

**ASSESSMENT OF PECUNIARY DAMAGES
FOR PERSONAL INJURY AND
WRONGFUL DEATH:
A STEP TOWARD FULL COMPENSATION
FOR TORT VICTIMS IN VIETNAM**

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ABSTRACT

The prime function of tort law is to compensate victims and enables them to recover full compensation for damage resulting from the wrongful act of tortfeasors. This means that the suffered must be entitled to recover what they have lost and what they will lose so as to get back to the situation they would have been in had the accident not happened. Though this rule is recognized in Article 610 of the Civil Code of Vietnam, the implementation of this rule by law and in practice is far different from the wording of this Article. Therefore, this research examines the current law and practice relating to the assessment of pecuniary losses for personal injury and wrongful death with an aim to reveal the inappropriate perception of this rule in Vietnam.

In selected comparisons with laws and practices in England, Japan, and the United States, this research reaffirms that tort victims in Vietnam are not fully compensated, even though the law gives them

the right to recover damages in full. The problems remain in six aspects. First, the disregard of increased earnings in anticipating the victim's lost earnings will pave the way for under-compensating the victim. Second, the loss of pension payment is not taken into account in the assessment process. Third, the calculation of the cost of caring service based on the caretaker's loss of earnings might be too expensive if the caretaker is a well-paid person. Fourth, the deceased's estate, however, receives less compensation because "the damages for victim's loss of earnings during the time of treatment" is replaced with "damages for their dependants' loss of dependency." Fifth, the assessment of dependency based on the difference between pre-accident and post-accident spending average of the victim's family is not appropriate. Sixth, the disregarding of pre-judgment interests and accumulation benefit in calculating damages will lead to the victim being under-compensated for past losses and over-compensated for future losses.

Based on the analysis of these issues, this research argues that full compensation could only be realized when these remaining problems are solved. It proposes that: (1) the prospect of increase in earnings should also be considered in the assessment of damages for both past and future loss of earnings; (2) damages for loss of pension should be an integral part of the award; (3) the damages for cost of nursing service should be calculated on the market price of such service; (4) the plaintiff in fatal cases should be entitled to recover the victim's loss of earnings when they are in the course of treatment and no damages is awarded for the loss of dependency in this period; (5) the damages for loss of dependency should be assessed on the victim's ability to provide support to the dependant if the accident had not occurred; and (6) the courts have to take into account pre-judgment interest and accumulation benefit while assessing damages.

INTRODUCTION

In recent years, the number of injuries and deaths in traffic accidents has been gradually increasing in Vietnam. Every day more than one hundred people are injured or die in traffic accidents.⁽¹⁾ In addition, there is also a large number of cases in which damage is inflicted to the health and lives of innocent people through criminal acts. Accordingly, the number of settlements needed to deal with damage deriving from those injuries and deaths is astronomical.

In the settlement process, the victims want to get a full compensation for their loss, but the tortfeasors, conversely, try to reduce or even avoid their liability for the damage. Thus, the neutralization of these two opposite interests rests on the division of liability between parties according to his or her fault contributing to the causation of the damage. However, the most concern to the court is what head of damage⁽²⁾ is recoverable and how to make a just assessment of the damage? This depends on law, policy and perception of the court on the issue.

In reality, the courts of Vietnam face many difficulties in applying law to define the head of damage and the amount of damages recoverable to the plaintiff.⁽³⁾ The Civil Code of Vietnam (CCV) has provided four articles with general descriptions on heads of damage in personal injury and wrongful death cases. It leaves room for subordinate legislations and the courts to make a detailed interpretation of these articles. However, the lack of official documents guiding the application of these articles poses an obstacle in the settlement process.⁽⁴⁾ In addition, provisions of the CCV are so ambiguous that they lead to over-compensation in some cases and under-compensation in others. These problems cannot be dealt with by the guiding documents themselves without any change in the provisions of the Civil Code.

Based on the assumption that the law must allow victims to receive “full compensation”, as the rule provided in Article 610 of the CCV, the research attempts to ascertain the problems leading to the over-compensation and under-compensation. It will use comparison as a method to look into the differences between compensation for tort

victims in Vietnam and that of some other countries. This approach will not only help to find out the cause of problems but also enable this research to introduce an appropriate perception of the “full compensation” rule as well as a new method of assessing pecuniary damages for personal injury and death to the tort system in Vietnam.

With that purpose, the research will start with the consideration of the principles of calculation in part one. In part two, it comes to more details on the calculation of damages for loss of earnings in personal injury and wrongful death cases. It shows that the law in Vietnam does not allow victim to receive full compensation for their losses, and then proposes solutions for the shortcomings. In part three, the research continues pointing out the influence of inflation and interest in calculating the present value of future loss. It proposes that the courts should take these issues into consideration in the calculation of damages.

Part one

DAMAGES AND THE PRINCIPLES OF ASSESSMENT

I. FULL COMPENSATION – THE CORE RULE OF TORT LAW

The prime function of tort law is to deal with compensation for damage caused by the tortfeasor to the victim;⁽⁵⁾ thus it recognizes the “full compensation” as a rule for its operation.⁽⁶⁾ This rule was officially recognized in English common law more than one hundred years ago, as Lord Blackburn wrote for a majority of the court in *Livingstone v. Rawyards Coal Co.*⁽⁷⁾ that “the principle of law is that compensation should as nearly as possible put the party who suffered in the same position as he would have been if he had not sustained the wrong.”⁽⁸⁾ From that time, this rule has been deeply recognized in English law and is still in use as a strong authority in present practice.⁽⁹⁾

According to this rule, the tortfeasor must be liable to bring the victim back to the living conditions they would have enjoyed had

(6) Assessment of Pecuniary Damages... (Thanh)

the accident not happened. It is incorrect and unjust to bring the victim to the same situation they were in right before the accident. This is because the victim's living condition will not remain the same every day and might have improved some time in the future had accident not happened. In addition, the rule also denotes that persons entitled to compensation are not only the injured themselves but also those who are affected by the consequences deriving from the accident.⁽¹⁰⁾ Thus, the compensation either aims at getting the victim back to their position they would have been in had there been no wrong committed by the tortfeasor, or helps the victim's beneficiaries to overcome any vulnerability which may occur without any direct support from the deceased.⁽¹¹⁾

Though the injured often receives a great amount of money for pecuniary losses in accordance with the rule of full compensation it does not mean the award is a complete remedy for the damage because the award is a result of anticipations of the victim's future. The judges have to predict what would have happened to victims had they not been injured and what will happen to them withstanding injury. The fact is that the future is full of uncertainties so that anticipations of the judge will never be one hundred percent correct. Accordingly, the award, which presents the difference between these two pieces of anticipation, is not absolutely precise either. Therefore, the law of tort tries to pursue a "fair" but not "perfect" compensation for tort damage.⁽¹²⁾

The recognition of maxim "restitutio in integrum"⁽¹³⁾ as a rule in awarding damages for personal injury is also a part of the debate. One argument assumes that the award of damages in personal injury involves many uncertainties and predictions so that this rule could not be applied in reality.⁽¹⁴⁾ This is the distinction between a claim for damages in personal injury and a claim for restitution of property damage.⁽¹⁵⁾ However, the concept has recently been interpreted more widely to the extent that it is equivalent to the full compensation rule used in common law.⁽¹⁶⁾ The application of this rule in a case of personal injury means that the plaintiff will be awarded a sum of money that will make good the sufferer.⁽¹⁷⁾ Though these arguments come from

different approaches, they all agree that the damages should be sufficient to bring victims back to the situation they would have been in had the accident not occurred. Therefore, “*restitutio in integrum*” and the full compensation rule could mean the same thing.

