

STRUCTURED SETTLEMENTS OF DAMAGES AWARDS IN BRITAIN AND CANADA

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THIS article examines the recent development of structured settlements in Britain against the longer Canadian experience of such awards of damages for personal injury. The comparison is particularly important given that many of the problems presently encountered in Britain have also been faced in Canada, where solutions have been found to some of the difficulties that can be caused. The Law Commission is presently examining the subject as part of its overall review of damages for personal injury, and it has issued a consultation paper on the subject.¹ The comparison is therefore particularly timely and apposite.

With the assistance of the Canadian Department of External Affairs the author was able to spend several weeks in Canada reviewing the literature,² interviewing academics, lawyers, insurers and, in particular, the brokers involved.³ The brokers interviewed arrange approximately 85 per cent of the structures in Canada. During the past few years the author

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1. Law Commission Consultation Paper No. 125, *Structured Settlements and Interim and Provisional Damages* (Oct. 1992) reviewed by the author in (1993) 137 Sol.J. 36. It forms part of the review of personal injury damages announced as the key feature of the Commission's *Fifth Programme of Law Reform* (1991) Cm.1556.

2. There are surprisingly few articles written by academics on the subject. But see Todd, "Structured Settlements and Structured Judgments" (1989) 12 Dalhousie L.J. 445, Feldthusen, "Mandatory Structured Judgments" (1988) 1 Can. Ins. L.Rev. 1, Bale, "Encouraging the Hearse Horse Not to Snicker", in F. Steel and S. Rogers-Magnet (Eds), *Issues in Tort Law* (1993), p.91, and Upenieks, "Structured Settlements: Are They Here to Stay?" (1982) 3 Advocates Quarterly 393. Mr Justice Holland contributed an important note in (1987) 8 Advocates Quarterly 185 and there are several short articles written by practitioners, e.g. Hanna, "Structured Settlements" (1991) 15(9) Canadian Lawyer 30 and the special issues of *The Law Times* for 4 Mar. 1991 and 5 Oct. 1992. In addition, there are a number of privately published guides and advertising booklets which are distributed by the brokers, e.g. F. McKellar, *Structured Settlements: A Practitioner's Manual*, and Henderson *Structured Settlements, A User's Guide*.

3. I received assistance from a number of individuals and companies in Canada, but I particularly wish to thank John Weir, the former Ontario Superintendent of Insurance and author of *Structured Settlements* (1984), Frank McKellar of McKellars Structured Settlements, David Sampson of Henderson Structured Settlements Inc., Robert Baxter of Baxter Structures, Bernard Younder of TSSC Structured Settlements Ltd, Robert Watkin of Bennet, Best and Burn, and the law schools at Osgoode Hall, Toronto, Windsor, Ontario, and Dalhousie, Nova Scotia.

has received similar assistance from those involved in the British market,⁴ and a book on the domestic scene is soon to be published.⁵

This article is socio-legal in nature: it describes practices and problems which have arisen within only a very limited legal framework; and it attempts to chart some of the concerns of those who are intimately involved with this form of compensation, even though these issues have received the attention of neither the judiciary nor the legislature. However, it only outlines a comparison, and does not repeat discussion of matters covered in the limited literature now existing on structures in Britain.⁶

I. STRUCTURES IN OUTLINE

STRUCTURED settlements have radically affected the way that damages are negotiated and paid in cases of personal injury. They substitute a pension for part of the lump sum traditionally obtained as compensation. The pension is usually derived from an annuity bought by the insurer covering the liability involved, and held for the benefit of the injured person. Unlike the lump sum, the amount of the pension can be varied, and its payments "structured" over a period of time; they may last for as long as the plaintiff lives, or longer if there is still a need to support dependants. The pension can be protected against inflation. It can also be tailored to allow for the release of larger amounts in the future if it is expected that the plaintiff's needs or expenses will be greater than now. Lump sums can then be made available (for example, to replace a car) provided that a specific date is set for the release of such money. However, such contingencies must be planned in advance, because a structure cannot be revised once it has been formed: there is no easy way of unlocking the capital in the structure if unforeseen circumstances arise

4. I am particularly indebted to the firm of Frenkel Topping, not only for its literature but also for its time and patience over many meetings and hours of interviews in the past few years.

5. *Structured Settlements: The Law and Practice* is to be published by Sweet & Maxwell later this year.

