); Malone, *Ruminations on Cause-In-Fact*, 9 STAN. L. REV. 60 (1956).

2. Stone, *Separate Trials, Declaratory Rulings and Installment Damages: A Comparative Study*, 35 TUL. L. REV. 597, 601 (1961).

3. 3 A. LARSON, *THE LAW OF WORKMEN'S COMPENSATION* §§ 82.70-82.72 (1983).

4. Woodbridge, *Installment Payment of Judgments*, 39 MICH. L. REV. 357, 366-88 (1941).

Surprisingly, the academic law journals have neglected the subject.⁵ There is a small body of literature in publications directed specifically at the insurance industry or the trial bar,⁶ and some lawyers with special sophistication in personal injury litigation are cognizant of the usefulness of the periodic payment technique. But a much broader segment of the personal injury bar ought to be acquainted with the available possibilities for covering an injured person's future needs at an efficient societal cost.

Furthermore, even the most sophisticated members of the bar need the assistance of experts in the fields of investment, insurance, money management, and finance in devising the plan or plans best suited to the needs of particular clients. A lawyer's expertise, focused as it is on establishing liability and safeguarding the client's legal rights, may well need to be supplemented when he seeks to develop the most effective and protective arrangement for his injured client's future. He may need to work with financial, actuarial, and other professional experts in his client's behalf. A conscientious lawyer's duty does not end with a signed settlement or with the expiration of the delays for appeal after verdict and judgment have been entered.

The case in which the periodic payment mechanism has most frequently been used is one in which: (1) there is a catastrophic personal injury, with physical results and considerable expense likely to persist for a lengthy period or for the life of the unfortunate victim, and (2) liability is either admitted or likely to be established. Under these circumstances, the traditional system of payment of a lump sum of money to the injured person may be costly and unwise for the claimant, unjust to the defendant, and burdensome for the public. Conversely, a periodic payment arrangement may be beneficial, financially and otherwise, to the claimant, fair to the defendant, and wise from the standpoint of the public's interest.

The first notable characteristic of a plan for periodic payment of damages is its flexibility. In contrast to the stark rigidity of a fixed sum damage payment, a plan for periodic payment can be tailored and adapted in detail, almost without limit, to meet the particular, and sometimes unique, needs and wishes of those involved. The interested parties include the injured claimant, his lawyer, his spouse, his children (whose needs will change as time passes), his physicians and nurses, his physical,

5. For a perceptive discussion, see Comment, *Variable Periodic Payments of Damages: An Alternative to Lump Sum Awards*, 64 IOWA L. REV. 138 (1978).

6. For thorough discussions of the subject, see Elligett, *The Periodic Payment of Judgments*, 46 INS. COUNS. J. 130 (1979); Hindert, *Periodic Payment of Personal Injury Damages*, 31 FED'N OF INS. COUNS. Q. 3 (1980); Hindert & Hindert, *New Rules for an Old Game: An Evaluation of the Model Periodic Payment of Judgments Act*, 15 INT'L SOC'Y OF BARRISTERS Q. 359 (1980). See also Choulos, *Structured Settlements: Cure or Curse?*, 16 TRIAL, Nov. 1980, at 73; Krause, *Structured Settlements for Tort Victims*, 66 A.B.A. J. 1527 (1980); McGinn, *Structuring Settlements*, 18 TRIAL, June 1982, at 58.

psychological or occupational therapists, the defendant, his insurer, and anyone else affected by the injury or involved in its resulting problems.

It is standard practice under such plans to provide for the payment of a lump sum to cover all damages accrued at the time of settlement. These damages would include past medical expenses, lost earnings to date, past pain and suffering, loss of consortium to date, and any other damages that might already have accrued, such as the cost of restructuring the claimant's home or the provision of a specially equipped van for transportation. It is also common practice under such plans to pay the attorney's fee at the time of settlement, if that is desired; however, if the attorney prefers to take the fee in installments over a period of time for tax or other reasons, his wishes can be accommodated in the plan.