The full compensation rule also denotes that the victim will be entitled to recover every head of damage as long as they are reasonably incurred and strongly proved.⁽¹⁸⁾ The recoverable damages cover not only the losses that the victim has already incurred but also the anticipated losses, which will be incurred in the future.⁽¹⁹⁾ Nevertheless, damages might not be recoverable if the injured has already received the collateral damages from another source.⁽²⁰⁾

Article 610 of the CCV also provides that “compensation for damage must be paid in full.”⁽²¹⁾ This rule is understood in current practice as the receipt of compensation for every head of damage when it is provided in the law and the victim reasonably incurs such damage. Article 613 of the CCV enables the living injured to recover damages for loss of earnings, expenses for medical treatment, and cost of caring service. If the victim loses part of their “working capacity” and have to do another job with lower wage, they will be entitled to recover damages for loss of earnings up to the time when their earnings reach the pre-accident level.⁽²²⁾ In case the victim is “completely unable to work,” they will be able to claim for cost of a regular caring service at home.⁽²³⁾ Meanwhile, Article 614 of the CCV enables the plaintiffs in fatal cases to recover damages for medical expenses, costs of funeral and loss of dependency to the dependants.

Though Article 610 of the CCV clearly provides that “damages must be paid in full,”⁽²⁴⁾ the compensatory damages do not actually make the victims whole. The shortcomings attribute to the fact that the law itself is paving the way for over-compensation in some cases and under-compensation in others. For example, the court disregards the victim’s increased earnings will make the victim under-compensated. Meanwhile, the victim might be over-compensated if the accumulation benefit is not deducted from the future damages. All of these issues will be taken into consideration in the relevant sections of the following parts.

II. LUMP SUM PAYMENT AND THE COURT'S POWER TO AWARD THE DAMAGES

The lump sum principle enables the court to award plaintiffs a sum of money for every head of damage at the time of judgment. This money includes the damages for past losses, and damages for future losses.⁽²⁵⁾ Among these damages, calculation of past damages seems easy for the court, as these losses are actually incurred. In contrast, the assessment of future damages is a speculative work and involves many uncertainties. Though plaintiffs have a duty to prove that the damage is likely to happen in the future, no one can assure that the victim's future will go on track with what they have proven before the court. Therefore, the calculation of damages for future losses will never be as precise as the result of a mathematic calculation.

Even a lump sum payment might under-compensate the victim as their health may deteriorate or over-compensate them if their health condition improves faster than expected, this form of award is "generally preferred."⁽²⁶⁾ In England, the rule is well recognized by common law and statute that the court has power to grant the award in form of a lump sum payment.⁽²⁷⁾ The court usually applies a multiplication method⁽²⁸⁾ to assess damages at the time of judgment and uses a "discount rate" to take into account contingent factors before going to the final award for future losses.⁽²⁹⁾ Though the statute gives plaintiffs a "chance" to claim for further damages as their condition may deteriorate in the future,⁽³⁰⁾ it is not easy for parties to make the case for reassessment of damages after the court grants a lump sum award.⁽³¹⁾

The courts of Japan also commonly apply the lump sum rule when they grant an award to the plaintiff in personal injury and death cases.⁽³²⁾ Although they use methods of calculating damages which are different from those applied by English courts,⁽³³⁾ both past and future damages are awarded to the victim once for all at the date of judgment. Similarly, compensation for personal injury in the United States is normally made in the form of a lump sum for both past and future damages.⁽³⁴⁾

Though the law does not have any provision requiring that damages

must be made in form of a lump sum payment, the courts of Vietnam usually do so, except for damages for loss of dependency.⁽³⁵⁾ In either of these situations, the plaintiffs and defendants are still entitled to request for a readjustment of damages.⁽³⁶⁾ However, it seems to be impractical to consider the damages once again, as it will consume time and human resources to almost the same extent as was needed in the first assessment. In addition, there must be a flexible procedure to facilitate the parties to claim for readjustment, because any minor change in the victim's health condition or the cost of services could lead to the reassessment of damages so as to make the award fit with reality.

It is apparent that periodical payment is a good solution to make the victim whole and to avoid over-compensation or under-compensation to the victim. The victim does not have to worry about the management of award or depreciation of this money due to inflation. However, this scheme then lays a burden on the defendant's shoulders to make periodical payments. In addition, each of these payments must be sufficient to cover the victim's losses within a given period; therefore, this scheme will always require the reconsideration of the damages when the loss is expected to change. As a result, it does not provide a solution more effective than the lump sum system.

The recent development of a new scheme called "structured settlement" appears to provide a harmony, collecting the good points from both the lump sum payment and the periodical system. The scheme allows the plaintiff to receive periodical payments for future losses but only requires the defendant to pay once at the time of settlement.⁽³⁷⁾ In this system, the damages are calculated on the basis of lump sum damages for every future loss.⁽³⁸⁾ This money will then be used to buy an annuity that will provide the victim with regular payments for such losses.⁽³⁹⁾ As a result, the defendant will be free from the duty to pay damages periodically, while the plaintiff will be relieved from the burden to manage the award effectively. In addition, it allows the parties to arrange "a fixed minimum period" of payment so as to provide the dependants with financial support if the victim dies earlier than the period estimated at the date of

settlement.⁽⁴⁰⁾ Nevertheless, this system calculates the damages on the lump sum basis so that it is unable to avoid the imprecision of the predictions employed by lump sum system. Moreover, in the case of England, the scheme can only operate if the victim receives about £ 500,000 for damages and only half of this amount can be put in the scheme.⁽⁴¹⁾

Therefore, from the practical and effective aspects of these schemes, the lump sum payment is superior to the periodical payment and structured settlement system. Most plaintiffs prefer to receive damages in the form of lump-sum payment, as they want to hold money in their hand and use it as they want.⁽⁴²⁾ They will not have to worry whether the defendant will make the periodical payment on time or not.⁽⁴³⁾ In addition, the lump sum scheme can operate without any limitation to the amount of damages recoverable. It also allows the courts to shorten judicial procedures for each case by restricting the range of cases to be reexamined.

Based the assumption that the lump sum payment system operates more efficiently than the others, the following parts of this research argue for the introduction of a new approach in the assessment of damages for personal injury and wrongful death to the tort system of Vietnam. Part two will examine the recovery of damages for different heads of damage to show that the tort victims in Vietnam do not receive full compensation. Meanwhile the influence of inflation and interest on the calculation of lump sum damages will be examined in part three.

Part two

RECOVERY OF PECUNIARY DAMAGES FOR PERSONAL INJURY AND DEATH

The Civil Code of Vietnam provides a number of heads of damage which plaintiffs can claim for recovery. Under Article 613 of the CCV, the surviving victims are entitled to recover loss of earnings, medical expenses, cost of caring services, and loss of dependency.

While plaintiffs in fatal cases are entitled to, according to Article 614 of the CCV, damages for medical expenses, funeral expenses, and loss of dependency. Though these heads roughly cover most pecuniary losses in personal injury and death cases, the plaintiffs are still over-compensated in some cases and under-compensated in others.

