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An Analysis of Inconsistent Methodology to Compute Permanent Future Nursing Care Costs in Personal Injury Claim

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ABSTRACT

Restitutio in integrum has been the underlying basis of assessment for damages under the corrective compensation scheme of the law of tort. This doctrine commands restoration of the claimant to the pre-existing condition prior to the commission of the tort. While this basis of assessment has no apparent problem in respect of pecuniary part of the claimable damages in a personal injury claim, however, from another side of the spectrum, there is an inconsistent methodology as to how to precisely calculate the 'price' of pain or even future loss. As a result, judicial activism plays its part in promoting its creativity of solution to the problem, leading to inconsistent methodology on this spectrum of damages that bears diverse output. The objective of this paper is to highlight the flaws of the inconsistent methodology for the assessment of permanent future nursing care. The method used for this research is by tracing the relevant authorities that use the various methods of computing the multiplier and analysing the outcome of each method. The findings revealed anomalies of output as each method produces different output without any qualification on why a particular method is chosen. This flaw in the computation of the multiplier for future losses other than related to loss of earnings should not remain viable as there is no consistency of the output based on similar factual circumstances. One of the solutions for this debacle is to forgo lump sum payment altogether and move towards structured settlement payment.

Keywords: Damages, future nursing care, personal injury

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INTRODUCTION

Tort law compensates past, actual and future losses not only in the form of economic changes in a person's life but also for non-pecuniary suffering or adversities which are not measurable in a meaningful monetary sense. However, all these losses are still usually compensated by way of damages in the form of a lump sum monetary award based on the legal doctrine of restitutio in integrum (Cane, 2013). This legal doctrine commands restoration of the claimant to the pre-existing condition prior to the commission of the tort, and it has been the underlying basis of assessment for damages under the corrective compensation scheme of the law of tort. Ahangar (2009) had defined damages as the sum of money given to the claimant as compensation for loss or harm caused by the tortfeasor. In tort, the threshold of damages is the whole extent of loss sustained by the plaintiff (McConnel v. Wright, 1903), which reflects the tort the principles of 100% compensation for the loss suffered.

Damages for personal injury claim under the law of tort in Malaysia has its genesis from the common law of England. For instance, the principles in the assessment of general damages for pain and suffering is not statutorily regulated but are formulated based on judicial principles and precedents, assisted by an assortment of guides and schedules for computation of the award. However, some of the heads of the general damages has been modified and codified by statutory provisions. For instance, the judicial prerogative to decide on the multiplier for the damages for future losses in respect of loss of earning and loss of was wrested from the judiciary in 1984 by the amendment to the Section 7(3) and Section 28A of the Civil Law Act, 1956.

The relevant portion of Section 7(3) of the Civil Law Act, 1956 (as amended 2019) with respect to computing the multiplier for future loss states that: -

"(iv)in assessing the loss of earnings (emphasis added) in respect of any period after the death of a person where such earnings provide for or contribute to the damages under this section the Court shall—

a. …
b. …
c. …
d. take into account that in the case of a person who was of the age of thirty years and below at the time of his death, the number of years' purchase shall be 16; and in the case of any other person who was of the age range extending between thirty-one years and fifty-nine years at the time of his death, the number of years' purchase shall be calculated by using the figure 60, minus the age of the person at the time of death and dividing the remainder by the figure 2."

This provision specifically provides for calculating the multiplier in respect of loss of earnings of the deceased person in a dependency claim, and none other. For calculating the loss of earnings in respect of personal injury claim which does not result in death, the same method is repeated

in Section 28A(2)(d) of the Civil Law Act, 1956. The statute is silent on how to compute other continuing future losses or expenses which does not relate to the loss of earnings. Thereby, the Judges are at their liberty to devise the methods for the other kinds of continuing future losses and expenses; such as permanent future nursing care or medical expenses.

The statutory law mentioned above prescribes the arbitrary multiplier of 16 years for those who aged 30 years and below and a variable multiplier for those aged between 31 to 60, by deducting the prescribed age limit of 60 years with the claimant's age and divide by half. It should be noted that the Civil Law (Amendment) Act, 2019, has only recently revised the age limit for future loss of earning and loss of dependency claim to 60 years in line with the rise of the public service retirement age. This statutory amendment was gazetted on 31 May 2019 and came into operation on 1 Sept 2019 (Federal Government Gazette, 2019).

The criticism levied on this statutory prescription centred mostly on the notion that the methodology for the statutory multiplier is arbitrary. It defeats the very fabric of tort law compensation; on the principle of providing 100% damages or compensation for the loss suffered (Lewis & Morris, 2012). However, despite this criticism, one positive outcome is that it provides a consistent methodology for constant output.