Only the *future* damages—*i.e.*, those that have not yet accrued—are covered by periodic payments. These will normally include: (1) medical expenses, costs of care or custody, and other outlays related to the claimant's physical and mental condition; (2) economic losses such as wages or other income reduced or precluded by the injury; and (3) future noneconomic losses including pain and suffering, loss of consortium, and loss of normal bodily function. These elements of future damages will be defrayed by periodic (*e.g.*, monthly) installments of a fixed sum or a sum which may vary from one time to another under a formula that takes account of inflationary factors in the national economy. Further, the plan may provide that an additional, substantial lump sum will be paid at stipulated intervals or times—for example, at the time or times that claimant's children reach college age. Finally, the plan may provide that the payments will continue for a fixed term (*e.g.*, thirty years) and thereafter until claimant's death, or it may provide that payments will continue after the claimant's death for an additional period related to the lifetime of such designated dependents as the claimant's spouse and children. These suggestions illustrate only a few of the variations and combinations that are possible.⁷

Several advantages in the foregoing system account for its increasing use in recent years. One of the most attractive, from the claimant's point of view, is the opportunity for substantial minimization of his federal income tax. The Internal Revenue Code provides generally that amounts received as damages for personal injury, either as lump sums or as periodic payments, are not includible in the taxpayer's gross income.⁸ If, however,

7. For a number of examples, see Krause, *supra* note 6, at 1529.

8. I.R.C. § 104(a)(2) (1982). It provides:

(a) *In general*

Except in the case of amounts attributable to (and not in excess of) deductions allowed under section 213 (relating to medical, etc., expenses) for any prior taxable year, gross income does not include—

(2) the amount of any damages received (. . . whether as lump sums or as periodic payments) on account of personal injuries or sickness.

the taxpayer receives a lump sum damage award which is invested by him, the income on the investment *is* includible in gross income.⁹ A skillfully devised periodic payments plan makes it possible to avoid this taxation through the creation of an annuity or trust arrangement which, while involving neither actual nor constructive receipt by the claimant of the lump sum settlement, provides for periodic payments comprised of both principal from the settlement and investment income. These payments would be received by the claimant as tort damages free from the federal levy. The Internal Revenue Act has recently been amended to recognize this precise type of arrangement.¹⁰

In the case of a severely injured individual in his early or middle years, the tax savings can be impressive. One experienced practitioner describes a hypothetical but realistic case in which a thirty-five-year old male who is completely disabled and has a future life expectancy of thirty-nine years receives an award or settlement for future damages of \$1,000,000.¹¹ If he takes it in a lump sum and invests it himself in an annuity which produces \$93,000 annually for his lifetime, his federal income tax liability, with specified assumptions as to medical expenses and other deductions, will be \$18,000 each year. If he enters into a carefully conceived periodic payment plan which also produces \$93,000 annually, he pays *no* federal income tax. If he lives his full life expectancy, the total tax savings under the periodic payment plan would amount to more than \$700,000. Any lawyer who fails to explore tax savings possibilities of this magnitude is surely failing to perform his full duty to his client.

To accomplish this favorable tax result, however, it is necessary to arrange a plan under which there is neither actual nor constructive receipt by the claimant of the funds which will produce the periodic payments. At the same time, there must be optimal assurance that these funds will be managed and invested astutely throughout the term of the plan to ensure that there will be no interruption in the flow of periodic payments. In attempting to fashion a plan that accomplishes both of these antagonistic objectives, the claimant's lawyer must not only exercise his own greatest skill and best professional judgment but must also recognize that he may require outside expert assistance. Unless he has exceptional sophistication and expertise in the fields of financial planning, money management, and income taxation, the attorney would be well advised to seek such assistance. This does not mean the services of persons who are merely annuity brokers. It means organizations of professional persons whose sole corporate purpose is the formulation and implementation of plans for periodic payment of damages. Such entities have

9. Rev. Rul. 29, 1965-1 C.B. 59.

10. I.R.C. § 104(a)(2), quoted *supra* note 8; see also Rev. Ruls 313, 1979-41 I.R.B. 8; 220, 1979-30 I.R.B. 5; Rev. Rul. 230, 1977-2 C.B. 214.

11. See Hindert, *supra* note 6, at 9-10.

developed in recent years and are meeting a steadily increasing demand for their services.