6. See my previous articles, "Pensions Replace Lump Sum Damages" (1988) 15 J. Law and Soc. 392, "The Case for Structured Settlements" (1991) 141 N.L.J. 1419, "Structured Settlements in Practice" (1991) 10 Civil Justice Q. 212, and "Legal Limits upon Structured Settlements" (1993) Camb. L.J. (forthcoming), and "The Merits of a Structured Settlement" (1993) Ox.J. Leg. Studies (forthcoming). For other academic reviews of developments in this country see Allen, "Structured Settlements" (1988) 104 L.Q.R. 448, and Scott (1988) 7 Civil Justice Q. 99. There are many articles by practitioners, e.g. Edwards (1989) 86 L.S.Gaz. (26 July), Frenkel, "Structured Settlements: Practical Considerations" (1989) 5 Personal & Medical Injuries Law Letter (April and May), Hulls, "Structuring Personal Injury Awards" (1990) 87 L.S.Gaz. (21 Mar.), Holloway, "Everyone's a Winner" (1992) 152 Post and Insurance Monitor (12 Sept.), Frenkel, "Salvaging the Wreckage and Healing the Wounds" (1992) 136 Sol. J. 8, Whitfield, "The Basics and Tactics of Structured Settlements" (1992) 142 N.L.J. 135.

which increase the plaintiff's needs. This is the major disadvantage of a structure.

By contrast, one of the advantages of a structure is that it may provide a plaintiff with higher income from the damages, whilst at the same time saving money for the insurer. Both sides are said to win. These financial benefits arise from the favourable tax treatment now given to structures by the Revenue authorities on both sides of the Atlantic. Whereas formerly the income from the investment of the damages award was subject to tax in the plaintiff's hands, it has now been agreed that this tax can be avoided if the damages are structured. The periodic payments to the plaintiff are considered to be capital and not income, and are therefore free of income tax. Insurers may now be able to pay out less, and yet fund a higher income for the plaintiff than if the damages were invested directly by the plaintiff.

Apart from its financial attractions, structuring offers plaintiffs freedom from the responsibilities of investment. They can also be protected from the vagaries of the financial world. The income from a structure can be tied to a price index, so that a plaintiff need not worry about the potential ravages of inflation, although the need for such protection in Canada is much less and in practice almost unknown. The income from the structure will not be affected by falls in the stock exchange, or by the revision of tax or interest rates. At the same time there is relief from the burden of having to manage a capital sum often in excess of anything normally encountered in the lifetime of the average person. If the plaintiff lives longer than the period envisaged when the structure was agreed, there is no fear of the money running out. Of course, this is a real fear when a lump sum award is made for it is often based upon little more than a guess as to the plaintiff's life expectancy. Finally, the plaintiff is protected from his own fecklessness (and that of his investment advisers), and from the depredations of spendthrift friends or relatives. The capital is locked away and cannot be dissipated. In short, structuring not only offers plaintiffs an opportunity to protect the sum awarded for their future, but can also relieve them of the worry and cost of the continued management of the fund. Overall, it can be argued that the development is the most important reform of tort in over 40 years.⁷

II. HISTORY OF DEVELOPMENT

A. *Judicial and Legislative Involvement*

Dissatisfaction with the lump sum as the only means of payment of damages for personal injury has been evident in many jurisdictions since

7. Lewis, "Pensions Replace . . .", *idem*, p.413.

the 1920s. Various legislative attempts have been made to give the judiciary the power to award pensions in lieu of the lump sum.⁸ Law reform bodies have commonly recommended the more extensive use of pensions.⁹ However, for a variety of reasons, statutes enacted for this purpose have usually proven ineffective. In Germany, for example, "lump-sum settlements have like termites reduced the rent system to but a hollow shell".¹⁰

There have also been judicial declarations of concern about the inadequacy of the lump sum system. The most notable statement in the Commonwealth was made by Mr Justice Dixon in the Supreme Court of Canada in *Andrews v. Grand & Toy Alberta Ltd.*¹¹

The subject of damages for personal injury is an area of the law which cries out for legislative reform . . . 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 system presents problems of great importance. It is subject to inflation, it is subject to fluctuation on investment, income from it is subject to tax . . . [Y]et, our law of damages knows nothing of periodic payment.

8. E.g. in 1966 Western Australia became the first jurisdiction in the common law world to depart from the lump sum award, and was followed the next year by South Australia. But little use has been made of these provisions. See Luntz, "Damages for Personal Injury: Rhetoric, Reality and Reform from an Australian Perspective" (1985) 38 Current Legal Problems 29. Veitch, "Cosmetic Reform: Periodic Payments and Structured Settlements" (1982) 7 U. Tasmania L.Rev. 136, and Brett, *Structured Settlements: A Report for the Motor Accidents Authority of New South Wales* (1991, unpub.). Legislation also exists in the former USSR, and in many jurisdictions in North America. See D. W. Hindert, J. J. Dehner and P. J. Hindert, *Structured Settlements and Periodic Payment Judgments* (1992). The only European countries to fail to give their judges the power to award damages by way of a pension are Luxembourg and Britain. In Canada judges in Ontario are required by s.116 of the Courts Of Justice Act 1990 to order damages to be paid periodically if a plaintiff seeks a gross-up in order to compensate for the tax payable on the income from an award. The order is to be made "on such terms as the court considers just", but is to be refused if it is not in the best interests of the plaintiff. No use has been made of this provision. In British Columbia Structured Compensation Bills were introduced in 1989 and 1990, but they failed following the change of government. For the 1990 Bill see (1990) 16 Commonwealth Law Bull. 1108.

