NOTE FOR THE ADMINISTRATION OF JUSTICE PANEL HEARING ON THE 25TH JUNE 2018

SUBMISSION FROM HONG KONG BAR ASSOCIATION

PRELIMINARY

1.01 HKBA would respectfully point out the Law Reform Commission Report, ("The Report") is only a consultation document at present, and neither the HKBA, the Law Society, nor the Insurers have made their views known, as there has been no real time for discussion since the end of April 2018 when the Report was published.

1.02 The HKBA Personal Injuries and Insurance Committee has not had full discussions about this either, so the views expressed in this paper are provisional and tentative and meant to be in outline only.

Discussion

2.01 Question 1 Should there be Periodical Payments for damages for Future Pecuniary Loss in Personal Injury Cases

HKBA feels that it is a useful payment option for injured plaintiffs whose future prognosis or care needs are uncertain. As has been said, in these cases, damages are either too much, or too little when assessing the lump sum which is needed to provide for such cases. This is crystal ball gazing. We all have had clients who are still living well beyond the multiplier period fixed by the court when ascertaining the lump sum necessary. These will be large award cases. Reliable investment returns are only obtainable from gilts or bonds which have low yields in historic terms currently. If periodical payments can be paid from a financially reliable organization, then this must be the best option. **So the Answer to Question 1 on page 109 must be "yes." A suitable provision can be put into the Law Amendment (Reform & Consolidation) Ordinance Cap. 23 to reflect this power.**

2.02 Which Organisation should be responsible for the supervision of Periodical Payments?

The next question which we need to consider is who should supervise this type of payment? HKBA believes that the High Court should provide the supervision, rather like the Court of Protection, to whom an application can be made for the review of the particular award.

2.03 Should there be a Threshold for these awards and What should they cover?

Inevitably HKBA believes PPOs should be available in the larger cases, as PPOs will be expensive to administer unless paid out by an insurer based fund. Current annual Court of Protection Costs administered by accountants start at HK $100,000.00. So provisionally HKBA would like to see some minimum threshold for these cases – say $20 million – or a figure to be discussed. Should it only cover Future Care & Attention Costs or cover loss of future income claims ? This has to be discussed more fully.

3.00 Question 2 - Who should fix the Discount Rate which is used to fix future losses?

The Personal Injuries Judge fixes the discount the lump sum award, by a presumed rate of return, so the plaintiff is not over compensated and to allow for contingencies. At present this is done by the **Personal Injuries Judge** in decided cases. There is inevitable lag between sharp movements in the financial markets and the successive decided cases. Thus we have seen gaps of 7 years in the Chan Pui Kee Case – reaction to the 1988 financial collapse, Chan Pak Ting was 5 or 6 years later after quantitative easing started in 2008/9 after the "economic tsunami" following Lehmann Brothers' collapse.

3.01 HKBA believes that the Chief Justice be given the power to fix or refix the discount rate after consultation with the HKBA, the Law Society, the Financial Secretary, the Hong Kong Federation of Insurers and the Legal Aid Department. This should bring a much quicker reaction to changes in returns available in the investment market. Currently we have adopted the 3 split periods method for the various periods for which in the past a continuous multiplier period would be normally adopted. See **Chan Pak Ting v. Chan Chi Kuen (2013) (** Should there be just one discount rate over the future loss period, or split discount rates for 3 periods as at present?)

3.02 HKBA would recommend a power be given to the Chief Justice in say the Law Amendment (Reform & Consolidation) Ordinance Cap 23 to fix the Discount Rate(s) after such consultation.

4.00 Question 3 – Who should initiate the Application for a Periodical Payment Order and how much of the Damages should this apply to?

4.01 (i) HKBA feels that the application should be normally initiated by the Plaintiff or his legal advisers. Then it is for the Court to decide whether it is appropriate.

(ii) Should apply to all or just part of the damages? HKBA thinks that there is nothing to stop a Plaintiff asking for part of the damages to be paid immediately and the balance postponed and rolled over into a PPO.

(iii) Feel it should be confined only the future care & attention element of future losses, so the question of dependency does not arise.

5.00 Question 4 - Who can initiate a review?

5.01 Naturally the Plaintiff should be able to initiate a review if the annual/monthly payment proves too little, such as the care regime becomes inadequate through a plaintiff's deterioration. Then there are questions of causation or attributability of the deterioration to the initial injury. Obviously the Court should have the power to review the PPO as well, where the Plaintiff recovers and the PPO is no longer necessary.