Various arrangements are available to accomplish the specific objectives of a particular case. Most involve the payment of the lump sum or sums by defendant to purchase an annuity or annuities, the use of a trust, or a combination thereof. Normally, these plans do not rely upon an unsecured commitment of the defendant—the danger of subsequent bankruptcy is too great. The annuities are commonly written by one or more of the reliable and financially secure life insurance companies; these organizations have had extensive experience in the field, particularly with respect to so-called “substandard lives,” *i.e.*, the lives of persons who do not have a normal life expectancy. The details of a particular plan are as infinitely variable as are the circumstances of the parties involved, and many illustrations are found in the practical literature.¹² If carefully drafted and administered, the financial benefits can be impressive.

Another important private and social benefit of a system of periodic payment of damages is the avoidance of the danger of dissipation of the award for purposes other than the maintenance and rehabilitation of the injured person. Two studies in Michigan have identified this danger as a very real one. The first, a study of lump sum payments of workers' compensation claims, was undertaken by James N. Morgan, Marvin Snider, and Marian G. Sobel of the Economic Behavior Program of the Survey Research Center of the University of Michigan.¹³ Part of the study focused on how the recipients of lump sum awards disposed of them. According to this study, about forty percent of the recipients did not conserve the lump sum with a view towards using it to replace lost wages. Instead, they spent all or part of the award for such matters as payment of installment debt other than medical bills, payment of the home mortgage, purchases of furniture and household appliances, investments in the recipient's own business, and investments in other business ventures, such as real estate and stocks. Then, in 1975, the Michigan Law Revision Commission, in its Tenth Annual Report, recommended a statute providing for deferred damage payments in cases in which personal injury awards exceeded \$100,000.¹⁴ The basis of its recommendation was stated as follows:

In such cases, the damage award is paid to the plaintiff who very frequently has little capacity for exercising sound judgment as to the making of investments with his new found riches. Often too,

12. See authorities cited *supra* note 6.

13. J. MORGAN, M. SNIDER & M. SOBEL, LUMP SUM REDEMPTION SETTLEMENTS AND REHABILITATION: A STUDY OF WORKMEN'S COMPENSATION IN MICHIGAN (Institute for Social Research, Univ. of Mich. 1959).

14. MICHIGAN LAW REVISION COMM'N, TENTH ANNUAL REPORT, 1975, at 129, 130 (recommendation concerning deferred damage payments).

the plaintiff lacks the discipline to conserve those assets to meet his lifetime needs, particularly where as a result of those injuries he is unable to support himself by normal employment.

Such plaintiffs often find themselves a few years later without adequate means for their support after having expended or dissipated the sums which they recovered. Such persons frequently become public charges requiring the expenditure of public funds for their future needs for medical expenses, support and maintenance.¹⁵

In addition, other studies have concluded that ninety percent of injured plaintiffs who receive substantial sums from settlements or other sources "will have squandered the *entire* sum within *five* years, leaving them a public charge, dependent upon welfare, health care assistance, and the like."¹⁶ Under the periodic payment system, individual installments may still be dissipated by the recipient for other purposes; the bulk of the award, however, will remain available to carry out its purposes, and the danger that the injured person will become a public charge is greatly diminished or virtually eliminated.

From the defendant's point of view, the periodic payments system is more equitable than the lump sum system in at least one important situation—the case in which the injured claimant dies prior to the expiration of his life expectancy. To illustrate, assume a case in which damages are calculated on the basis of a life expectancy of thirty years and amounts are included for future medical expenses and for future pain and suffering. Assume further that that injured person dies at the end of three years. Under the lump sum payment system, the entire amount of the damages paid, including the portion for future medical expenses and future pain and suffering, passes to claimant's successors as a windfall. This result has been described as "one of the social injustices . . . that we think should be avoided."¹⁷ Under a periodic payments plan, the portions of the payments attributable to future medical expenses and future pain and suffering could be terminated upon the claimant's death, although all other installments, including for special purposes (*e.g.*, education) would continue. Several authorities,¹⁸ including one bar committee,¹⁹ have considered

15. *Id.* at 129.