This paper focusses on the inconsistency of the judicial methodology being currently applied in Malaysia in respect of computation of damages for future losses and expenses which are not statutorily regulated. The spectrum of future losses damages which are excluded from the statutory purview includes continuing or permanent future nursing care costs or permanent future medical expenses.

MATERIALS AND METHODS

One of the basic concepts of tort damages for a personal injury claim is that the damages award typically takes the form of a lump sum monetary sum. The Court awards the damages in a lump sum, once and for all. Except in exceptional and rare situation, this lump sum damages award or settlement is fixed and final without the possibility of increment or decrement in the future even when there are changes to the claimant's situation. (Cane, 2013).

The Court would not belikely to have any predicaments of finding the actual amount of loss for pecuniary expenses which have been incurred prior to the trial, except to substantiate the amount with sufficient evidence of loss. However, for continuing expenses or losses, it appears that the Court would likely need to have the sixth sense of foresight in order to be able to determine the continuing and future losses accurately; for it to comply with the tort compensation requirement of providing 100% compensation of all losses suffered. In practice, part of this problem has been alleviated by the statutory prescription, but some of the head of future damages are still left for the Court to decide.

For a better appreciation of the issue, this paper adopts the facts of John s/o Netchumayah v. Marimuthu (1985) for a hypothetical scenario in a personal injury claim. The 30 years old plaintiff was involved in an accident and suffered permanent quadriplegia. It was clear that he would never be able to walk again and was greatly dependent on others for his living vicissitudes. Prior to the accident, the plaintiff earned as a cinema operator for $580 a month. Due to the accident, he was incurring costs for nursing care at $200 a month and continuing for the rest of his natural life. From the facts, excluding the scope of special damages from the discussion in this paper, the claimable head of general damages are as follows: -

a. Pain and Suffering;
b. Loss of Future Earnings; and
c. Continuing Future Expenses for Nursing Care.

For item (a) head of damages, i.e. the assessment of the quantifiable damages sum for the pain and suffering for the claimant's injuries and residual sufferings would be by way of judicial trends and precedents (Ali et al., 2017). Assessment of damages for pain and suffering is assisted by the Compendium of Personal Injury Awards produced by the Bar Council's Task Force, which are currently in its 4th version in 2018 and is published every 3 to 4 years since 2007 (Task Force to Review Compendium of Personal Injury Award, 2018). The Malaysian Compendium tries to emulate the English's Judicial College Guidelines, which is currently in its 15th edition in 2019, published biennially since 1992 (Judicial College, 2019).

For item (b), the provision of a fixed multiplier for loss of future earning is governed under the Civil Law Act, 1956 in the form of Section 28A(2)(d). Loss of earnings can be in the form of pre-trial damage and post-trial damage. Pre-trial damage is considered as special damages as the pecuniary amount of losses can be specifically assessed since it has occurred. However, post-trial damage required the Court to predict future loss, and thus, it falls under the category of general damages (Abel, 2006).On the aspect of the interests, the category of damages carries a different proportion of interests; the interests for special damages commences from the date of loss while for general damages, it commences from the date of claim (Mahdzir, 2017). The Civil Law Act, 1956 also placed a cap of the claimable age for future loss of earnings at 55 years. The Act also prescribed a two-tier level of assessment; persons below the age of 30 and those who are between 30 and 55 (Awang et al., 2017). However, this age limit has now been increased to 60 years vide the Civil Law (Amendment) Act, 2019. Thus, the task of predicting the multiplier has been taken away from the Court's discretionary power. What is left is only for the Court to find the appropriate multiplicand based on the available evidence that has been tendered in the Court; taking into account deduction of expenses incurred while working. Thus, in

such a scenario, the Court may deduct some apportionment from the full income amount of $580 as the multiplicand, before using the fixed multiplier of 16 years multiplier as provided under the Act.

For the head of damages under item (c), all other future losses and expenses such as future costs of surgery, medications and nursing care also fall under the general damages. However, this head of damages is not being mentioned in either sections 7(3) or 28A of the Civil Law Act, 1956, nor was it being reviewed in the recent amendment to the Act in 2019. Thus, the computation of the multiplier for this future loss is left at the Court's discretion. The judicial activism of the Court's discretion has led to the inconsistent methodology of various approaches being adopted by the courts to assess this type of future damages. The assessment of the multiplicand is based on factual evidence available while the assessment of multiplier requires evaluation of expert evidence in terms of the disability suffered as well as determining and predicting the future consequences for the claimant. Without a prescribed methodology to assess this spectrum of future loss, the Court is left to rely on its judicial activism on this spectrum that leads to a multitude of methods with contrasting results.

The problem of quantifying the multiplier would only exist in cases where there is evidence of continuing and permanent future loss or expenses, as in the nursing care costs or medical costs for permanently disabled persons, as in the cases of paralysed and comatose claimants. If the medical experts only prescribed a specific shortened duration for the nursing care or medical requirement, the problem of assessing the multiplier would be eased as the specified duration would be used as the multiplier figure; without the need to consider the full lifespan multiplier (Husaini, 2019).