5.02 HKBA has concerns **Legal Aid** may not be available throughout the entire period of the PPO, and no proper provision for costs can be made for future applications. These problems occur currently in cases where the Court of Protection has to manage funds for mental patients. They could be overcome if there was continuing Legal Aid – presumably the

subject of the order will not have the damages in his or her hands, and therefore still be eligible for Legal Aid. If there was a payment authority as set out hereafter, then this should not be a problem as they could take on the obligation for the payment of costs in suitable cases

5.03 **Dependency Claims** If the subject of the PPO dies from consequential infirmities as a result of the injuries giving rise to the claim for which the PPO was made, then HKBA feels Hong Kong should consider following English law and practice and allow a loss of dependency claim notwithstanding that limitation may have expired, if dependants (as defined in the Fatal Accidents Ordinance Cap. 22) wish to make a claim.

5.04 **Provisional Damages Awards**

HKBA does not see any difficulty in allowing Provisional Damages Awards being made in combination with PPOs- and later applications being made if the eventuality deemed provisional occurs.

6.00 **Question 5 Funding Options for PPOs**

6.01 Preliminary discussions with members of the Hong Kong Federation of Insurers indicate that for quite a number of years, the general insurers have been losing large sums of money in the casualty market in the construction industry in particular, because of the increase in number of claims, and the increase in size of future loss claims. So the advent of PPOs is not going to be overly welcomed. Further there are over 100 registered insurers, some large and some small. They do not want to have additional problems with long term reserving. **In England most insurers prefer to value the risk and pay off the claim if they can** to another authorized insurer who takes on this type of risk.

6.02 The Courts and the Plaintiffs will want security of payment of the PPOs throughout the future Thus it would be more sensible if there was a mandated insurer or fund from which PPO's could be paid. Then the individual insurer could pay into a captive entity, or the designated insurer the lump sum value of the claim, and who could pay out the PPOs.

6.03 The Motor Insurers' Bureau Agreement (1980) provided for the setting up of the Motor Insurance Bureau. This entity has had an excellent history of reserving and paying out otherwise uninsured motor claims. For instance it has just paid out HK 900 million on account of claims made against the failed Anglo Starlite Insurance Company Ltd., and is still left with over HK $2 billion in assets in the First Fund Account. The Second Fund has HK $2 billion plus in it, for covering insolvent insurers cases.

6.04 **There is no reason why there could not be a Third Fund for Periodical Payment Orders in General Insurance Cases**

This could be administered by MIB or by the Hong Kong Federation of Insurers.

6.05 The Insurance Authority could mandate that every insurer who wishes to write non-motor casualty insurance has to be a member of and signatory to an agreement to set up this **Third Fund.**

6.06 HKBA feels that the Hong Kong Federation of Insurers should be allowed time and space in which to explore this option and make recommendations about the setting up of a **Third Fund.**

The Advantages a Third Fund would provide are:

(a) Security of payment for PPOs in the future so the Court would not have to be troubled with investigating a particular insurance company's financials;

(b) The Insurance Authority would be relieved of the burden of investigating long term provision; just general supervision of the fund.

(c) The Agreement could provide security of payment in the event of a shortfall if PPO's were in danger of draining the assets of the Third Fund; there would be a levy or a reserve fund to cover these – depending on the structure and the Agreement between the Insurers;

(d) Payment in by an Insurer would enable the insurer to get rid of the long term risk;

(e) If a Plaintiff died or there was a kind of windfall, this could go to the reserve to cover all underfunded claims later on by agreement with the Insurer concerned.

(f) Expertise would be built up and consistency obtained in dealing with reviews and costing components in the PPOs; and kinds of cases where attributability could be agreed;

(g) The History of MIB is low cost – it costs currently under **HK$3 million p a to run –** this compares with ECAS which costs just under **HK$7 million p.a. to run**

(h) Monthly Payment Out Costs will be much lower than going through a firm of accountants or through the High Court Registry or ECAS.

6.07 HKBA puts these comments forward with the understanding that there has only been a short discussion about the implications of the Law Reform Commission proposals.

Dated: 22nd June 2018

HONG KONG BAR ASSOCIATION