16. Choulos, *supra* note 6, at 74.

17. *Annuities to Settle Cases*, 42 *INS. COUNS. J.* 367, 377 (1975) (statement of Andy Collins).

18. Sedgwich & Judge, *The Use of Annuities in Settlement of Personal Injury Cases*, 41 *INS. COUNS. J.* 584 (1974); Thomas, *Medical Prophecy and the Single Award: The Problem and a Proposal*, 1 *TULSA L.J.* 135, 144 (1964).

19. Special Comm. on Medical Malpractice Ins., *Medical Malpractice Committee Report*, 48 *WIS. B. BULL.* 17 (June 1975) (recommendation 6(c)).

this aspect of the periodic payment system to be one of the strongest factors supporting it.

The flexibility and other advantages of the periodic payment system have led to a geometric increase in the number of such arrangements. One experienced commentator and practitioner in the field has estimated the dollar value of the settlements or awards obtained in each of three recent years which were to be paid pursuant to periodic plans as follows:

1980	\$ 70,000,000
1981	250,000,000
1982	1,000,000,000.

He predicts that in 1985 the dollar volume will reach \$5,000,000,000 or more.²⁰

The desirable features of periodic payments plans in settlements have also prompted interest in their incorporation into judgments in contested cases. Occasionally, the courts have done this by judicial decision,²¹ but the general view has been that the incorporation of periodic payment plans in judgments involves such a substantial departure from common law practices that it requires statutory authorization.²² Several states have enacted statutes providing for the periodic payment of judgments, usually in cases of small claims²³ and medical malpractice cases.²⁴ In Washington, the statute applies to any civil action for personal injury.²⁵

In 1977, the general interest in the subject led the National Conference of Commissioners on Uniform State Laws to establish a special committee to study the matter. The committee was chaired by a distinguished legal scholar, Roger C. Henderson, then Dean of Arizona State University College of Law. The committee was asked to draft a statute that would assist the states in implementing such a system. The result of its efforts is the Model Periodic Payment of Judgments Act approved in 1980.²⁶

A detailed analysis of the Act will not be presented here due to space limitations, but its salient provisions may be summarized briefly. Its stated

20. Interview with Patrick J. Hindert, President of Benefit Designs, Inc., Cincinnati, Ohio (Oct. 28, 1983).

21. *McGhee v. McGhee*, 82 Idaho 367, 353 P.2d 760 (1960); *M & P Stores v. Taylor*, 326 P.2d 804 (Okla. 1955), noted in Note, *Judgments: Installment Payments*, 11 OKLA. L. REV. 458 (1958); Note, *Damages—Installment Verdict in Tort Action*, 12 VAND. L. REV. 490 (1959).

22. *Frankel v. United States*, 321 F. Supp. 1331 (E.D. Pa. 1970), *aff'd sub nom. Frankel v. Heym*, 466 F.2d 1226 (3d Cir. 1972). In *M & P Stores v. Taylor*, 326 P.2d 804 (Okla. 1955), see *supra* note 21 and accompanying text, the Oklahoma Supreme Court allowed the judgment to stand although it expressed doubts as to its propriety.

23. See, e.g., ILL. ANN. STAT. ch. 110A, § 288 (Smith-Hurd Supp. 1983-1984); IOWA CODE ANN. § 631.12 (West Supp. 1983-1984); see also Annot. 111 A.L.R. 389, 392 (1937).

24. ALA. CODE § 6-5-486 (1975); KAN. STAT. ANN. § 60-2609 (1983).

25. WASH. REV. CODE ANN. § 4.56.240 (Supp. 1983-1984).

26. 14 U.L.A. 20 (Supp. 1980).

purposes are to alleviate some of the practical problems arising from the unpredictability of large future losses, to make more precise awards for future losses, to pay damages as the trier of fact finds they will accrue, and to assure that damage payments more nearly serve the purposes for which they are awarded.²⁷