This part of the research shows that the present method of assessment does not enable plaintiffs to get “full compensation” as is provided in Article 610 of the CCV. It will present the assessment of some heads of damage, in which the problems of over-compensation and under-compensation still remain, in order to point out the shortcomings of the current approach. By doing so, this part attempts to identify an appropriate method of determining and evaluating the damages in personal injury and wrongful death cases.

I. ASSESSMENT OF DAMAGES FOR PERSONAL INJURY

1. Recovery of damages for future loss of earnings

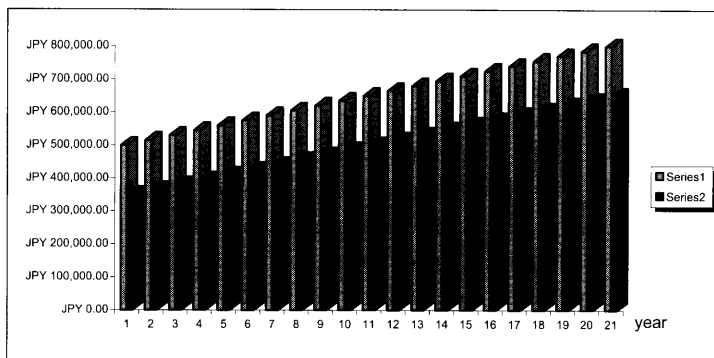
(a) The influence of earnings increase element in evaluating future loss of earnings

With the full compensation rule, the damages must be sufficient to return the victim to the situation they would have been had there been no accident. It means that the assessment of lost earnings should be based on the balance between the money the victim would have earned had they not sustained injury and the income they will get withstanding the injury. However, the courts of Vietnam do not apply this maxim. They usually allow the victim to receive damages, which are the balance between pre-accident and post-accident earnings, until the victim’s post-accident earnings increase to the pre-accident level.⁽⁴⁴⁾ This way of thinking is inappropriate and does not provide the victim with full compensation, for it disregards the victim’s earning increment. In reality, the earnings of pre-accident and post-accident jobs might rise with different incremental rates so that the gap between what they would have earned had the accident not occurred and what they will earn might be different as the time goes on. Thus, the assumption that the damage will be constant for a period of time in

the future is impractical. Even if the two jobs offer the same earnings increase rate and the loss is constant, the current approach could not allow the victim to receive full compensation. The reason for this under-compensation is that the victim can only receive damages from the time of accident until the time their income from current job is equal to the pre-accident level. After this period, they receive nothing for their loss of earnings.

For example, the injury causes the victim to leave her pre-accident job and starts working at a lower paid job. The victim's monthly earnings in previous and present jobs are 500,000 Yen and 350,000 Yen respectively. Both jobs offer an earnings increase rate of 5% per year on the based earning of 300,000 Yen per month. After ten years doing the current job, the victim will get the same earnings she got before the accident with 500,000 Yen per month. Accordingly, the current approach allows the injured to receive the monthly damages of 150,000 Yen for ten years. Though the loss is still incurred after the victim's earnings reach pre-accident level, the victim is not able to recover any compensation. As a result, the damages for future loss of earnings will not fully compensate the victim. Therefore, to put the victim into the situation she would have been in had the accident not happened, she should be entitled to recover damages as long as the gap between the earning streams of pre-accident and post-accident jobs exists. In this case, the loss should be equivalent to 150,000 Yen per month for the rest of her working life.

Further explanation could also be seen from illustration of the following graph.



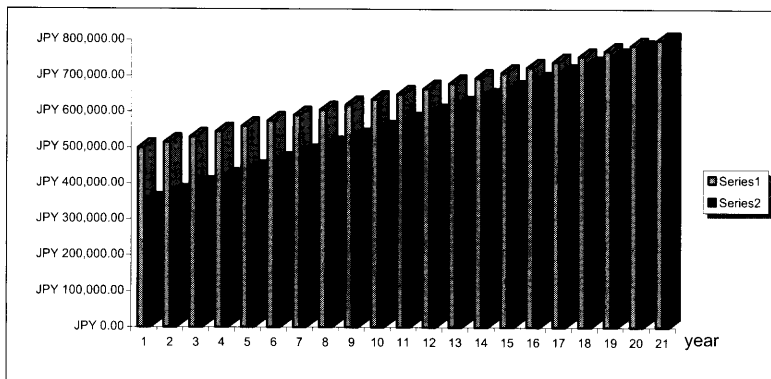
Series 1 is the earnings she would have received had she not been injured. Series 2 is the earning stream the injured will receive from her current job. The gap between each element of series 1 and its corresponding element of series 2 will form a monthly loss of earnings and represents the losses within twelve months. The graph shows that the tortfeasor will not escape from the liability to compensate the victim when her earnings reach the pre-accident level because the gap between the earning streams of the two jobs still exists for the rest of her working life.

The duration of making compensation could be shortened if the earnings increase rate of the current job is higher than that of pre-accident job. With a higher earnings increase rate, the injured will receive a bigger increment from her current job than the increment of her previous job. This means that the gap between earnings of the two jobs will be gradually narrowed. At the time this gap vanishes, the tortfeasor would be able to be disburdened of the duty to compensate the victim because the injury makes no difference between her earnings from the current job and the money she would have earned had the accident not occurred. Accordingly, the higher the earnings increase rate the present job offers the sooner the tortfeasor will be able to wash his hands of the liability to compensate for the victim's loss of earnings.

Suppose the earnings increase rate of the victim's post-accident job in the above example is 7.5% per year, her loss of earnings will change quite differently. By doing the current job, the victim's monthly earnings will increase by 22,500 Yen ($300,000 \times 0.75$) after each year, while her monthly earnings of the pre-accident job could only increase 15,000 Yen ($300,000 \times 0.05$) every year. After twenty years, the earnings that the victim will get from the current job will equal the amount she would have got had the accident not occurred. Accordingly, the tortfeasor is assumed to have accomplished his compensation liability after twenty years because the gap of earnings between two jobs no longer exists thereafter.

(14) Assessment of Pecuniary Damages.. (Thanh)

The following graph will provide further details on the victim's earning stream of pre-accident and post-accident jobs respectively.



In this graph, series 1 shows the earnings that the victim would have received had the accident not occurred; and series 2 reflects her flow of earnings from her current job. The rise of series 1 is lower than that of series 2 due to its lower earnings increase rate. The gap between each element of series 1 and its corresponding element of series 2 becomes smaller as the time goes on. This is because the present job's earnings rise faster than that of the previous job. Once this gap vanishes, the tortfeasor will not have to compensate the victim for loss of earnings any more. Therefore, the victim is entitled to damages for loss of earnings within 20 years, but not for the rest of her working life as it is decided in the previous example.

The above-mentioned analysis shows that the earnings increase rate plays a significant role in the assessment of damages for loss of earnings. The victim's future earnings will not be projected properly if the earnings increase rate is not precisely determined. In addition, avoiding this rate in calculating lost earnings will obviously produce an unsound award for the future loss of earnings. Therefore, this element should be taken into account in the assessment process.