The question follows how to calculate this spectrum of damages; to calculate for future losses at the present value to abide with the tort compensation principle of 100% lump-sum compensation for past, present and future losses.

PREDICTING FUTURE LOSSES

Future losses and expenses which are excluded from the purview of the Civil Law Act, 1956 statutory provisions, included continuing permanent nursing care costs, medical costs, medication expenses and other permanent continuing requirements pertaining to the life and health of the permanently disabled claimant (Husaini, 2019). A claim for nursing care occurs when the claimant becomes permanently disabled due to the tort and thus requires continuing services to be rendered to him in attending to his daily needs (Kandiah, 1996).

In contrast to future loss of earnings and loss of dependency which are regulated by the Civil Law Act, 1956, the assessment for permanent future nursing care or medical expenses has been left to fend for itself by the legislators; allowing the Court to apply its discretion on the assortment of methods to calculate the years' purchase for loss of future permanent nursing care costs. Judicial

activism has created various approaches in the assessment of this spectrum of damages. The Court in Bujang Mat & Anor v. Lai Tzen Hai & Anor (2004) has even acknowledged and endorsed the existence of 5 distinct methods which has been used by the Malaysian Courts to calculate future losses in respect of permanent future nursing care costs or permanent future medical costs.

One may ask why it is difficult to compute the damages when it only requires the Court to find how much are the claimant's future losses are for the whole of his natural life span. While it seems easy to be said, but in legal reality, that very fabric of assessment entails variables which could not be accurately predicted with 100% certainty (Chan et al., 2012). For instance, one cannot predict the natural life span of a person since many possible contingencies may happen in the future. The assessment of individual mortality is guided by actuarial assumptions based on the general statistics of a particular jurisdiction. For instance, the mortality rate of a citizen in Malaysia in 2019 is 74.5 years (Department of Statistics Malaysia, 2019). Still, it does not necessarily ascertain that a Malaysian citizen could not live beyond that prescribed aged or work beyond the statutory age limit. An example can be seen in the like of Malaysian own former prime minister, Tun Mahathir Mohamad, who became the Malaysian 7th Prime Minister at the age of 92 years old.

This predicament is compounded by the fact that tort compensation requires the Court to assess the full 100% damages by a lump sum payment at the present value for the claimant. Thus, since most of the future losses have not yet occurred when the Court makes its finding, the Court needs to consider accelerated payment issues in its computation. Accelerated payment involved the Court to consider that the claimant is given a lump sum money for losses which have yet to occur and thus, the Court normally consider a discount, which is known as a discount rate in the UK, when allowing a lump sum payment for prospective future losses. This contingency and acceleration payment consideration has seen the UK courts allowing a discount rate of up to 4.5% to 2.5% a few years back in the UK (Fairgrieve & Gauci, 2017). However, since 27 February 2017, this discount rate has dipped to a negative percentage of -0.75% for the first time (Government Actuary's Department, 2017). It was assumed that the claimant would not make sufficient investment returns based on the lower risk investment vehicle such as Index-Linked Government Stocks (ILGS) (Wells v. Wells, 1998). Furthermore, the expenses suffered may have escalated much more in the future based on the inflation fluctuations.

INCONSISTENT METHODOLOGY

The first method is by applying the direct multiplier envisaged by the statutory provisions in the Civil Law Act, 1956, i.e. adopting a fixed 16 years multiplier for claimants aged under 30. Authorities that had adopted this methodology were influenced by the Supreme Court case of Marappan & Anor v. Siti Rahmah bte

Ibrahim (1990) in which the Court assumed that the legislature had taken into account the contingencies and accelerated lump sum payment factors when legislating the set multiplier. As such, the Court deemed bound by the set multiplier and declared that there was no need for any legislation to repeal what was merely a matter of practice when refusing to apply the annuity tables approach trend.

This decision caused much debate since the Supreme Court had not sufficiently rationalised the fixed multiplier for damages which were not mentioned in Section 28A of the Civil Law Act, 1956. However, since the decision emanated from the highest Court at that point in time, it had created a binding precedent and was followed by the courts since 1992 in Chandran v. Mohammad Razali bin Jaafar (1992) to the more recent cases of Kanan a/l Subramanian & Anor v. Aman Syah bin Abadzyuid (2002), Marimuthu a/l Velappan v. Abdullah bin Ismail (2007) and Syarizan bin Sudirman (a Child Claimed Through the Father and His Attorney Sudirman bin Selamat) & Ors v. Abdul Rahman bin Bukit and Anor (2010).