The parties to a contested case may have it tried under the Act by mutual consent. If there is not mutual consent, one party may move to have the claim so tried over the objection of the other. If a plaintiff elects to have his claim tried under the Act, he must show that there is a good faith claim for future damages in excess of \$100,000; if a defendant so elects he must show that future damages of more than \$100,000 are claimed and that he can provide specified security for future payments. Either party may object to trying the case under the Act on the ground that "the purposes of the Act would not be served" by doing so.²⁸

If a case is tried under the Act and the defendant is found liable, the jury is to make findings fixing the amount of any past damages and the amounts of future damages for medical costs, other economic loss, and noneconomic loss.²⁹ Each of these categories of damages is defined in the Act.³⁰ Economic loss must be based on the length of time the claimant would have lived but for the injury.³¹ Damages must be calculated by the jury without regard to future changes in the earning or purchasing power of the dollar; the law provides that these factors be taken into account in the judgment, and the jury must be so advised.³² If the total of future damages is less than \$100,000, the court enters a lump sum award (at present value) unless claimant specifically requests periodic installments.³³ If the total of future damages exceeds \$100,000, the judgment must first specify the payment of attorney fees in a manner separate from the future damages payable to the claimant. These fees may be paid in either a lump sum or installments, as the attorney and client may agree; in either event, however, the amount to be paid in attorney fees is deducted from the award of future damages.³⁴ Next, all subrogees who have a right to reimbursement for payments already made (*e.g.*, workers' compensation payors) are entitled to receive lump sum payments from the award of future damages.³⁵ After all such adjustments, if the remainder of the award of future damages, reduced to present value, is more than \$50,000

27. MODEL PERIODIC PAYMENT OF JUDGMENTS ACT § 1, 14 U.L.A. 22 (Supp. 1980).

28. *Id.* § 3, at 24.

29. *Id.* § 4(a), at 26.

30. *Id.* § 2, at 23.

31. *Id.* § 4(b), at 26.

32. *Id.* § 5, at 27.

33. *Id.* § 6(2), at 28.

34. *Id.* § 6(3)(i), at 28.

35. *Id.* § 6(3)(ii), at 29.

or, if the remainder is less than \$50,000 but the claimants elect periodic payments, the court shall enter judgment for the future damages, without present value reduction, payable in specified installments.³⁶

When the court enters judgment for periodic installments, each party held liable is required to post security for the payments within thirty days after the date on which the judgment is subject to execution and to maintain such security in the future.³⁷ This is, of course, a crucial element of the program. The security must be approved by the court and may take one or more of several forms of commitment executed by one or more qualified insurers. Authorized forms of security include a bond, an annuity contract, evidence of applicable and collectible liability insurance, one or more agreements guaranteeing payment of the judgment, or "any other satisfactory form of security."³⁸ If satisfactory security is not posted or maintained, the court must enter a lump sum judgment,³⁹ and, if the failure to comply is without good cause or otherwise capricious, a lump sum judgment for the total amount must be entered without discounting the payment to present value.⁴⁰

Future periodic payments must be adjusted to take into account fluctuations in the purchasing power of the dollar.⁴¹ The index figure used is based on the rate of discount for United States fifty-two-week treasury bills.⁴² This provision enables a judgment debtor or other obligor for periodic installments to invest the necessary funds in treasury bills to make the required yearly adjustments. While such treasury bills provide a reliable accommodation between security and liquidity, the obligor is not limited to that course if other investments that meet the Act's requirement for security are deemed more desirable for the purpose.

There are also important provisions governing the effect of the death of claimant or of other beneficiaries. If the claimant dies, installments not yet due for medical care, other costs of health care, and noneconomic loss terminate, but other future installments continue in conformity with the judgment. Installments payable to a wrongful death beneficiary do not terminate at his death unless all such recipients are dead; if one or more survive, the deceased's installments are shared equitably by the survivors for the respective periods specified for them in the judgment. A similar provision is made regarding installments due deceased beneficiaries other than wrongful death beneficiaries.⁴³

36. *Id.* § 6(3)(iv), at 29.

37. *Id.* § 9(a), (b), at 35.

38. *Id.* § 8(a), at 33.

39. *Id.* § 9(b), at 35.

40. *Id.* § 9(c), at 35.

41. *Id.* § 7(a), (b), at 31.