9. E.g. *Report of the Royal Commission on Civil Liability and Personal Injury* (1978, Cmnd.7054), the Australian National Committee Of Inquiry, *Compensation and Rehabilitation in Australia* (1974); the Ontario Committee on Tort Compensation, *Report* (1980); the Board of Inquiry into Motor Vehicle Accident Compensation in Victoria, *Report* (1978); the Manitoba Law Reform Commission, *Periodic Payment of Damages for Personal Injury and Death* (1987). However, such payments were rejected by the Ontario Law Reform Commission in its *Report on Compensation for Personal Injury and Death* (1987) and by the English Law Commission in its 1973 *Report on Personal Injury Litigation—Assessment of Damages* (Report No.56).

10. Fleming, "Damages: Capital or Rent?" (1969) 19 U. Toronto L.J. 295.

11. [1978] 2 S.C.R. 229. See similarly e.g. Macnaughten J in *Metcalfe v. London Passenger Transport Board* [1938] 2 All E.R. 352, and *Jenkins v. Richards Thomas and Baldwin Ltd* [1966] 1 W.L.R. 476, 480.

In spite of such statements in both Canada and Britain, neither the judiciary¹² nor the legislature¹³ has been able to implement a periodic payment system on any scale. Instead it has been left to the initiative of certain individuals—lawyers, insurers, brokers and taxation officials—to devise structured settlements which, largely because of their favourable tax treatment, have encouraged the use of pensions. They have developed “in the shadow of the law”.

B. *The First Structures*

Structures first developed in the United States in the 1960s in the settlement of the few Thalidomide cases to affect North America.¹⁴ However, they remained relatively rare until favourable tax treatment was given to them in 1977. The development and present use of structures in the United States have been subject to the particular conditions affecting insurance and tort law reform in that country and are beyond the scope of this article. Suffice it to say that the later developments in Canada and Britain now have more in common with each other than with the US position.

The origin of structures lies in the advance rulings sought from the Revenue as to whether the payments to the plaintiff would be tax free. It took some time for clear decisions to emerge. In individual cases the Revenue at first indicated that they would oppose such settlements, only for them later to change their view. Thus in Canada lawyers from British Columbia had their application for a tax-free structure rejected in 1977, only to find two years later that favourable rulings had since been granted to other firms in similar cases. The complaint was that “in the West we shake the tree and in Ontario they catch the fruit”.¹⁵ It was not until 1981 that Revenue Canada issued general guidance for the public as to when the tax-free payments might be obtained.¹⁶ In Britain the first attempts to discuss the matter with the Revenue took place as early as 1983. However, it was not until 1987, after the intervention of the Association

12. In *Burke v. Tower Hamlets Health Authority*, *The Times*, 10 Aug. 1989, Drake J considered that he had no power to award damages by means of a pension. This was criticised by Croxon, “Has a Court Power to Make an Order Other than a Lump Sum for Damages for Personal Injuries?” (1990), *AVMA Med. and Leg. J.* 4 (July). However, the Supreme Court of Canada also declared that it had no power to order a structure in *Watkins v. Olafson* (1990) 50 C.C.L.T. 101.

13. See *supra* n.8. The arrangements made for the payment of interim and provisional damages can be seen as going some way towards ending the once-and-for-all system, but are beyond the scope of this article.

14. “Annuities to Settle Cases” (1975) 42 *Ins. Counsel J.* 367. These settlements also involved Canadians. See J. P. Weir, *Structured Settlements* (1984), p.10.