The second method is found in the precedent of the case of Zamri Md Som & Anor v. Nurul Fitriyaton Idawiyah Nahrawi (2002), which applied a direct multiplier but not limited to 16 years. The High Court while mentioning the case of Marappan & Anor v. Siti Rahmah bte Ibrahim (1990) in its deliberation merely compared that in the latter case, the claimant aged 23 years was awarded based on a multiplier of 16 years for the post-trial damages and considered 20 years would be appropriate for a 10years old claimant in the current case. How the figure is arrived at is anyone guesses. In another case of Wong Li Fatt William (an infant) v. Haidawati bte Bolhen & Anor (1994), the High Court had applied a direct multiplier of 10 years for a 3-year-old claimant after taking into account elements of accelerated payment and inference of reduced life span of the claimant. Thus, this second method is simply a figure based on the judicial perception, which was varied from Court to Court and judge to judge.A judge is entitled to select the years' purchase at his discretion, which may be speculative at the end. Authorities are not in uniformity as far as the numbers of years' purchase are concerned, and they do not help to draw a clear, distinct and authoritative conclusion (Dass, 1975).

The third approach is adopting a direct multiplier after by taking into account the balance lifespan of the claimant. The High Courts in Ng Chun Loi v. Hadzir & Ors (1993) and Tan Ah Kau v. The Government of Malaysia (1997) had utilised this approach in the assessment of permanent future nursing care costs. The courts made no deductions for contingencies when making an award in respect of costs of nursing care. A more recent High Court decision which supports this approach is the case of Intan Nirwana Sdn Bhd & Anor v. Srimahendran Lingam Maniam & Anor; Nayanasegar Haruskrushna (Third Party) (2011) in which the Court adopted a 40-years multiplier without any contingency deduction. The Court in that case even rationalised that the

decision not to deduct 1/3 for contingencies was not erroneous as indicated in the case of Bujang bin Mat & Anor v. Lui Tzan Hai & Anor (2004). However, there is a recent High Court decision of similar jurisdiction which had refused to apply this approach, as in Rosli bin Saad & Anor v. Salmiah binti Mat @ Mehat (2018).

The fourth approach is a bit more deliberate; the Court considers the life expectancy of the claim at the time of the accident and deducts1/3 for contingencies and accelerated lump sum payment, and a apply direct multiplier before calculating the output. The 1/3 deduction has no economic or actuarial foundation, but merely a judicial practise to take into account the early gains for accelerated payment or other contingencies, such as early death. In Chandra Sekaran a/l Krishnan Nair & Anor v. Ayub bin Mohamed & Anor (1994), the High Court had agreed to adopt this approach in awarding the claimant who was permanently paralysed as the Court considered that it was the “common law” approach without mentioning the source of the precedent common law. Some of the cases which adopted this approach included the Court of Appeal in Wong Kuan Kay v. Rohaizad Othman & Anor; Majlis Perbandaran Johor Bahru Tengah (Third Party) & Another Appeal (2015) and the High Court in Chan Yun Seng v. Zakaria Awang (2019).

The fifth approach is also using the life expectancy minus age at the time of the accident to determine the appropriate base multiplier. However, in contrast to using a 1/3 reduction for contingencies and accelerated payment as in the fourth approach, the Court utilises annuity tables with no deduction for calculation of the output. This approach adopted a method which was initially used by the Indian Courts to assess future losses by using annuity tables. The table uses the basic financial concept of present value, i.e. the current value of future loss sum given at a specified rate of return. Future loss sum is reduced at the discount rate, and the higher the discount rate, the lower the present value of the future loss sum. The rate of return applied in Malaysia has been fixed at 5% interests per annum on the annual varying depreciating capital.

For example, if the future loss is $1,000 a month, the annual loss will be $12,000 and adopting a five years’ purchase or multiplier, this will amount to $60,000. However, since the loss of the next five years has not yet occurred, it would not be just to award the claimant the full $60,000 for the loss which has yet to occur. As such, using the basic financial concept of the present value of $60,000 for the next 5 years at the rate of return of 5% per annum, the present value is only$51,953.72.In another perspective, this sum if invested at a rate of 5% per annum will yield interest, but the interest will be insufficient to make up the annual loss of $12,000 per annum; hence, withdrawals from the capital will be necessary to make up the annual loss sum of $12,000. See the illustration in Table 1.