42. *Id.* § 7(c)(1), at 31.

43. *Id.* § 11, at 38.

The Model Act contains two alternative approaches to restricting the assignment of periodic installments (spendthrift provisions). One permits such assignments only to meet medical and health care costs. The other permits the assignment of periodic installments for costs of alimony, maintenance, child care, medical and health care expenses, attorney fees, and other expenses of litigation incurred in securing the judgment.⁴⁴ Periodic installments of future damages for loss of earnings are exempt from legal process to the extent that wages or earnings are exempt from such process under state law.⁴⁵

Finally, the parties may "adopt" the Act or any part thereof in a settlement agreement filed in the proper court, whether or not an action has been brought, and may provide that one or more sections of the Act shall apply. The court may then enter a consent judgment adopting the specified sections of the Act.⁴⁶

Apart from the policy considerations mentioned above, constitutional questions will surely be raised if the Model Periodic Payment of Judgments Act or a similar statute is enacted. Would such a statute be in violation of state or federal constitutional provisions guaranteeing equal protection of the laws, due process of law, or jury trial? Three state supreme courts have expressed opinions on these issues in cases involving medical malpractice legislation that required periodic payment of judgments under specified circumstances.⁴⁷

In *State ex rel. Strykowski v. Wilkie*,⁴⁸ the Wisconsin Supreme Court had before it a provision requiring that the portion of an award for future medical expenses over \$25,000 be paid to a future medical expense fund and disbursed for those expenses in periodic installments until the amount was exhausted or the patient died. The court held the statute constitutional with a brief statement that the procedure was obviously intended for the benefit of claimants with substantial injuries requiring long-term treatment and, as such, was neither unreasonable nor a denial of equal protection of the law.⁴⁹

In New Hampshire, the supreme court reviewed the constitutionality of that state's legislation relating to medical malpractice and found the entire statutory scheme unconstitutional.⁵⁰ The provision permitting trial courts to order periodic payment of damages in an appropriate case was

44. *Id.* § 13, at 41.

45. *Id.* § 14, at 42.

46. *Id.* § 15, at 42.

47. *American Bank & Trust Co. v. Community Hosp.*, 660 P.2d 829, 190 Cal. Rptr. 371 (1983); *Carson v. Maurer*, 120 N.H. 925, 424 A.2d 825 (1980); *State ex rel. Strykowski v. Wilkie*, 81 Wis. 2d 491, 261 N.W.2d 434 (1978).

48. 81 Wis. 2d 491, 261 N.W.2d 434 (1978).

49. 81 Wis. 2d at 506-12, 261 N.W.2d at 441-44.

50. *Carson v. Maurer*, 120 N.H. 925, 424 A.2d 825 (1980).

struck down on the ground that it "unreasonably discriminates in favor of health care defendants and unduly burdens seriously injured malpractice plaintiffs."⁵¹ The court emphasized that the statute did not provide for interest payments on amounts withheld, that it gave a windfall benefit to the defendant if the claimant died, that it denied the plaintiff the right to dispose of the funds embodied in the judgment, and that it applied only to claimants whose future damages exceeded \$50,000 and thus "requires one class to shoulder the burden inherent in a periodic payments scheme from which the general public benefits."⁵²

Finally, the California Supreme Court, in a case involving negligent medical care, directed its attention to the periodic payment of judgments.⁵³ The statute provided that in a malpractice action against a health care provider in which the award for future damages exceeded \$50,000, the trial court, at the request of either party, was required to enter a judgment ordering periodic payment of the future damages in excess of \$50,000. Elaborate provisions covered the details of administration of the award, including maintenance of security and modification of the judgment in case of the death of the judgment creditor. Plaintiff had obtained a jury verdict for \$198,000, including future damages, and defendant moved that the court enter a judgment providing for the periodic payment of future damages in excess of \$50,000. The motion was denied by the trial court, which held the statute violative of the equal protection and due process clauses of the state and federal constitutions. The supreme court affirmed four to three.

