COMMENTARY

Mandatory Structured Settlements and the Subtle Assault on the Tort System

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The author of the following Commentary is concerned not with structured settlements themselves, but only with the possible adverse consequences of a statutory scheme which would require compulsory periodic payment of judgments or settlements. Quite by coincidence, just such a piece of model legislation was proposed by the National Conference of Commissioners on Uniform State Laws only weeks before this Commentary was written. Some of the more controversial sections of the proposed law are described in a note following the article.

Introduction

Much has recently been said about the advantages of the structured settlement. It may simply be a curious coincidence that some of the strongest advocates of the structured settlement are insurance company personnel or their counsel. To listen to some of the arguments advanced by these people, it is subtly suggested that we have now found the panacea for all problems associated with personal injury litigation from the plaintiff's point of view. I do not write this article to condemn the structured settlement—I write to say beware of the consequences that can flow from the widespread implementation of structured settlements.

As a matter of reference, this commentary is written from my

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vantage point as a trial lawyer in British Columbia where a serious challenge to our tort system is taking place. The structured settlement may prove to be one of the means by which an accident victim's right to recovery in the courts is threatened. Before dealing with this prospect, it is my view that the numerous stated advantages of structured settlements are not sufficiently supported by reference to the real situation:

1. *Dissipation of Lump Sum Award*

It has been stated that 90 percent of plaintiffs who receive significant "windfalls"—be they lotteries or settlements—will have wasted the entire sum within five years. The reasons for such a statistic are diverse. The plaintiff may suddenly find himself responsible for investment of a substantial sum, and will usually have no experience in this risky endeavour. As a result of careless investment and mismanagement, the funds can quickly dissipate.

To justify the widespread introduction of structured settlements on this basis, however, is to suggest that people are fools. The plaintiffs' counsel should have regard to their own experience with this situation. We are not dealing with the dissipation of monies by people who have won a "lottery". Surely, a person suffering serious injury and economic loss is not going to treat a lump sum award in the same way as one would treat the proceeds won through a lottery, racetrack, inheritance, etc. Admittedly, some instances of bad management have occurred but that does not mean that the great majority of accident victims must be penalized. It is my view that the accident victim is penalized when his right of freedom to deal in the marketplace as he or she sees fit is taken away and substituted by a monthly "pension". Remember that the accident victim is injured through no fault on the part of the victim and has already suffered an enormous intrusion into his or her personal life. Before we as trial lawyers conclude structured settlements on this basis are justifiable, I suggest the question of dissipation of lump sum awards should be internalized—how would you react in the event you were struck down and because of physical disability were precluded from making your living as you desired? How would you feel if you were pensioned off at an early age and denied the right to marshall your resources and use your intellect to provide for yourself and your family?

Concern is expressed for the victim who suffers brain damage.

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However, trust companies and other financial institutions exist to provide day to day management services and investment planning. Existing institutions are able to deal with the management of large amounts of capital and have done so to the satisfaction of their clients for years.

In the United States, tax considerations may give an advantage when a structured settlement is used. However, tax rulings change but the structured settlement continues. Besides, ample tax shelter devices are available to victims, the municipal bond being one. The point is that when a client seeks our advice, surely we must have regard to the "human considerations" that exist and will continue to exist long after the structured settlement is negotiated. People should not suffer a complete loss of dignity and lack of freedom to make decisions in the competitive marketplace given the fact that we live in a democratic and free community.

2. *Waiting Time for Award*

We are told of a problem of court delays in getting the case to trial. We are told these delays may be either intended or unintended and, of course, may be inherent in the nature of the court system. However, while it is common ground that our courts are busy, in the interim, the victim in many jurisdictions can receive "no fault" benefits. Furthermore, many victims have the benefit of prepaid medical insurance to deal with out-of-pocket expenses related to treatment. Many employees are the beneficiaries of an employers' sick leave plan. Many homes are favoured by the working spouse. Additionally, there are government unemployment insurance schemes to assist with income replacement. In short, the problem of income replacement has been addressed by other agencies and schemes.