Table 1
Present value calculation for future loss

YEAR	REDUCING CAPITAL SUM	ANNUAL LOSS $1,000 a month for 5 years purchase	INCOME ON INVESTMENT At the rate of 5% per annum on the reducing capital	CAPITAL REDUCTION / WITHDRAWALS
1ST	51953.72	12,000.00	2597.69	9402.31
2ND	42551.41	12,000.00	2127.57	9872.43
3RD	32678.98	12,000.00	1633.95	10366.05
4TH	22312.93	12,000.00	1115.65	10884.35
5TH	11428.57	12,000.00	571.43	11428.57

This annuity table is based on the rate of return of 5% per annum on reducing capital. However, this 5% rate of return was based on the standard investment return at that time when the table was presented by Messrs Murphy & Dunbar way back in the 70s (Dass, 1975). The same rate of return has been used even until now despite the fluctuation of the rate of return throughout the years. There is also no judicial guide for the changing of the annual return rate being practised by the Malaysia courts. Cases that had adopted this approach among others are Inderjeet Singh v. Mazlan bin Jasman (1995) and Yu Mea Lian & Anor v. Government of Terengganu & Ors (1997).

All these approaches are considered valid under the law despite its multifariousness. The High Court in Bujang Mat & Anor v. Lai Tzen Hai & Anor (2004) while acknowledging these different methods used in the computation for permanent future nursing care, had still to choose only one of the approaches and merely applied the fourth approach, i.e.by taking the balance lifespan with 1/3 contingencies for accelerated payment. It was unfortunate that the Court did not indulge itself in specifying whether this approach was the valid approach compared to the other. The Court iterates that any of the approaches may be used to determine the multiplier in the assessment of permanent future nursing care or future medical expenses. With due respect, the Court in Bujang Mat should have taken the opportunity to adopt the best-reasoned approach on the issue once and for all when it realised the ambiguity of having a multitude of approaches in calculating permanent future nursing care/ medical expenses (Husaini, 2019).

DIVERSITY OF THE OUTPUT AWARDS

Analysis of the output of each approach bears contrasting results. This paper is applying the factual background of Marappan & Anor v Siti Rahman bte

Ibrahim (1990) as a hypothetical example; which involved a 23-year-old claimant and a multiplicand for the nursing care costs at $350 for the whole life expectancy. The mortality rate of the claimant is assumed by way of national mortality statistics at 74.5 years (Department of Statistics Malaysia, 2019). The analysis of the output awards is tabulated in Table 2.

From the above, using all the valid and legally endorsed judicial methodology in computing future losses such as nursing care costs, the range of award may be between $42,000.00 up to $216,300.00 based on the same factual background and applying the same rate for the multiplicand. Each approach appears, for the time being, to be valid methods in assessing permanent future nursing care or medical expenses and could not be discounted as flawed. However, the contrasting results definitely imply a flawed judicial output as a consistent output could not be obtained on the same factual situation. For the claimants, they would choose the method which results in the highest output while for the defendants, on the adverse. However, this is far from realities in practice, as it remains the prerogative of the Court to utilise the appropriate multiplier based on any of the approaches as reflected

Table 2
Output awards for each approach

APPROACH	DETAILS	MULTIPLICAND ($)	MULTIPLIER	OUTPUT AWARD ($)
1	The direct multiplier of 16 years	350	16 years	67,200.00
2	The direct multiplier not limited to 16 years	350	Flexible: 10 to 20 years	42,000.00 – 84,000.00
3	The direct multiplier of remaining life span	350	74.5 years – 23 years = 51.5 years	216,300.00
4	1/3 deduction from the remaining life span	350	74.5 years – 23 year – 1/3 = 34.3 years	144,900.00
5	Annuity table calculation from the remaining life span	350	74.5 – 23 years = 51.5 years and calculated using annuity tables	77,191.83

in the cases cited earlier; which leads the parties merely hoping for the best outcome for their benefit.

This different output creates a problem for the legal professionals of the industry. The claimant would insist on the highest possible award and would expect the highest output method to be used for the computation of their claim. However, can the claimant's legal representative confidently and assertively assure his or her client that it would be so when the Courts are also using other approaches as the "correct" approach? On the other perspective as well, the defendants, which are usually represented through the intermediary of an insurance company in a personal injury claim involving a motor accident, also cannot assure of their actual risk, when the range can triple from the lowest risk amount.

CRITICISM OF THE METHODOLOGY

The simple analysis above reveals different results to the same factual situation. Each approach results in contrasting monetary sum. There is no prescribed condition for any of the approaches to be applied for a particular set of facts. It appears for now that everything goes. However, it is also not viable to have a particular set of criteria to entitle the claimant to apply a specific approach, which bears the highest output, since each method produce a different outcome.

The existence of diverse approaches to calculating the multiplier in permanent future nursing care is not an anomaly which could remain viable to be left on its own. It is not plausible to have a divergent of calculation, which results in contrasting outcome. This inconsistency of methodology would affect the credibility of the judgment; if the same case is presented before a different court, it can produce a different outcome. This credibility of judgment is not caused by an error of judgement but is rather endorsed by precedents (Husaini, 2019).