(b) Compensation for loss of pension

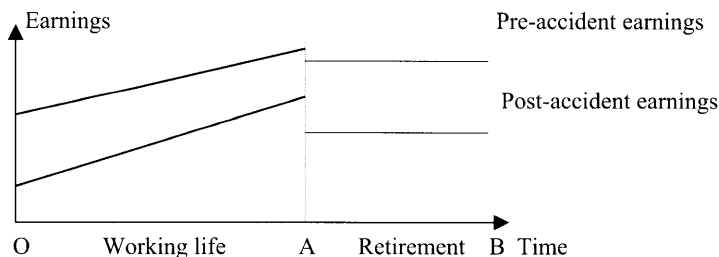
In many cases, the injury also leads to a reduction in the victim's pension payment.⁽⁴⁵⁾ This situation might result from the fact that the period of contribution to the scheme is shortened or the earning average of the last five-year working period prior to the retirement is reduced.⁽⁴⁶⁾ If either of these elements decreases to a lower level than the ones the victim would have got if they had not incurred injury, the loss of pension becomes imminent damage resulting from the injury. Thus, the victim should be entitled to recover damages for such loss of pension. Nevertheless, the CCV does not clearly state that the injured plaintiff is entitled to such damages. Therefore, this part will examine whether the pension payments have the nature of "earnings," which the injured could recover according to Article 613 of the CCV. If the loss of pensions is recoverable, how should the assessment of damages be conducted?

On the first issue, Article 140 of the Labor Code of Vietnam⁽⁴⁷⁾ regards the pension fund as a source providing its participants a sum of money or periodical payments after retirement. The money received from this scheme is not the earnings in a sense that an employer directly pays an employee in exchange for labor. It is the benefits of a scheme, to which employer, employee, state and other sources make contributions;⁽⁴⁸⁾ therefore, the pension payments can be seen as the fruit of an insurance policy that the victim has directly or indirectly made their contributions. These contributions, in fact, come from the victim's earnings in a way that a part of their income is extracted to pay for the pension scheme. It means that the pension payments can also be seen as the delayed remuneration of the victim's earnings. Therefore, the damages for loss of pension should be recoverable to the victim,⁽⁴⁹⁾ and Article 613 (2) of the CCV should be open to cover these kinds of damages.

Regarding to the assessment of damages in this circumstance, it is also based on the balance between what the victim would have received if they had not been injured and what they obtain under present working conditions. It requires the courts to estimate the pension payments that the victim would have got had the accident not occurred

and the amount they will get from the pension scheme they are making contribution to. However, the pension payments are paid the same every month so that the determination of damages will rest on the estimation of loss of pension at the time of retirement. This can be calculated by multiplying the average of lost earnings within five years prior to the date of retirement by the pension rate,⁽⁵⁰⁾ which they are entitled to receive.⁽⁵¹⁾ The result of this multiplication will represent the victim's monthly loss of pensions from the date of retirement up to their death. Nevertheless, this figure will have to go through another mathematic calculation, which takes into account the accumulation benefit, before coming to the final award.⁽⁵²⁾

The above-mentioned method of assessment can be seen in the following illustration.



The graph shows that the victim is not totally deprived of the earnings after the accident, as they are able to work in another job with lower earnings. They will recover loss of earnings from the time of accident until they reach notional retirement age (OA). After that period, they are entitled to recover loss of pension payments up to the time they are expected to die (AB).

On the contrary, victims who are free workers and do not join a pension scheme⁽⁵³⁾ will not be entitled to recover damages for loss of pension. Instead of paying into a pension fund, the employer gives that money to his employees and lets them decide how to use it. In that way, the free worker's net earnings are about 20% higher than that of the worker who joins a compulsory pension scheme.⁽⁵⁴⁾

Accordingly, if two persons have the same injury, the free worker receives greater damages for loss of earnings during his or her working life than the award for loss of earnings that the worker, who joins a compulsory pension scheme, could get.⁽⁵⁵⁾ However, the free worker cannot claim for loss of pension after he or she reaches notional retirement age, as he or she has already recovered every penny of his or her lost earnings during his or her working life. Even though the damages for loss of pension are not recovered, the damages for loss of earnings are sufficient to bring the victim to the condition he or she would have been had the accident not occurred.⁽⁵⁶⁾ Therefore, the free worker would only be able to recover the damages for loss of earnings up to notional retirement age and would not be entitled to damages for loss of pension after that time.

(c) Pension payments and the recovery of future loss of earnings

In more serious cases, the injury might force victims to leave their job early before they reach the notional retirement age. After retirement, the victims lose income directly paid by the employer but they are entitled to obtain money from the pension scheme, in which they participated. Thus, it raises the question of whether the pension payments should be taken into account in assessing damages for loss of earnings or not. If the answer is positive, then pension payments will be deducted from the damages for loss of earnings. If the answer is to the contrary, the injured will receive both damages for loss of earnings and pension payments at the same time.

While the courts of Vietnam have not touched upon this issue, the English common law has set out a rule that pension payments are not to be taken into account in the assessment of damages for loss of earnings. The House of Lords held that a pension was similar to insurance, which had been contributed directly or indirectly by the victim; therefore it should not be deducted from the damages for loss of earnings.⁽⁵⁷⁾ Lord Reid said:

The products of the sums paid into the pension fund are in fact delayed remuneration for his current work. That is why pensions are regarded

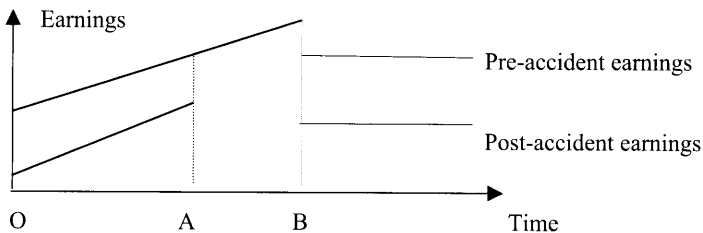
as earned income. But the man does not get back in the end the accumulated sums paid into the fund on his behalf. This is a form of insurance.... So, if insurance benefits are not deductible... why should his pension be deductible?⁽⁵⁸⁾

He added: “a pension is intrinsically of a different kind from wages.”⁽⁵⁹⁾ Wage is a direct payment from the employer in exchange for service, while the pension is a fruit of investment in an insurance scheme or at least a kind of savings the victim has made. They have a different nature so that the receipt of pension payments does not offset against the damages for loss of earnings. Therefore, the injured should be entitled to receive both damages for loss of earnings from the tortfeasor and the pension payments from the pension scheme. Lord Pearce also agreed with this approach and said that the measurement of damages on “real loss,” which was laid down in *British Transport Commission v. Gourley*,⁽⁶⁰⁾ was not applicable in this case.⁽⁶¹⁾

Put it in another way, the deduction of pension payments from damages for loss of earnings will better off the tortfeasor by using the victim’s money to compensate for their own loss. In their working time, the victim has to receive a low income in order to make their contributions to the pension scheme with the purpose of receiving pension payments after retirement. The pensions are supposed to remedy the low-income the victim received in the past. If the pension payments are deducted from damages for loss of earnings, the victim’s living conditions remain unchanged; however, they actually lose their contributions to the pension scheme. In such case, the tortfeasor will take credit against these contributions and does not have to pay for the losses that have been covered by the victim’s pension scheme. Ultimately, the victim’s payments to the pension fund are not for their benefit but for the tortfeasor’s benefit. This apparently breaks people’s sense of justice because the victim did not intend to make good the tortfeasor with their money when they participated in the pension scheme. Therefore, the pension payments should not be deducted from the recoverable damages for loss of earnings. Accordingly, the victim

can receive pension payment and damages for loss of earnings at the same time during the early retirement period; thus, the court of Vietnam should follow this approach.