15. Weir, *idem*, p.105.

16. Interpretation Bulletin IT 365-R. The current bulletin is IT 365-R2 of 8 May 1987, although this has been supplemented by more recent advance rulings in individual cases.

of British Insurers, that a public agreement was finally reached and a press release giving notice of the favourable tax position was issued.¹⁷

Whereas in Canada the Revenue decision had immediate effect upon a case, in Britain it was not until a year after the press release that a case was privately arranged by Eagle Star Insurance to take advantage of the new development. The second case did not arise until 1989. However, it did reach court because judicial consent was needed to the settlement made on behalf of a brain-damaged plaintiff. In *Kelly v. Dawes*¹⁸ the judge gave consent to the new method of settlement. It was considered the best means of providing for the particular plaintiff.¹⁹ This was some ten years after the first cases had been settled in Canada. Stimulated in part by the publicity given by the *Kelly* case, about 40 structures were organised in Britain in 1991 and a further 100 or more were put in place in 1992. By mid-1993 almost 200 were in place and £60 million of annuities had been purchased. The momentum had become such that no lawyer or insurer could ignore it.

C. Brokers and the Size of the Market

In both countries there has been a continuing process of education of the legal and insurance professions as to the potential scope and advantages of structured settlements. The brokers have taken a major part in this. Whereas in Canada there are a handful of major brokers (nearly all situated in Ontario and British Columbia), in Britain there is but one major active player, although others are now offering their services. The British broker is Frenkel Topping, the Manchester-based firm specialising in forensic accountancy. It has built up unrivalled expertise in the area and was responsible for arranging over 80 per cent of the settlements now in place. By contrast, in Canada the leading broker, McKellars Structured Settlements, has about 65 per cent of the market, although it too began with a very large share. In 1991 McKellars alone arranged 379 structures—almost four times as many as those arranged in Britain in 1992. The annuity premiums collected by McKellars amounted to \$85 million out of a total Canadian market which can be estimated as worth around \$130 million. This compares with an estimate of £30 million for the market in Britain in 1992. By contrast, in the United States the market is very much larger and was estimated to be worth \$4 billion in 1990 (see Table 1). Throughout the 1980s the market in Canada continued to grow by an average of 20 per cent a year, but it is now levelling out. There was a

17. Circular No.A.B.I. 54/87, July 1987. For discussion by the senior tax inspector responsible for the agreement see Newstead, "Tax Aspects of Structured Settlements" (1989) 7(10) *Litigation Letter* 78.

18. *The Times*, 27 Sept. 1990.

19. See Lewis, "Structured Settlements in Practice", *op. cit. supra* n.6, at p.214.

sharper rise in the earlier years of structuring, and a similar rise can be expected in Britain as practitioners begin to understand the role that structures can play in achieving settlement of their cases.

Table 1 Growth in structured settlements in North America

Year	USA (\$m)	Canada (\$m)
1977	15	
1979	150	0.3
1981	575	25.0
1983	1,300	46.0
1985	2,500	61.0
1987	3,300	84.0
1989	4,000	104.0
1991	?	130.0

Sources

United States The figures are estimates based on evidence obtained by D. W. Hindert, J. J. Dehner and P. J. Hindert, *Structured Settlements and Periodic Payment Judgments* (1992), para. 1.03.

Canada The estimates are based, first, on the author's interviews with brokers representing 85 per cent of the Canadian market, and second, on the computerised accounts and estimates supplied by the leading broker, McKellars Structured Settlements Inc. These accounts dealt with the annuity premiums McKellars alone structured over various years, and did not estimate the size of the total market. To provide a direct comparison with the US, Table 1 estimates this total market by grossing up McKellars' figures to reflect its present estimated 65 per cent market share. However, the larger market share McKellars held in the earlier years has been ignored. In comparing the US, no account has been taken of the differing value of the Canadian and US dollar.

The amount of damages put into a structure in Canada is usually about two-thirds of the total obtained from the defendant, and for McKellars this averaged \$225,000 in 1991. This is lower than the average British structure of £350,000, and reflects the greater familiarity with structures in Canada and a readiness to use them even in certain cases of low value. For example, 50 of McKellars' cases in 1991 involved structures averaging only \$24,000. These were established primarily to benefit children following the death of their parent in an accident. Although the surviving spouse might receive several hundred thousand dollars damages, children will commonly be entitled to only small sums (largely to provide for their college education), and it is these sums that are used to purchase the smaller structures. In Britain the lowest sum so far to be structured is £56,000 paid to a widow.²⁰ Structures for minors in wrongful death cases have yet to develop.

20. Frenkel (1991) *The Lawyer* 1.

Defendants in Canada are able to save about 8 to 15 per cent of the traditional lump sum value of the claim, and this is similar to the saving suggested by British brokers. However, it has been alleged in Britain that at times insurers have sought excessive discounts.²¹ These have amounted in some cases to over 30 per cent.²² There are no similar concerns in Canada, although it is recognised that the money available for structuring depends upon the skill of the parties in negotiating, and that both sides could suffer if a structure is not concluded. Unlike in the United States²³ defendants will let plaintiffs know the lump sum amount which they are offering as the purchase price of the annuity. This can then be compared by their lawyers with the traditional lump sum value with which they are so much more familiar. Plaintiffs are not simply offered a pension and told that if they wish to discover the lump sum equivalent they must find it out for themselves. The more open and informed model of structuring in Canada is being followed in Britain, although there has been an attempt in one case to hide the true cost of the annuity on offer.²⁴ Significantly, this involved an intermediary which was a subsidiary company of a US firm.