3. *The Trial Process Delay is Detrimental to the Memory of the Witness*

In fact, only a small number of cases actually go to trial. Prudent counsel on both sides can obtain witness statements for the benefit of refreshing the witnesses' memory at a later time. I suggest this really is not a problem in view of the very small number of cases that go to trial, and additionally, where the liability for the accident is really in issue. In any event, we still have procedural rules to provide for the taking of deposition evidence from wit-

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nesses so that the evidence can be deposed to under oath for later reference.

4. *The Concern about Overcompensating or Undercompensating the Victim*

It is said that there is too much speculation involved in the trial process and hence the victim may be over or undercompensated. In most cases, the plaintiff's condition is known by the day of trial. Any ongoing medical care can be paid by private medical plans or those which are operated by the state (as In British Columbia). Furthermore, the common law tort system allows us to make an individual award to suit that individual plaintiff in the given circumstances of that case. Over the years, plaintiffs' counsel have become more sophisticated in their utilization of various expert witnesses to assist in dealing with the issue of "probabilities" in the future. In the result, the courts can tailor the award to suit the individual rather than strain to place the individual into a "pigeonhole" referable to some category that is predetermined by the policy makers of the board.

5. *The Possibility of Varying the Award to Suit Changing Circumstances*

While the insurance companies and their counsel usually profess to take the needs of the plaintiff into consideration, these needs extend only as far as the insurance companies care to extend them—they are strictly defined. In point of fact, the plaintiff's legally recognized rights are usually not comprehensively covered. Tangible losses, such as medical expenses or lost wages substantially comprise such "needs", and can be calculated with relative ease. However, loss of consortium, and future pain and suffering are among the intangibles which are actively evaded by the insurance companies. Plaintiff's counsel should be prepared with effective arguments to obtain equitable compensation for these losses.

While this flexibility referred to above is enticing in theory, the fact that the award could be varied upwards in favour of the victim also envisions the circumstances that the award could be varied downwards against the interests of the victim. It is suggested that this may encourage the victim to maintain his or her disability for fear of having the matter reassessed unfavourably. It is submitted that the finality of the Court system allows the victim

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to put the injury and the case in the past and take a new and fresh perspective to the future. Furthermore, this eliminates any possibility of having to place an accident victim in the position of needing to go to an administrator to "plead" for more money. Any one of us who as counsel has dealt with a client with respect to a matter before the Workers' Compensation Board may well identify with this experience.

The Canadian Experience

At the outset of this Commentary, I indicated that structured settlements may become a device that severely restricts an accident victim's freedom to seek recovery in the courts.

To those who say "nonsense", consider this reality. As late as 1973, British Columbia enjoyed a vigorous insurance industry where competition and marketplace conditions governed. We are a Western Province and have a long social tradition of independence, not unlike that tradition which flourishes in many of the jurisdictions in the United States. However, a change of government resulted in the election of the New Democratic Party which, justly or unjustly, was known in some quarters as a "Leftist" party. One of the election planks of this party was to bring in a scheme of state-owned car insurance to drive the private insurer from the field of car insurance. Without commenting on the philosophical advantages or disadvantages of state-owned car insurance, it is safe to say that we now have the expected and usual situation associated with a government enforced and government operated monopoly.

It is my view that any government scheme will not long be operative before the directors of the scheme conclude that everything would be much better if only the lawyers could be eliminated from the process. Lawyers can be "more difficult to deal with", they can result in "larger and allegedly inflated claims being paid" and generally "make things more difficult" for those administering the scheme. It does not take the talent of a soothsayer to recognize that the structured settlement in this context will result in the establishment of a board to deal with tort victims with a concurrent expulsion of the tort system. The precedent for this type of board is clear—the Workers' Compensation Board. In British Columbia, the Workers' Compensation Board scheme excludes the right of the victim to have the option of common law tort recovery. The

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victim can take what the government scheme "doles" out to him or take nothing—no freedom of choice, no independence, no right of judgment in the courts. I say the structured settlement in personal injury cases can be used as a tool by those persons who wish to introduce a government controlled board and to do so, must manipulate the public into accepting the professed advantages of the structured settlement. The Workers' Compensation Board scheme will be introduced into car accident injury cases because the public will be told that the courts are no longer the appropriate forum to provide for the resolution of these problems.