The recovery of damages in the case of early retirement can be presented in the following graph.



As it is seen from this graph, the injured will receive damages that consist of three parts. The first part is awarded for loss of earnings during working time (OA), which is equal to the balance between the income the victim would have received had the accident not occurred and the actual income they obtain from their current job. The second part of damages is awarded for the loss of earnings during the time of early retirement (AB). In this period, the victim does not have income so that the damages will be equivalent to the amount they would have received from previous job had there been no injury. The last part is awarded for the loss of pension payments after the time they reach the notional retirement age. In addition to these damages, the victim is still entitled to receive pension payments from the pension fund for the early retirement period (AB) as a fruit of their participation in pension scheme.

2. Recovering the cost of caring service

In personal injury cases, the cost of the caring service is also recoverable to the victim.⁽⁶²⁾ The need of the caring service in the course of treatment naturally comes out of the tortfeasor's wrongdoing;

therefore, tortfeasor must bear the cost of the caring service so as to help the victim to live their normal life. In addition, the injured victim can claim for damages under this head when they have “completely lost capacity to work and need regular nursing.”⁽⁶³⁾

However, damages awarded for the cost of service in the course of treatment are different from the damages for a regular caring service given to the victim at home. The former is calculated on the caretaker’s loss of actual earnings plus the “reasonable expenses” that the caretaker incurs during the time he or she is providing service for the injured.⁽⁶⁴⁾ Meanwhile, the latter is evaluated on the basis of reasonable expenses commonly given to the service provider in exchange for caring service.⁽⁶⁵⁾ This means that the damage award in this situation is calculated on the commercial price of caring services available in the market regardless of the caretaker’s loss of earnings.

It appears that the calculation of damages based on the caretaker’s loss of earnings, which is stipulated in Article 613 (3) of the CCV, is heavily bias towards the victim rather than the tortfeasor. The tortfeasor will find it unreasonable to pay money for the victim – selected caretaker’s loss of earnings if this loss is higher than the cost of service available in the market. It is wasteful and unfair for the tortfeasor to pay for the damages beyond the commercial price, as the damages aim to meet the victim’s needs and not the caretaker’s losses. In addition, the use of the caretaker’s earnings as a basis for calculation of damages will encourage a high-income earner to stay off work to take care of the victim and receive the same earnings. Meanwhile, this approach will discourage people, whose earnings are unchanged during the time caring for the victim, to provide service because their best efforts are not recognized and these efforts will benefit the tortfeasor rather than the injured. Therefore, the approach using the commercial cost of caring services proves to be much more reasonable than the current method of assessing damages on the caretaker’s loss of earnings.

Another question is whether the plaintiff could recover the cost of caring service if the caretaker is the tortfeasor. The courts of Vietnam have not yet dealt with this issue, but it has actually happened in the

practice of English courts. The House of Lords has set out a firm rule that the injured cannot recover the cost of caring service when the tortfeasor is the caretaker.⁽⁶⁶⁾ Obviously, it is reasonable to get the tortfeasor compensate one way or another for the wrong he has done to the victim. If the tortfeasor has provided the caring service, he should not be obliged to pay for the cost of that service again.⁽⁶⁷⁾ There is no justification to require that “the tortfeasor himself should compensate the plaintiff twice over for the self-same loss.”⁽⁶⁸⁾

Although this authority has not been overruled, it is still faced with counter-argument that the victim should be allowed to claim for damages for both past and future caring services when the caretaker is the tortfeasor.⁽⁶⁹⁾ The rationale for this argument is that the damages will be held on the trust for the service provider⁽⁷⁰⁾ and plaintiff has a “personal obligation” to repay him this money.⁽⁷¹⁾ In such a way, the tortfeasor is apparently not obliged to make compensation twice for past damage because the money, which he has paid to the victim in form of damages, will come back to his pocket. In respect of future damages, the tortfeasor has paid for the service in money so that he will not bear the duty to provide service any longer. If he continues to provide caring service for the victim, he will be able to receive payment for his service. Thus, the damages theoretically do not over-compensate the injured even the caring service is provided by the tortfeasor.

II. ASSESSMENT OF DAMAGES FOR WRONGFUL DEATH

1. Damages for loss of earnings – an integral part of award in fatal cases

In Vietnam, the loss of earnings is currently not in the list of recoverable damages that the plaintiffs in fatal cases can claim for recovery.⁽⁷²⁾ Instead of this head, the courts usually allow the victim’s dependants to receive damages for loss of dependency right from the time of accident. This approach might enable the plaintiffs to recover full compensation when the victim dies right after the accident and

does not receive any continued earnings from their employer. However, in many other cases, the current approach might over-compensate or under-compensate the deceased and their dependants.

The dependants are over-compensated if they are entitled to receive money from two sources at a time after the accident. Suppose that a man died at the scene of the accident, due to the negligence of tortfeasor, but his employer still gives his successors a sum of money as his “continued earnings” under the agreement between the deceased and the employer before the accident. In that case, the recovery of damages for loss of dependency will overlap with the victim’s continued earnings. As a result, the plaintiff recovers the damages for the loss that dependants have not actually suffered. This situation could be avoided if the courts take into account the deceased’s continued earnings while assessing damages for loss of dependency.

In other cases, victims might be under-compensated for their losses, as they are not entitled to recover loss of earnings before death. The problem is that the CCV treats victims, who die after a long period of receiving medical treatment, as if they were found dead at the time of accident. In fact, they are alive during this period and receive medical treatment like many other injured victims. Thus, there is no justification to deny their status as an injured victim during the time of treatment. If the injured victims are entitled to recover damages for loss of earnings during their hospitalization period, the deceased should be entitled to recover such damages also. Though the law replaces the damages for loss of earnings with damages for loss of dependency, the award cannot fully compensate for the deceased’s losses. This is because the support, which victims give their dependants, is only a part of their earnings. Accordingly, the recovery of damages for loss of dependency will leave the remaining part of the victims’ loss of earnings unrecoverable.

Therefore, the plaintiffs in fatal cases should be allowed to recover damages for loss of earnings that victims incur from the time of accident to their death. In this way, the dependants will only recover damages for loss of dependency from the time of victim’s death until the time limitation for recovery is terminated.⁽⁷³⁾ In addition, the assessment

of damages for loss of dependency must also take into account the victim's prolonged earnings to avoid over-compensation for the dependants.

2. Recovery of dependency

(a) *Eligible dependants*

Article 614 (3) of the CCV recognizes that the dependants, who “the victim has duty to support,” are entitled to recover damages for loss of dependency. The compensation under this head is not a remedy for the damage caused to the victim and not made for the victim's benefit. It is made for the dependants' loss because they are no longer able to get financial support from the victim. The tortfeasor has destroyed the source that provides support for the dependants; therefore, he must be liable to fill up this loss so as to maintain the dependants' living conditions at a standard indifferent from that which they would have enjoyed if the victim had not died.

Nevertheless, the wording of Article 614 (3) is so ambiguous that it leads to different ways of understanding about “the victim's duty” to support dependants and the relation between this duty and the recovery of damages for loss of dependency to the deceased's dependants. The first approach interprets the victim's duty as a “legal duty”;⁽⁷⁴⁾ therefore, the dependants are entitled to recover damages for loss of dependency regardless of whether the victim has previously provided support for the dependants or not.⁽⁷⁵⁾ The tortfeasor will have to pay the dependants a sum of money so that they can afford to live at the average living standard in the area.⁽⁷⁶⁾ This approach might benefit the dependants after the victim's death when the victim's support is not sufficient for the dependants to maintain their life at the average living standard in the area. The use of such criterion as the upper limit for the award might also result in under-compensation for the dependants if the deceased's support allows them to have better life than the average living standard in the area.