An area of concern in Britain has been the way in which brokers are paid. Frenkel Topping obtains a commission of around 3 per cent of the value of the premium placed with the life office for the purchase of the annuity. If the structure does not take place it makes no charge for the preparatory work. In effect Frenkel charges upon a contingent fee basis. This has drawn objection from lawyers, although it is the usual basis upon which intermediaries are rewarded when arranging annuities and life insurance business in general. By contrast, no objection has been made by the legal profession in Canada to the similar commission system operating there.²⁵ This may be because of the practice (if not the law) of paying Canadian lawyers by means of a contingent fee. They are familiar with that system of payment and are therefore less likely to object to it. In any event the computerised quotations obtained from life offices have built into them an allowance for the payment to the intermediary, and it may be that even if the method by which brokers were paid were changed, it would make no difference to the annuity rates offered. However, in Britain it is possible to enhance the annuity by removing the commission element.

21. Letter to *The Times*, 7 July 1992, from Graeme Williams QC and David Richardson.

22. Lewis, "What Discount Is Available for a Structured Settlement?" (1993) 143 N.L.J. 772.

23. Fuchsberg, "Pitfalls in Structured Settlements" (1989) 20 *Trial Lawyers Q.* 62.

24. See the transcript of *Braybrooke v. Parker* (22 Oct. 1991, QBD).

25. Weir, *op. cit. supra* n.14, at p.64 notes the fee structure. This can vary according to the influence the broker has in the market place, and McKellars has negotiated higher commissions.

A second area of concern has been whether a broker should be allowed to act for both sides in a structure. Although there has been no objection to this in Canada, the Law Society in Britain at first issued guidance stating that the plaintiff should have independent advice.²⁶ However, in evidence to the Law Commission, the Society has moderated its views. With proper safeguards, including both sides being made aware of the dangers of joint instructions, it is prepared to sanction an intermediary acting for both plaintiff and defendant.

III. COMPARISON OF THE POTENTIAL SCOPE FOR STRUCTURING

THERE are several factors which suggest that the scope for structuring in Britain is even greater than that in Canada, and that the demand will increase considerably in the next few years. Britain has almost twice the population of Canada, and both countries have experienced a continued rise in the number of large tort claims. The increasing ability of medical science to prolong the lives of those who would otherwise have died as a result of their injuries has led to greater dependence upon the tort system. In these cases of serious injury the cost of continuing future care has become of growing importance. These large claims—typically involving spinal or brain injury—are the ones most likely to be structured, and they are becoming more common.

A further reason for supposing that there will be sustained increase in structuring in Britain relies upon the fact that the learning curve with regard to the benefits a structure may offer is a long one. The Canadian brokers attribute the continued growth in their business throughout the 1980s to the fact that many insurers and lawyers remained unaware for some years of the circumstances in which structures might be used. Even today many small firms who rarely deal with high-value cases are still to understand the concept.

In Canada there are several restrictions which limit the ability of a plaintiff to sue in tort and these significantly reduce the scope to structure. These limits do not apply in Britain. They are discussed in the following sections.

A. Work Accidents Excluded

As in the United States, industrial injury cases are compensated almost exclusively by means of workers' compensation. This means that there is little or no recourse to tort. Although consideration has been given to structuring the workers' compensation pensions themselves, in practice this has proven too difficult and there are no structures for Canadian

26. Guidance published in "Personal Injury" (1992) 89 L.S.Gaz. 40 (28 Oct.).

industrial injury cases. By contrast, in Britain these types of case comprise 46 per cent of all claims made in tort.²⁷

B. Policy Ceilings

North American liability policies contain financial ceilings limiting the exposure of the insurer. In practice this reduces the maximum damages which can be obtained from the system, for it is difficult to enforce outstanding judgments against individuals rather than insurance companies. The scope for structuring is then curtailed. However, these policy limits have also been said to have encouraged structures in certain cases by emphasising the need for the damages to go as far as possible.²⁸