The majority opinion is an unusual one. After tracing the legislative history of the statute during the "medical malpractice crisis," a substantial portion of the opinion consists of argumentative responses to propositions advanced by defendants and *amicus curiae* in support of the statute.⁵⁴ The ultimate decision, however, was based on one very narrow

51. 120 N.H. at 944, 424 A.2d at 838.

52. 120 N.H. at 944, 424 A.2d at 838.

53. *American Bank & Trust Co. v. Community Hosp.*, 660 P.2d 829, 190 Cal. Rptr. 371 (1983).

54. In the course of these remarks, the majority expressed serious misgivings about the "pragmatic results" of the statute in that (1) it allowed the insurer to retain the use of the future damages portion of the award thus depriving the claimant of "the opportunity to invest the retained sums in high yield long-term accounts and to obtain earnings on such accounts commensurate with the rate of inflation," 660 P.2d at 834, 190 Cal. Rptr. at 376; (2) it permitted the insurer to retain outright any portion of the future damages award which might not have been paid out at the time of the victim's death, except as to future earnings if the victim left dependents, 660 P.2d at 834, 190 Cal. Rptr. at 376. Defendant's argument that the periodic payment system would protect against dissipation of the award was dismissed almost summarily with one sentence of 56 words which said in effect: "The claimant should be allowed to take care of himself." 660 P.2d at 836, 190 Cal. Rptr. 378. A paragraph was devoted to defendant's argument that if the victim receives the lump sum and invests it he will pay tax on the income, a tax which could be avoided if the periodic

ground—that the legislature had assumed that a periodic payments system would bring a reduction of medical malpractice insurance premiums paid by hospitals and that this reduction would result in a reduction in the cost of medical care, whereas in fact total medical care costs had risen since enactment of the statute. The majority opinion cites studies showing that prior to the statute the cost of \$1,000,000 malpractice coverage for each hospital bed was roughly four dollars per day and that five years later such costs amounted to three dollars per day. Meanwhile, over roughly the same period of time, general hospital costs had risen from \$217 per day to \$620 per day. On this basis, the court concluded:

It is obvious . . . that experience since 1975 has demonstrated the fallacy of the Legislature's assumption that the reduction of malpractice premiums paid by hospitals would result in a meaningful containment of hospital costs. Since section 667.7 was premised on that assumption, the classification of malpractice victims made therein constitutes a denial of equal protection of the law under the foregoing standard.⁵⁵

The dissenting opinion of Justice Kaus, joined by Justices Broussard and Feinberg, presents a strong and persuasive analysis demonstrating that a system of periodic payment of damages does not offend the equal protection guarantees of either the state or federal constitutions. They acknowledged that there might be a constitutional question with respect to the right to jury trial, but it seemed correctable. Two brief statements summarize the minority's disagreement with the majority's approach:

To begin with, it is—to say the least—a novel proposition that a statute is to be declared unconstitutional simply because it does not accomplish all that the enacting Legislature may have hoped for. . . .

Second, . . . [a]lthough the Legislature may have viewed the containment of total medical costs as an incidental benefit of limiting malpractice insurance costs, its primary goal was related directly to the reduction of insurance costs and insurance premiums themselves.⁵⁶

At the time of this writing, the case is still before the court on an order of rehearing granted June 15, 1983.

payments include both principal and income derived from investment of the judgment funds. The court brushed this argument aside on the apparent misunderstanding of the effect of Revenue Ruling 220, 1979-2 C.B. 74, that if the claimant received a combination of principal and interest he was necessarily receiving the economic benefit of the award and the exemption would not apply. It seems obvious that the possible tax saving aspects of the periodic payments system were not understood. The majority opinion is a strange one even for the California Supreme Court.

55. 660 P.2d at 840-41, 190 Cal. Rptr. at 382-83.

56. 660 P.2d at 842, 190 Cal. Rptr. at 384 (Kaus, J., dissenting).