This approach also unreasonably requires that the eligible dependants must be “unable to work” as the prerequisite for the

recovery of dependency.⁽⁷⁷⁾ This requirement will restrict people who partly live on the deceased's support from their right to claim damages for loss of dependency. As a result, these dependants will not get full compensation for their losses.

Take for example, a deceased husband who usually earned 900,000 Yen per month and his wife also earned 300,000 Yen per month. With his monthly earnings, the victim spent 400,000 Yen for his own expenses, 400,000 Yen for his two-year-old son, and 100,000 Yen for his wife. After the victim's death, his family does not receive any prolonged earnings from the victim's employer, and the wife's earnings are stable at 300,000 Yen per month. In this case, Article 614 (2) of the CCV allows the child to recover damages for loss of dependency of 400,000 Yen per month after his father's death. Meanwhile, the wife is not eligible to claim for her loss of support, which is of 100,000 Yen per month, as she is still able to work. Thus, the wife will have to live on 300,000 Yen per month, which is much less convenient than she would have been if her husband had been alive. This means that the damages do not fully compensate the deceased's dependants as is stated in the rule in Article 610 of the CCV.

Another approach interprets Article 614 (3) of the CCV in a way that allows any dependant, who lives fully or partly on the deceased's support, to recover damages for loss of dependency.⁽⁷⁸⁾ This approach releases the unreasonable restriction on the range of eligible dependants of the above-mentioned interpretation; thus the dependants, who are partly supported by the victim, can recover the loss of dependency. As such, this explanation on the wording of Article 614 (3) is well justified and could enable the dependants to recover full compensation.

Nevertheless, no supporter of this approach points out the need to take into account the prospect of increase in earnings of the deceased, and their capability of providing support for the dependant while making the assessment of damages for loss of dependency. The fact is that the deceased would not have received the same income if the accident had not happened. This change in the victim's net income

then leads to the change in the victim's support to the dependants; therefore the consideration of the victim's earnings increase is essential to the assessment of damages for loss of dependency. In addition, some authors make the mistake of calculating the damages for loss of dependency on the balance between the pre-accident and post-accident spending average of the victim's family.⁽⁷⁹⁾ The following section will investigate this mistake so as to reveal an appropriate method of assessing damages for loss of dependency.

(b) Assessment of damages for loss of dependency

The mistake of the calculation based on the balance between the pre-accident and post-accident spending average of the victim's family lies in the negligence to take into account the supporters' ability to financially support the dependants when there are more than one supporter. According to this method the key point is to determine the balance between the pre-accident and post-accident spending average of the victim's family, regardless of how much the victim is able to support dependants before the accident. It also disregards the other person's ability to support the dependants after the victim dies and forces them to make a contribution beyond their financial ability.

Suppose that the deceased husband earned 840,000 Yen per month before the accident; and his wife's net income is constant at 360,000 Yen per month both before and after the accident. When their earnings were used up for the benefit of their family with a ten-year-old and a thirteen-year-old child, their spending average was 300,000 Yen per month per person. After the husband dies, his wife and two children have no financial support other than the wife's income so that the spending average of the victim's family is 120,000 Yen per month per person. In this circumstance, the loss of dependency of each dependant is the difference between the pre-accident and post-accident spending averages of the victim's family. The loss of dependency will be calculated as following.

The balance between pre-accident and post-accident spending averages is:

$$300,000 - 120,000 = 180,000 \text{ Yen}$$

Thus, damages awarded to dependants for loss of dependency are 180,000 Yen per month for each of the two children.

If the mother's contribution remains unchanged at 60,000 Yen per month and the dependants receive the damages of 180,000 Yen per month from the tortfeasor, the child will have 210,000 Yen per month to maintain their living. Meanwhile, if their father had not died, the children would have received 540,000 Yen (840,000 – 300,000) per month from their father and 60,000 Yen per month from their mother. In such a situation, each of the children would have received 300,000 Yen per month for their living expenses. This shows that the two children actually receive less financial support than they should have if the accident had not happened.

The mistake of this approach is that it requires the mother to provide financial support for her children to a greater extent than she is able. If she usually gave 60,000 Yen per month for her children before the victim's death, this support becomes 240,000 Yen ($120,000 \times 2$) per month after her husband dies. As a result, there remains only 120,000 Yen per month for her to maintain her own living, which must be less comfortable than the living condition she would have had if her husband had not died.

This undesirable situation could be avoided if her ability to support her children is considered during the assessment of damages for loss of dependency. If the two children need 600,000 Yen per month to cover their living expenses and their mother could only afford 60,000 Yen per month, they should have 540,000 Yen per month from the tortfeasor to fill the loss of support from their father. Therefore, the dependants will only be made whole as long as the tortfeasor provides them with 540,000 Yen per month.

Part three

INFLATION AND INTEREST IN THE CALCULATION OF LUMP SUM DAMAGES

It has been mentioned earlier that awarding damages in form of lump sum is better than other solutions such as periodical payment and structured settlement. However, the question arises is that how the court could come to the final award that fully compensates the victim but does not punish the tortfeasor. If the anticipated future losses are added up and given to the victim at the time of judgment, they become wealthier after the accident with the benefit received from investing the award. Thus, the court must take this accumulation benefit into consideration so as to award the victim a sum of money that is sufficient to cover their future losses but does not leave them any extra benefit. This part will examine this issue in detail with a purpose of introducing an appropriate and better method of assessment to the tort system of Vietnam.

However, with the existence of inflation⁽⁸⁰⁾ the purchasing power of money declines over time.⁽⁸¹⁾ It means that a sum of money awarded to the victim today, which will be used for buying a service in the future, might not be sufficient to buy such service, as the price of service is higher than it was in the past. Thus, the court also has to consider this inflation element in the assessment of damages so as to protect the victim from being worsened after receiving the lump sum damages.

Moreover, if a sum of money is invested today produces more benefit than the same amount that is invested tomorrow, the victim become worse when they actually receive the same amount they have paid. If they did not pay for past losses, they would invest the money and earn benefit there from. In fact, they do not get any interest, as they have to pay for the damage instead of investing it. Therefore, this part will also consider the possibility of awarding interest on past damages in order to make the victim whole.

I. THE PRESENT VALUE OF FUTURE LOSSES

1. Accumulation benefit and the need to reduce future damages

The damages awarded in form of lump sum are different from the periodical payment system. All losses are estimated at the time of judgment and given to the plaintiffs in a sum of money.⁽⁸²⁾ If the notional series of periodical payments are added up and awarded to the plaintiffs, they will benefit from the unused money by investing it in the market. Accordingly, they actually receive the compensation for the damage and the interest from investing the award. Therefore, the court should deduct this benefit from the damages so that the victim is not over-compensated.⁽⁸³⁾ The deduction rate will be “the rate of interest that it is assumed an investor could earn on a lump-sum award.”⁽⁸⁴⁾

However, there are many ways of making investment in the market that the victim can do and the interest rates of these schemes differ. The victim can, for example, put money in such a high-risk investment as equity to get high benefit, or earn less money from risk-free investment such as index-linked government securities and government bond. In the first scheme, the victim must be a skillful investor; otherwise, they will subsequently lose money in the game with other investors. In addition, the investment in equity usually lasts for a long period of time before it can provide high benefit to the investor. Thus, it is not suitable for such investors like victims, who regularly draw out money to cover their future expenses. In contrast, the second scheme does not require any special understanding of the financial market or investment skill. All they should do is to put money in the scheme and get stable benefit after certain period of time. This could be seen as the easiest way of making benefit that is suitable for unskilled and prudent investors like the victim.