C. Limited Access to Tort in Road Accident Cases

Several Canadian provinces have no-fault motor accident schemes, and these may severely limit the use of tort or, as in the case of Quebec, entirely prevent an action from being brought.²⁹ These again reduce the scope to structure. Indeed the main reason for believing that the Canadian market will not continue to expand as it did in the 1980s is the reform of the Ontario Motorists Protection Plan put in place in 1990. Road accidents in Ontario constitute about 40 per cent of all Canadian structures and any reform in the area is therefore of great importance.³⁰ The changes made to the no-fault scheme in 1990 will have the effect of preventing an action in tort in 95 per cent of road accident cases by requiring a plaintiff to establish "a loss of use of a permanent and major part of the body". Although many structuring cases involve such catastrophic losses and therefore are able to satisfy the threshold requirement, the 1990 reforms will remove many smaller claims from the tort system. The change has not yet come to affect the system in full because many settlements of pre-1990 cases are still to be made.³¹ But to offset the loss

27. Report (Cmnd.7054), *op. cit. supra* n.9, at Vol.2, table 11. However, such cases are less likely to involve serious injury. They comprised only 28% of settlements made by insurers for £150,000 or more in 1987 and 1988: P. Cornes, *Coping with Catastrophic Injury* (1993), p.20.

28. In *Pelky v. Hudson Bay Insurance Co.* (1981) 35 O.R. (2d) 97 the court, in considering the insurer's duty to settle claims in good faith, implied that it would be unreasonable for an insurer, in any claim which would be in excess of the policy limits if awarded as a lump sum, to fail to propose a structure or to reject one arbitrarily.

29. The scheme is well described in appendix 12 of the *Report of the Ontario Task Force on Insurance*.

30. Middlemass accuses practitioners of overlooking other areas where a structure might be used in "Structured Settlements" (1992) 16 Canadian Lawyer 41 (Dec.).

31. Baxter, a leading broker, states that "about 80 percent of the cases I am opening today are pre-June 1990". See Reiman, "Specialists Must Be Innovative to Break Even in Tough Times" (1992) Law Times (5 Oct.).

of tort cases brokers have arranged to structure the pensions available under the no-fault scheme, and these can amount to \$1,000 a week for lost earnings alone.³² Proposals to revise the no-fault scheme further (for example, to provide for unlimited future care costs as they arise) have dramatic implications for liability insurers. This is because they must establish reserve funds to cover this new unlimited contingent liability. Again, structured settlement specialists have been astute to recognise that their product could provide the means whereby a reserve could be created for a specified single annuity premium.³³ Structures are therefore not necessarily confined to dealing with the sums available from the tort system, but are affected by any substantial reforms of that system. Overall, the introduction of no-fault motor vehicle schemes has limited the scope to structure. In Britain no such scheme exists at present, and although a Lord Chancellor's committee is considering a limited no-fault system for small claims,³⁴ there are no proposals to limit access to tort for major injuries.

D. Problems with Foreign and Self-Insurers

Until recently, the ability of self-insurers and foreign insurers to take advantage of structuring in Canada seemed limited. This was because the tax benefits seemed to be available only to insurance companies formed in Canada. However, following recent advance rulings from the Revenue, structuring is now possible for the likes of Lloyd's and US insurers involved in cross-border claims, as well as for self-insurers such as Canadian Pacific Railways and the mutual protection society for Canadian doctors. The change has been brought about as a result of submissions made by brokers and lawyers in particular cases. It involves a circuitous device whereby the self- or foreign insurer assigns liability to a domestic insurer who, in turn, buys an annuity from a life office.³⁵ It has taken many years to extend structures to these particular groups, whereas in Britain structures have already been put in place for self-insurers. In particular, health authorities have already taken advantage of the pen-

32. Reiman, "No-Fault Opportunity" (1991) *Law Times* (4 Mar.).

33. Fenik, "Annuities—the Perfect Reserve" (1992) *Canadian Insurance Accountants Association Education and Technical Information Circular* 1992-5.

34. Lord Chancellor's Department Consultation Paper, *Compensation for Road Accidents* (May 1991).

35. For details see Watkin, "The New Method of Structuring Settlement Agreements" (1992) 71 *Can. Bar Rev.* 27.

sion method of payment.³⁶ They have even been able to obtain the benefits of structuring by self-funding, and not buying an annuity.³⁷

IV. PROBLEMS ENCOUNTERED IN BRITAIN

DESPITE this greater scope for structuring in Britain there are several difficulties facing the market. Some of these problems have already been encountered in Canada and it might be instructive for the Law Commission to consider that country's experience when putting forward proposals for reform.

A. Tax and the Revenue Authorities

In both countries the Revenue have naturally been concerned that their attitude towards structured settlement taxation might encourage other attempts to avoid tax in circumstances far removed from those involving personal injury. They do not want tax planners to take advantage of the apparent blurring of the distinction between capital and income so as to concoct other schemes to repay "debts" by means of tax-exempt pensions. Revenue authorities on both sides of the Atlantic deliberated long and hard before permitting structures in the first place, and look carefully at each modification proposed to previous arrangements.