A PRAGMATIC PROPOSAL

One of the possible solutions for this debacle is for the Court to take cognisance of the flawed and inconsistent outcome if the various methods of assessment of the future losses are to remain. The Court may adopt a single approach rather than endorsing all approaches in order to achieve a consistent output in a similar fact situation. This may be an immediate and possible resolve based on the current legal scenario without the need for legal reform or legislative intervention. The case of Marappan being a Supreme Court case may have laid a foundation for a stricter guideline on the computation of the multiplier in this circumstance based on the doctrine of binding precedent. Though many authorities seem to deviate from the precedent, it should remain binding for all courts below. However, it is proposed that permanent future nursing care or permanent future medical expenses and the calculation thereof would be timely included in the statutory provision, as an independent section, similar to section 7 and section 28A(2)(d) of the Civil Law Act, 1956, rather than mere back riding

a provision which it was not meant to be (Husaini, 2019). However, all the methods of assessment are not without its fallacies as none of the approaches could meet the actual tort compensation of 100% damages for the loss suffered in the maxim of restitutio in integrum (Husaini, 2019).

The UK adopted a much more scientific approach by using Actuarial Tables (which are usually called as Ogden's Tables, taking the name of the first chairman of the committed which drafted the Actuarial Tables), which was first published in 1984 by the UK Government Actuary's Department: now in its 8th edition, published in 2020 (Government Actuary's Department, 2020). The development of the Actuarial Tables in the UK is not an easy assignment and was constructed based on the statistical data of the local jurisdiction (i.e. the United Kingdom) as compiled regularly by the Office of National Statistics, UK. The first edition was merely based on the mortality rate at that time. Each edition has improvements and updated schedules based on current situation and developments and even includes contingencies other than mortality factor in the actuarial calculations, which were updated and improved from time to time as new editions to the Actuarial Table are published (Hasim, 2016; Mohamad et al., 2012)

While this actuarial approach may be a viable solution to achieve the concept of tort compensation of 100% damages in a lump sum award, Malaysia cannot simply adopt the UK Actuarial Tables to its own shores without modification and statistical data of the local jurisdiction. However, the UK Actuarial Tables could be the guide for Malaysia to develop its own Actuarial Tables. Malaysia needs to set up a committee which would be responsible from time to time to review and develop the Actuarial Tables as need be based on the current situation at a particular time. The UK committee that is responsible for the development of the Actuarial Table: Personal Injury and Fatal Accident Cases were formed from a group of actuaries, law members, members from insurance companies and even academicians, who are experts in claims, personal injury and negligence areas (Mohamad et al., 2012).

The above solutions are based on the lump sum award framework. Whilst a lump-sum payment offers a once-and-for-all payment, and a clean break is often attractive to both sides, it has long been recognised that this form of the award is unsatisfactory in its ability to deliver on the restitution objective of damages (Cropper & Wass, 2009). Thus, a structured payment for future losses could be the option for paying common law damages for future losses, thereby eradicating totally the need to predict a suitable multiplier for future losses. This concept of structured payment was adopted from the United States as a means of converting a lump sum into periodical income throughout the lifespan of the victim. The Court in the UK approved the first structured settlement in 1989 but was not widely used despite its advantages (Lewis, 1994).

The structured settlement payment would enable seriously injured claimants to receive regular payments which could be guaranteed to last for their lifetime (Cropper & Wass, 2009; Lewis, 2010) rather than having a large lump sum payment which may either be under-compensated if the claimant's mortality prolonged and vice versa. There are many other advantages of the structured payment which have been detailed by other authors (Cropper & Wass, 2009; Lewis, 1993, 2006).

The unsatisfactory nature of the lump sum payment for tort compensation was raised by the House of Lords in Wells v Wells (1998) before the Damages Act 1996 was amended in 2005 whereby the structured payment award was recognised as one of the forms of damages award for future pecuniary loss in respect of personal injury (Section 2, Damages Act 1996) if the Court was satisfied that the continuity of payment under the order can be fulfilled by the defendant. Since the real payor of the judgment for most of the personal injury claim especially in relation to motor vehicle accident would be the insurer under the compulsory motor insurance requirement provisions, the claimant would rest assured of the continuity of payment under the structured settlement award. In the UK experience, the adoption of structured settlement payment was initiated by the Court even before the statutory codification. Thus, the Malaysian Courts may also award in such manner based on their own inherent powers provided under the Courts of Judicature Act, 1964.