Conclusion

The ultimate object of the exercise should be to enhance the dignity of the accident victim. We must recognize that in dealing with the personal injury victim, we are dealing with innocent people who, through no fault of their own, have suffered injury and loss. We must make special effort to protect the right of the individual to conduct his affairs in the future as best he or she can in the circumstances. To those victims who see merit in obtaining a structured settlement, they should be entitled to obtain this either by court order or consent judgment. Albeit there may be cases where an annuity form of compensation is preferable, I suggest that given certain political considerations, the structured settlement may be used as a device to persuade the community to substantially eliminate the present system of compensation through our courts. I am sure the good citizens of British Columbia, fiercely independent and energetic, did not envision what would happen down the road upon the introduction of a state-owned car insurance corporation; given the existence of a state-owned car insurance scheme, it becomes expedient to eliminate the "inconvenience" of dealing with lawyers, juries, and the courts. Concurrent with elimination of the courts is the introduction of a universal scheme of periodic payments awarded by a Settlement Board to assess the present monthly "dole" and to ostensibly provide for future assessment as and when required. Consider this proposition when the structured settlement is discussed.

Editor's Note—The author's concerns in the foregoing Commentary are applicable, very coincidentally, to a model law recently proposed by the National Conference of Commissioners on Uniform State Laws. The Model Periodic Payments of Judgments

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Act was proposed and drafted for states considering legislation to allow periodic payments in personal injury cases. The Model Act would replace the lump sum payment method, whereby awards are discounted to present value and projections made of investment income from the proceeds.

The Model Act has drawn considerable comment from personal injury lawyers who feel it would force tort victims to accept unfavorable restrictions on payments of their awards. However, the burgeoning number of multi-million dollar verdicts has raised legal eyebrows about the benefits of the customary lump sum payments of awards. The commissioners have stated that lump sum payments often create problems in financial estate planning, and adversely affect the cost and availability of liability insurance to defendants.

The most controversial provisions of the Model Act are sections 3 and 11. The former provides for compulsory effect if one party to the action has made an "effective election" to come under it. The practical consequences of this provision, opponents contend, will be to allow a defendant to impose the periodic payment election on the other parties by proving that security in the amount of $500,000.00, regardless of the amount of damages or the claim, whichever is less, can be provided. The dissenting party's only recourse against the election will be to show, under section 3(d), that the purposes of the Model Act will not be served by utilizing it in a given case.

Section 11 would terminate the installment payments of any judgment in the event of the death of the victim, to the extent of "health-care costs or noneconomic loss." It is claimed that the defendants could effectively wager on the plaintiff's life expectancy and retroactively "prevail" on the judgment upon the plaintiff's death. The health-care benefits termination is rationally justified, but the second modification, concerning noneconomic loss, would apparently terminate any further compensation for pain and suffering. The drafters point to the purpose of the Model Act as being payment for losses as they accrue, and state, "[s]ince death precludes the accrual of losses for such items of damage, it was felt that these items would be a windfall to the recipient." The installments which represent economic loss, i.e., lost wages, are to continue to the surviving beneficiaries. Omitted in the drafters' remarks is the solution to the reverse problem of losses actually

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exceeding projected figures.

The Model Act went through eight tentative drafts in the past four years. There are obvious refinements to be made, and questions to be answered before the Model Act will be acceptable to both plaintiffs' and defense attorneys alike. However, it is equally obvious that structured settlements are firmly established with both lawyers and insurance companies, and the accompanying statutory guidelines will be enacted.

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