However, it is possible to discern that Revenue Canada has taken a more liberal attitude than its British counterpart. It has never claimed that it was forced by legal precedent to accept structuring. This is the position of the British Revenue, albeit that the main authority upon which it relies was decided over 50 years ago.³⁸ Most importantly, Canada has never sought to require a withholding tax to be paid as in Britain. This requires the life insurer to pay tax on the income arising from the annuity, with the result that the liability insurer must gross up the payment in order for the plaintiff to receive it in full. The liability insurer later reclaims the gross-up at the end of the tax year, suffering a loss of cash flow in the meantime.

Nor has Revenue Canada demanded too much from the liability insurer by way of regular book-keeping when it is apparent that the payments to the plaintiff are being made by the life office. To all intents and purposes the liability insurer plays no further part. The Revenue has

36. The first health authority case was *Field v. Hertfordshire Health Authority*, *Daily Telegraph*, 1 Nov. 1991. It has been followed by over twenty others despite particular problems being involved. See *The Times*, 28 July 1992, "Accident Awards Held Up by Dispute Over Who Pays" and Lewis, "Health Authorities and the Payment of Damages by Means of a Pension" (1993) 56 *Modern Law Review* (forthcoming).

37. The first self-funded case was *Sian O'Toole v. Mersey Regional Health Authority* (1992) L.S.Gaz. (2 Sept.) and (1992) 136 Sol.J. 880.

38. *Dott v. Brown* [1936] 1 All E.R. 543. See Lewis, "The Taxation of Structured Settlements" (1993) *British Tax Rev.* (forthcoming).

even permitted the liability insurer to assign completely any contingent obligation that may exist. There is no prospect of the Revenue in Britain agreeing to such a simplified system.

Overall, however, it is to be regretted that in both countries structures have developed almost on a piecemeal basis, with no legislative involvement or wider public debate as to their merits. Canadians point towards their constitutional difficulties in securing tax law reform. Because of this problem and that of obtaining legislative time, those promoting structures have been driven to negotiate with the Revenue on a case-by-case basis, rather than seeking to lobby the legislature. Although generally helpful, the Revenue have at times delivered confusing and contradictory decisions. However, problems have been alleviated by the Revenue issuing Interpretation Bulletins which give general guidance as to the position adopted, and by publishing advance rulings in selected individual cases. By contrast, there is no such practice in Britain, where developments remain shrouded in secrecy as negotiations on individual cases remain confidential to the parties concerned. Therefore, a framework of legislation would be very welcome in Britain. Specific provision could be made for structures, limiting the possibilities for using the tax-free device in other circumstances. In particular, the withholding tax problem, which has no counterpart in Canada, could be removed and the system of payment then made easier and more efficient.

B. The Security of the Structure

There has been increasing concern about the solvency of certain British insurers,³⁹ and a corresponding worry about the security of any structures that might be put in place. Because they envisage that payments will continue over many years, structures are particularly susceptible to problems caused by the potential failure of a liability office. At best the source of the payments made to the plaintiff may change, thereby possibly prejudicing their tax-free status; at worst the payments may be entirely lost. Liability insurers are also concerned about the extent that they might be affected in the event of the failure of a life office. The collapse of Executive Life of California has had a dramatic effect upon the use of structures in the United States and the methods now employed there to ensure that plaintiffs do not suffer as a result of such a failure.⁴⁰ In Britain

39. In particular the recent problems faced by Lloyd's and the collapse of Municipal Mutual Insurance. For a detailed analysis see Lewis, *op. cit. supra* n.5, at Chap.15.

40. Jeffries, "Structured Settlement Security: Reality or Facade?" (1991) 27 *Trial* 26 (Aug.). Two other long-established insurers active in the structured settlement market failed in 1991: both Executive Life of New York and Monarch Life were placed into receivership. In 1992 they were followed by the failure of Mutual Benefit Life of Newark, one of the oldest companies and known as the "Tiffany" of the industry. It had 700,000 customers. In November 1992 Fidelity Mutual Life of Pennsylvania failed, leaving a million

particular study has been made of the Policyholders' Protection Act 1975 but only limited reassurance can be given.⁴¹

In Canada there has been less concern about the problems that could be caused. First, the Revenue have agreed that the failure of a liability insurer will have no effect on the tax-free nature of the payments which must continue to be made by the life office;⁴² and second, the potential failure of a life office is not considered a realistic possibility because structures are placed only with insurers who are thought to be completely safe. The brokers emphasise that they deal only with the ten or so companies having assets of at least \$5 billion.⁴³ The failure of those such as Standard Life, Manu Life, Great West Life, Canada Life or Sun Life is not contemplated, and it is with these offices that most structures are placed.