RESULT AND DISCUSSION

There exists no strict rule or guide as to the computation for permanent future nursing care costs. Upon perusal of the trend of awards by the courts, as highlighted above, it is quite clear that there are various methods available. This spectrum of damages has been excluded from statutory regulations in the 1984 amendment of the Civil Law Act, 1956 and again in 2019 amendment of the same Act. The question follows as to whether it should remain that way or is it high time to regulate the assessment of permanent future nursing care, similar to the damages in respect of future loss of earnings and loss of dependency. If left at this pace, the computation of damages, especially in the arena of multiplier for permanent future loss in respect of medical treatment and nursing care, would be left at the whims and fancies of the presiding judges without real certainty whether that computation is right or wrong. However, even if legislation intervention is used to standardise the computation of the multiplier, a reliable method for the computation of that multiplier needs to be properly determined under the principle of restitutio in integrum rather than having a simplistic legislative arbitrary dictation of the multiplier figure as in the current section 28A of the Civil Law Act, 1956. Another viable option which complied with the tort restitution principle is the structured settlement payment award which may be initiated by the Court on its own powers.

CONCLUSION

The judiciary is aware of the multiple methods to calculate the permanent future expenses or losses such as future nursing care and medical expenses but had not streamlined the methods into a common output for the like cases. The doctrine of binding precedent further compounds the problem wherein the courts are bound to follow past precedents, but it appears that past precedents are no consensus on the method and adopt various methods as a valid way of assessing this type of permanent future losses. The notion of justice does not prescribe the like cases to be treated differently to produce a different result. The precedents do not impose any conditions on how the various methods are applied to particular cases. Thus, various methods that produce different awards are a flawed justice on its own and cannot be allowed to continue. The legislature should take action as it once did in 1984 regarding the calculation of loss of earnings. While the legislative arbitrary multiplier may not be in tandem to the doctrine of restitutio in integrum, a mechanism such as the Ogden's Tables used in England may provide a better solution. If the legislature neglects to take heed, the judiciary could still provide a solution by only adopting a single assessment method for this purpose rather than endorsing all. There is also the structured payment mechanism under the purview of the judiciary's tools to avoid altogether with the complication of predicting the future.

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REFERENCES

Abel, R. (2006). General damages are incoherent, incalculable, incommensurable, and inegalitarian (but otherwise a great idea). *DePaul Law Review, 55*(2), 253.

Ahangar, M. A. H. (2009). *Damages under Malaysian tort law: Cases and commentary.* Petaling Jaya, Malaysia: Sweet & Maxwell Asia.

Ali, N. A., Saleh, S. S. M., Jamian, N. H., Mustapa, N. R. N., & Yahya, M. A. (2017). The Personal Injury Claims Calculator (PICC) System. *International Journal of Academic Research in Business and Social Sciences, 7*(11), 1361–1371. https://doi.org/10.6007/ijarbss/v7-i11/3575

Awang, N., Majid, N., Saleh, S., & Said, J. (2017). An analysis on compensation of claims regarding to personal injury and loss of earning on several court cases. *Journal of Fundamental and Applied Sciences, 9*(6S), 358-370. https://doi.org/10.4314/jfas.v9i6s.28

Bujang Mat & Anor v. Lai Tzen Hai & Anor, [2004] 4 CLJ 127, p. 144-145. [2004] 6 MLJ 376; [2004] 5 AMR 181; [2004] 1 MLRH 404.

Cane, P. (2013). *Atiyah's accidents, Compensation and the law* (8th Edn.). Cambridge, U.K: Cambridge University Press.

Chan, F. W. H., Chan, W. S., & Li, J. S. H. (2012). Actuarial assessment of damages in personal injury litigation: How precise are we?. *Law, Probability and Risk, 11*(1), 25–39.

Chan Yun Seng v. Zakaria Awang, [2019] 5 CLJ 549.

Chandra Sekaran a/l Krishnan Nair & Anor v. Ayub bin Mohamed & Anor, [1994] MLJU 82.

Chandran v. Mohammad Razali bin Jaafar, [1992] MD 911.

Civil Law (Amendment) Act, 2019.

Civil Law Act, 1956.

Courts of Judicature Act, 1964.

Cropper, R., & Wass, V. (2009). Periodical payments awards and the transfer of risk. *Personal Injury and Wrongful Death Damages Calculations: Transatlantic Dialogue*, 91, 159-191. https://doi.org/10.1108/s1569-3759(2009)0000091010

Damages Act, 1996 (United Kingdom).

Dass, K. S. (1975). *Quantum in accident cases.* Kuala Lumpur, Malaysia: Malaysian Law Publishers.

Department of Statistics Malaysia. (2019). *Abridged Life Tables, Malaysia, 2017-2019.* Retrieved December 21, 2019, from https://www.dosm.gov.my/v1/index.php?r=column/pdfPrev&id=YnV4S1FyVnNzUWJlQ3F5NHVMeFY3UT09

Fairgrieve, D., & Gauci, J.-P. (2017). *Briefing note on the discount rate applying to quantum in personal injury cases: Comparative perspectives.* London, UK: British Institute of International and Comparative Law.

Federal Government Gazette. (2019). *Civil Law (Amendment) Act, 2019: Appointment of Date of Coming Into Operation,* P.U. (B) 330, 4 July 2019, Malaysia.