It appears that the Model Act would not run afoul of these constitutional limitations, however. It would not be limited to actions involving medical malpractice, avoiding claims that it subjects a particular category of plaintiffs or defendants to special treatment. It would not disturb the jury's ultimate authority to determine the quantum of damages; it regulates only the administration of the verdict after the jury has performed its function. It does discriminate between plaintiffs whose judgments for future damages exceed the threshold figure of \$100,000 and plaintiffs whose judgments for future damages do not exceed that amount. However, justification for that kind of discrimination seems well established by the long-standing and widespread practice of providing different procedural and jurisdictional standards in litigation based upon the amount of the claims or damages involved. Furthermore, the interest of the public in protecting itself from the potential burden of catastrophically injured persons would seem to furnish adequate grounds for distinguishing between judgment creditors above and below the \$100,000 mark. Thus, it would seem that the danger of constitutional infirmity in the Act is not great enough to deter its adoption.

The general rationale of the Act was well summarized by Dean Henderson at the time of its promulgation.⁵⁷ Since then, however, it has not made much progress toward adoption. The most likely reason is that it immediately received a double "bath of ice water"⁵⁸ from important sources. One was from representatives of the insurance industry;⁵⁹ the other was from Philip H. Corboy, past chairman of the American Bar Association's section on litigation.⁶⁰ The writer has been advised that the principal reason for lack of support by the insurance industry is that group's inability or unwillingness to issue the type of annuity or other security mechanism that would take account of fluctuations in the purchasing power of the dollar in calculating the annual installment payments. However, it is understood that the representative of one of the largest commercial banks in the country advised the drafting committee that annuity contracts that included such an adjustable feature were entirely feasible and that his bank could and would issue them.⁶¹

Mr. Corboy's statement of his objections was characteristically pungent and eloquent. As a highly respected leader of that branch of the trial bar devoted to protecting the rights of the injured, his views are entitled

57. Henderson, *Periodic Payments of Bodily Injury Awards*, 66 A.B.A. J. 735 (1980).

58. Cf. W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 78, at 508 (4th ed. 1971).

59. Interview with William J. Pierce, Executive Director of the National Conference of Commissioners on Uniform State Laws (Dec. 5, 1983) [hereinafter cited as Interview with Pierce].

60. Corboy, *Structured Injustice: Compulsory Periodic Payment of Judgments*, 66 A.B.A. J. 1524 (1980).

61. Interview with Pierce, *supra* note 59.

to full hearing and thoughtful appraisal, but they ought not to foreclose further consideration of the Act. Some of the objections he raises could probably be alleviated or even eliminated by compromise. However, the basic theme of his argument is that the courts ought not to be vested with the authority to impose a periodic payment plan against the will of either of the parties or their attorneys. This position is not tenable. In light of litigation developments in recent decades, the public interest is of such importance that it should be preeminent.

It is understandable that a proposal of such significant and far reaching change in the personal injury damage system would generate strong reactions on both sides of the litigation table. But just as war is too important to be left to the generals, so the improvement of this area of the judicial process ought not to be blocked by the opposition of those whose views are likely to be deeply colored by their personal and professional interests.

Similar situations have arisen in the past. The inauguration of the workers' compensation system was strenuously opposed by those whose personal interests would be adversely affected by reformation of the system of compensation for industrial injury.⁶² Introduction of the comparative negligence concept into tort law was delayed for decades by those having a vested interest in the original contributory negligence defense; it was labeled an unworkable idea, although systems of comparative negligence had been in successful operation in the Federal Employers' Liability Act⁶³ and in Wisconsin for decades.⁶⁴ Today, however, many states have adopted comparative negligence, by statute or judicial decision.⁶⁵ No-fault automobile insurance is still the target of strenuous constitutional attacks, although it is surviving them.⁶⁶

Progress comes slowly in the law, but it does come. In the area of periodic payment of judgments it is to be hoped that it will come more rapidly than some of the improvements of the past.

62. W. DODD, ADMINISTRATION OF WORKMEN'S COMPENSATION 27-52 (1936); I A. LARSON, *supra* note 3, § 5.20.

63. 45 U.S.C. § 53 (1976).

64. WIS. STAT. ANN. § 895.045 (West 1983).

65. AM. JUR. 2D NEW TOPIC SERV. *Comparative Negligence* (1977).

66. For a most penetrating and thorough analysis of the subject, see King, *Constitutionality of No Fault Jurisprudence*, 1982 UTAH. L. REV. 797.