In reality, the most common approach is to choose interest rate of a risk free investment scheme to reduce future damages to present value. In recent case, the House of Lords held that the assessment of damages for future losses and expenses should be based on the assumption that the plaintiff would invest the award in index-linked

government security.⁽⁸⁵⁾ It is also common in the United States that the deduction of accumulation benefit from the damages is based on the interest rate of the inflation free government bond.⁽⁸⁶⁾ The justification for choosing risk free investment scheme is to avoid placing a burden of investment on victims when they are not really skillful investors. They should be regarded as laypeople, who prudently invest their money in a sector with high certainty of gaining benefit.

It is reasonable for the courts of Vietnam to follow this school of thought that the deduction of accumulation benefits from future damages should be based on the interest rate of a risk-free investment scheme. At present, the government-backed financial securities are not widely available in financial market.⁽⁸⁷⁾ Most of people tend to put their money in savings accounts to get interest when they could not do anything with that money. In this kind of investment, the creditor will regularly receive a sum of benefit at the end of each term, which is accounted on the deposited money. In addition, the interest rate theoretically consist of two elements, of which one aims to offset the decrease in purchasing power of the deposited money, and the other is for the cost of using lender's money.⁽⁸⁸⁾ Therefore, this could be a reasonable way of investment that the victim is expected to put their money.

2. Calculating the present value of future losses

There are many ways of discounting the victim's future losses to the present value. In *Beaulieu v. Elliot*,⁽⁸⁹⁾ the Supreme Court of Alaska held that "the award should not be reduced to present value" because the dividends received from investment could offset the inflation.⁽⁹⁰⁾ This approach seems impractical because the interest rate usually includes in itself an element to cope with inflation and the real interest for the use of lender's money. The Second Circuit, in *Doca v. Marina Mercante Nicaraguense, S.A.*,⁽⁹¹⁾ took a position slightly different from the Supreme Court of Alaska when it remanded the case to the district court with a suggestion that a fixed discount rate of 2% was appropriate in this situation.⁽⁹²⁾ If the parties failed to provide reliable evidence

about the inflation or discount rate, this fixed rate would also be applied.⁽⁹³⁾ Nevertheless, the method using “variable adjusted discount rate” on case-by-case basis has been gaining support from the United States Supreme Court and many state jurisdictions.⁽⁹⁴⁾ Though, this method is time-consuming, it has potential to project a proper result for present value of future damages. Thus, this method should be applied to assess the damages for personal injury and death in Vietnam, where the courts have not touched upon this issue.

In general, the reduction of future damages to present value is to prevent the victim from using early receipt of future damages for their own benefit. In that sense, if the victim’s future losses have the value of V_f , the court should award them an amount of money V_p . When the victim receives this money and invests it in the market, they will get the benefit equivalent to V_b . At the end, the total money, which the victim receives after investment ($V_p + V_b$), must be sufficient to cover their future losses of V_f . It means that the court has to find out the present value V_p so that it satisfies the following formula:

$$V_f = V_p + V_b$$

In the case of Japan, there exist two methods of calculating present value of future losses. The first one is the Hoffman method, which uses single interest rate in its calculation.⁽⁹⁵⁾ The second method, in opposite, assumes that victims will put money in a scheme, which offers compound interest rate; thus, it uses Leibniz method for its calculation.⁽⁹⁶⁾ Though both methods have been approved by the Supreme Court of Japan to be appropriate to deduct the accumulation benefit from future damages,⁽⁹⁷⁾ this section will only examine the Leibniz method to see the rationale for its use in Japan.

According to the Leibniz method, the relation between future loss and its present value is shown in the following form:

$$X = A/(1 + r)^n$$

This formula indicates that if the anticipated damage in the year $n+1$ is A , and the victim is supposed to receive compound interest rate of r from investing the award, they will only be able to receive

an award equivalent to X.

When the losses occur in several years in the future and the same every year, the courts will take the Leibniz rate in a fast-and-ready table,⁽⁹⁸⁾ which is corresponding to the number of year the loss will occur, and multiply it by the annual loss. However, this calculation could only apply for the cases that the losses are unchanged within a certain number of consecutive years. According to this assumption, the present value of future damages will be calculated in the following formula.

$$V_p = A \left\{ \frac{1}{(1+r)^0} + \frac{1}{(1+r)^1} + \frac{1}{(1+r)^2} + \dots + \frac{A_n}{(1+r)^{n-1}} \right\}$$

In reality, the victim's losses are not the same every year; thus, such way of calculation is unrealistic. It means that the courts should discount the future losses in each of those years to their present value separately and add up these discounted installments at the end.⁽⁹⁹⁾ If the losses within n year(s) have the value of $A_1, A_2, A_3 \dots A_n$ respectively, the present value of future damages will be calculated as follows:

$$V_p = \frac{A_1}{(1+r)^0} + \frac{A_2}{(1+r)^1} + \frac{A_3}{(1+r)^2} + \dots + \frac{A_n}{(1+r)^{n-1}}$$

Or

$$V_p = \sum A_n / (1+r)^{n-1} \quad (1)$$

The calculation of damages according to this formula is much more precise and practical than Leibniz method; therefore, the Vietnamese courts should apply the formula (1) to calculate the present value of future losses.

Nevertheless, the value of money will not remain the same during the time of high inflation such as the present days in Vietnam. It means that though the investors are apparently entitled to receive benefit on the investment, the real value of their money does not actually increase in the same rate with the interest rate because of inflation. Thus, the next section will take this matter into consideration to see the relation between interest rate and inflation rate in the

calculation of the present value of future losses.

II. INFLATION ELEMENT IN THE CALCULATION OF THE PRESENT VALUE OF FUTURE DAMAGES

In times of high inflation, when inflation is driving the way the legislation governing the establishment and performance of obligation,⁽¹⁰⁰⁾ the law must protect the obligee of a legal relation from the influence of inflation.⁽¹⁰¹⁾ If tort victims are entitled to full compensation, they should be protected by law in order to avoid getting worse after receiving lump sum damages due to the inflation.⁽¹⁰²⁾ Thus, the assessment of future damages is not only the work of anticipating what the victims will loss in future but also involves in predicting what will happen with the award. The ultimate purpose of this work is to assure that the award given to the victims today will be sufficient to compensate for their losses in the future.

In reality, the occurrence of inflation is known with the increase in retail price and cost of service or the decrease in purchasing power of the money.⁽¹⁰³⁾ If the victim is given a sum of money, which is equivalent to the cost of service at present time, to buy such service in future, they might not able to do so, as the price of such service will be higher than its present price. Similarly, damages awarded to the victim at the time of judgment might not sufficient to cover their future losses, as inflation causes decrease in the purchasing power of the money that victim is holding. However, the victim could avoid this adverse effect by investing the award and draws out the money when they need to pay for their losses. As a result, the courts have to find out the relationship between inflation and interest rate in order to calculate the present value of the victim's future damages.