Government Actuary's Department. (2017). *Ogden's Tables: Actuarial Tables in Personal Injury and Fatal Accident Cases - Supplementary* (7th Ed.). London, United Kingdom: GAD.

Government Actuary's Department. (2020). *Ogden's Tables: Actuarial Tables in Personal Injury and Fatal Accident Cases - Supplementary* (8th Ed.). London, United Kingdom: GAD.

Hasim, H. M. (2016). The development of an actuarial approach to calculate damages for loss of future earnings. *Law, Probability and Risk, 15*(2), 95-106. https://doi.org/10.1093/lpr/mgv017

Husaini, M. F. (2019). The fallacy of consistency in assessing permanent future loss in a personal injury claim: The Malaysian practice dilemma. *International Journal of Academic Research in Business and Social Sciences, 9*(7), 714–725. https://doi.org/10.6007/ijarbss/v9-i7/6163

Inderjeet Singh v. Mazlan bin Jasman, [1995] 2 MLJ 646.

Intan Nirwana Sdn Bhd & Anor v. Srimahendran Lingam Maniam & Anor: Nayanasegar Haruskrushna (Third Party), [2011] 1 LNS 1698.

John s/o Netchumayah v. Marimuthu a/l Govindan, (1985) Kuala Lumpur HC No. P804/1983.

Judicial College. (2019). *Guidelines for the assessment of general damages in personal injury cases. In Oxford University Press* (15th Ed.). Oxford, England: Oxford University Press.

Kanan a/l Subramanian & Anor v. Aman Syah bin Abadzyuid, [2002] 7 MLJ 561.

Kandiah, C. (1996). Claim for nursing / future care of permanently disabled / paralysed accident victim - Should there be for nursing care at home or private / professional nursing centre. *Current Law Journal, 2*, lxxix.

Lewis, R. (1993). The merits of a structured settlement: The plaintiff's perspective. *Oxford Journal of Legal Studies, 13*(4), 530–547. https://doi.org/10.1093/ojls/13.4.530

Lewis, R. (1994). The Taxation of Structured Settlements. *British Tax Review,* 19-31.

Lewis, R. (2006). Appearance and reality in reforming periodical payments of tort damages in the UK. *SSRN Electronic Journal*, 418–442. https://doi.org/10.2139/ssrn.892980

Lewis, R. (2010). The indexation of periodical payments of damages in tort: The future assured? *Legal Studies, 30*(03), 391-407. https://doi.org/10.1111/j.1748-121x.2010.00163.x

Lewis, R., & Morris, A. (2012). Tort law culture in the United Kingdom: Image and reality in personal injury compensation. J*ournal of European Tort Law, 3*(2), 230–264. https://doi.org/10.1515/jetl-2012-0230

Marappan & Anor v. Siti Rahmah bte Ibrahim, [1990] 1 MLJ 99; [1990] 1 CLJ 32.

Marimuthu a/l Velappan v. Abdullah bin Ismail, [2007] 2 MLJ 23.

McConnel v. Wright, [1903] 1 Ch 546.

Mahdzir, N. (2017). Compounded interest in fatal accident and personal injury claims in Malaysia: The departure from the traditional approach. *Journal of Glocal Business and Social Entrepreneurship, 3*(7), 135–142.

Mohamad, M., Hashim, H., & Khalid, H. (2012). The traditional multiplier-multiplicand approach. In *International Conference on Economics Business and Marketing Management* (pp. 325–329). IPEDR, IACSIT Press, Singapore.

Ng Chun Loi v. Hadzir & Ors, [1993] 1 CLJ 323.

Rosli bin Saad & Anor v. Salmiah binti Mat @ Mehat, [2018] 1 LNS 1882.

Syarizan bin Sudirman (a Child Claimed Through the Father and His Attorney Sudirman bin Selamat) & Ors v. Abdul Rahman bin Bukit & Anor, [2010] 8 MLJ 530.

Tan Ah Kau v. The Government of Malaysia, [1997] 2 AMR 1382.

Task Force to Review Compendium of Personal Injury Award. (2018). *Revised compendium personal injury awards.* Wilayah Persekutuan, Malaysia: Bar Council Malaysia.

Wells v Wells, (1998) WLR 329.

Wong Kuan Kay v. Rohaizad Othman & Anor; Majlis Perbandaran Johor Bahru Tengah (Third Party) & Another Appeal, [2015] 4 CLJ 902.

Wong Li Fatt William (an infant) v. Haidawati bte Bolhen & Anor, [1994] 2 MLJ 497.

Yu Mea Lian & Anor v. Government of Terengganu & Ors, [1997] MLJU 252.

Zamri Md Som & Anor v. Nurul Fitriyaton Idawiyah Nahrawi, [2002] 1 CLJ 309.