C. Annuities and the Life Insurance Market

Concern has been expressed in Britain about the limited and volatile nature of the annuity market. It has been suggested that it is not as able as its North American counterpart to offer competitive rates; it is unused to writing policies based upon "impaired" lives;⁴⁴ it cannot readily offer the range of annuities which structured settlement specialists may require;⁴⁵ and it may take some time for companies to deliver their quotations in particular cases.

Canada had similar concerns in the early years of structuring. However, underwriting practices have now stabilised and, with increasing familiarity with structures, insurers have been able to offer a wider range of annuities. Some have reputations for producing better rates than

customers. These last two failures were caused by excessive exposure to the falling real estate market, and not the "junk bond" financing which led to the demise of Executive Life.

41. Both the Association of British Insurers and Frenkel Topping have been in correspondence with the Policyholders' Protection Board on the matter.

42. The liability insurer makes an "irrevocable direction" for the life office to make payments to the plaintiff. Whether this is sufficient to keep the creditors of the liability company from seeking the funds tied up in the structures is open to question. However, it would be a very robust judge who allowed such an action at the expense of the disabled victims of accidents.

43. Together with the "guarantees" offered by brokers, statements as to asset value are potentially misleading: details of surplus ratios would be better indicators of solvency.

44. These offer higher yields to those whose life expectancy has been impaired so that, for example, a 30-year-old may be taken to be 50 for life insurance purposes. Elligett, "The Periodic Payments of Judgments" (1979) Insurance Counsel J. 144. These annuities in North America have been said to be on average 30% cheaper than standard life ones, but British life companies have been more conservative in their rating policies. See Lewis, "Problems Faced by Life Insurers Underwriting Structured Settlement Annuities" (1993) 3(2) Ins. Law and Practice 1.

45. This involves e.g. paying annuities at different rates, with different start times and guarantee periods, and with allowance for the release of larger "balloon" lump sum payments at certain intervals.

others for particular types of annuity, but overall the market is seen as sufficiently competitive. Brokers are able to obtain instant computerised quotations from the leading companies, and comparisons can be made easily.

Whereas in Britain annuities are often linked to inflation by being tied to the Retail Prices Index, this is almost unknown in Canada. Instead, annuities are usually fixed to escalate at a rate of 3 to 4 per cent a year.⁴⁶ Of course, the greater the rate, the lower the initial yield from the annuity, and Canadians consider indexing to be prohibitively expensive. Whereas Canada has been a country of relatively low inflation, in Britain fears about the erosion of fixed pensions are such that plaintiffs' lawyers are keen to index the value of present sums, even though this may prove expensive. In Canada quotations for annuities are held open for up to three days on average, although because of its position in the market McKellar is able to obtain longer quotations at the same rates. As with any structure, if advantage is to be taken of the rates quoted, it is essential that the settlement be made expeditiously. In Britain there has been a Practice Direction to achieve this end,⁴⁷ although quotations seem to be kept open longer for they may be accepted within an average of two weeks.

V. CONCLUSION

THIS article has outlined the main features of structured settlements in Canada in order to highlight areas which may be of concern to the English Law Commission as it deliberates the extent that legislation is required to develop structuring further. The comparative treatment is especially appropriate, given that Canadians have experienced pension payments for almost a decade longer than the British. The similarities in the legal systems and the structure of insurance enable clear parallels to be drawn.

One major topic which the Commission is considering has not been discussed here because Canadians have little experience of it. It is whether and to what extent judges should be given the power to award damages by way of a structure. Should they be allowed to do so against the wishes of either or even both of the parties to the action? If so, who is to arrange the structure, in what sort of case and what security is to be offered against potential failure? Would it fuel demands for the payment of damages to be subject to periodic review? If so, could private insurers

46. The higher figure is used to secure future care costs for it is anticipated that the inflation rate for medical costs will be higher than for other items.

47. Issued by the QBD Master on 12 Feb. 1992: see [1992] 1 All E.R. 862.

fund open-ended commitments to service the tort system, or would it signal the beginning of the end for the private administration of common law damages for personal injury? These tantalising questions must be left for future discussion.⁴⁸

48. They are well dealt with in the Manitoba Law Commission report, *op. cit. supra* n.9, at Chap.4. The problems of structures which could be subject to review are highlighted in the Ontario Law Reform Commission's Report, *op. cit. supra* n.9, at Chap.5.