There are a number of ways to take into account the inflation element in calculating present value of future losses. The first one is "inflate-discount" method, which requires the courts to estimate the victim's future damages and to take into account the changes in purchasing power of the money before discounting the damages to

present value.⁽¹⁰⁴⁾ The second method, namely “total offset” method, assumes that the rate of earnings increase is equal to the discount rate so that there is no need to discount future damages to the present value.⁽¹⁰⁵⁾ The third one is “real interest rate” method, which supposes that the victim will receive an interest rate including inflation rate and real interest rate; therefore, future damages will be reduced to present value by using the real interest rate as a discount figure.⁽¹⁰⁶⁾ The fourth method, which is somewhat similar to the third approach, bases the discount rate directly on the inflation-proof interest rate offered by index-linked government security.⁽¹⁰⁷⁾

Among these methods, the first approach is best fit to calculating the present value of future damages by using the formula (1) mentioned above. That is because the future losses (A), which might be affected by inflation, and the interest rate (r) do not have connection with each other; thus they must be considered separately. If the inflation is stable at y% per year and the cost of service at present is P_p , the anticipated price of such service after n year(s) will be $P_p(1+y)^n$. Thus, the sum $P_p(1+y)^n$ is the victim's future losses in the year n+1, and the present value of damages in that year will be calculated as follow:

$$V_{pn} = P_p (1 + y)^n / (1 + r)^n$$

Regarding to the “total offset” method, it is quite simple and the court will not have to do anything but anticipate future losses and add them up. Nevertheless, it is unjust to assume that every people have the same earnings increase rate so as to apply the same discount rate. Moreover, if the “total offset” is applicable in calculating damages for future loss of earnings, what discount rate should be applicable to calculate the present value of future medical expenses? The earnings increase rate could not be used to calculate present value of future medical expenses because it has no relation with the increase in medical costs. Therefore, this method is not appropriate for the calculation.

The third and the fourth approaches, on the contrary, are rather troublesome to be used in formula (1). If a part of the interest offsets the increase in price of service, the variable A in formula (1) will be the present cost of service (P_p). The real interest rate will be the

balance between the interest rate (r) offered by the bank and the inflation rate (y). Accordingly, the calculation will be conducted in the follow manner:

$$V_p = P_p/[1 + (r - y)]^n$$

If the victim puts this award into investment with the interest rate r, compounded annually, and draws out after n year(s) in order to pay for the losses in the year n+1, the total money they will get is:

$$S = \{P_p/[1 + (r - y)]^n\} \times (1 + r)^n$$

Meanwhile, the price of the service in the year n+1 is:

$$A = P_p (1 + y)^n$$

Apparently, the value S is smaller than the value A; therefore, the damages awarded by using this method will not fully compensate the victim for their future losses.

With such advantages and disadvantages of the four methods mentioned above, the “inflate-discount” method is the best choice to apply in calculating the present value of future damages in the tort system of Vietnam.

III. INTEREST RATE AND THE CALCULATION OF PAST DAMAGES

In theory, the victim is entitled to receive compensation for damage from the time of injury.⁽¹⁰⁸⁾ However, tortfeasor did not pay for the damage as it happened so that the injured had to pay for it out of their pocket and waited for remedy till the date of judgment. If they had not made such payment, they would have obtained benefit from using their money in the market. That means victims have been deprived of an opportunity to make benefit on their own money from the date of payment until the date of judgment. Therefore, the award of prejudgment interest is reasonable to ensure that victims receive full compensation.⁽¹⁰⁹⁾ That also prevents the tortfeasor from unjust

enrichment by delaying payment for the victim's past losses.⁽¹¹⁰⁾

As the term means, prejudgment interest is only recoverable on damages for the loss that have already incurred up to the date of trial.⁽¹¹¹⁾ The award given to the victim in this situation is to compensate for the loss of benefit from the money they have already paid for the damage out of their pocket. Thus, the prejudgment interest will only be accrued on past damages. It cannot be calculated on the damages accrued after the date of settlement because the victim is entitled to receive the award for future losses at the time of judgment so that they will not have to use their own money any longer.

The prejudgment interest is made on the past damages so that the plaintiffs have to prove that they have actually incurred losses. The remaining work of the court is to determine the accrual period and the applicable interest rate. Thus, the following sections will concentrate in examining these two main issues.

1. Accrual period

In calculating prejudgment interest, the accrual period is a key factor affecting the recovery of damages. There are different approaches in determining the time when this period starts. The first approach calculates prejudgment interest on damages accrued from the date of injury.⁽¹¹²⁾ The Supreme Court of Texas opposed this approach and held that "interest shall begin to accrue on both pecuniary and non-pecuniary damages from a date six months after the occurrence of the accident giving rise to the cause of action."⁽¹¹³⁾ However, this rule has recently been changed with a new statutory rule.

... prejudgment interest accrues on the amount of a judgment during the period beginning on the 180th day after the date the defendant receives written notice of a claim or on the date the suit is filed, whichever is earlier, and ending on the day preceding the date judgment is rendered.⁽¹¹⁴⁾

Applying in the situation of Vietnam, the second and third

approaches are rather arbitrary. The fact is that the victim has the right to claim for damages right from the time the tortfeasor caused injury to them. They have this right and are entitled to bring action against the injurer to claim for any loss accrued from that time, as long as the time limitation for this action is not expired. If the victim paid for the damage at the time it occurred, their loss of use of money also started from that date. Therefore, when prejudgment interest is calculated on damages, which have been accrued after the fixed date, the victim will lose the use of money for the payments they have already made before that date. As a result, their loss of benefit could not be recovered in full.

In addition, the setting of a starting date for the accrual period like these two approaches do not encourage the tortfeasor to get involved in mitigating the victim's damage or early settlement. The main purpose of the award of prejudgment interest is to prevent the tortfeasor from unjust enrichment by making use of the money that should have been paid for the victim's damage.⁽¹¹⁵⁾ It encourages the tortfeasor to make payment for damage shortly after it occurs, as the recovery of prejudgment interest to the victim will show the tortfeasor that he has no benefit in delaying the payment for the victim's losses. However, the adoption of a fixed date in the last two approaches will discourage the tortfeasor to make compensation before the fixed date because he does not have to pay for the interest accrued on the payments that the victim has made before that date. Therefore, applying a fixed date as the starting point of the accrual period will always under-compensate the victim and encourage the tortfeasor to delay making payments for the victim's past losses.

From such analysis, the first approach proves to be the best choice and well justified for the recovery of prejudgment interest as a part of compensatory damages. It allows the victim to recover interest on the payments they have made since the date of injury. It also avoids the shortcomings of the second and third approaches in order to make the victim whole.

2. Compound interest rate or simple interest rate

Along with the determination of accrual period, choosing interest, whether it should be simple or compound interest rate, is also important. In *Cavnar v. Quality Control Parking*,⁽¹¹⁶⁾ the court held that pre-judgment interest had to be calculated on daily compounded interest rate.⁽¹¹⁷⁾ This rule has recently been replaced with a new statutory rule, which requires pre-judgment interest to be calculated on simple interest at the rate equal to post-judgment interest rate.⁽¹¹⁸⁾ The English courts also use simple interest rate to award interest on past damages.⁽¹¹⁹⁾ However, they prefer to calculate pre-judgment interest at half of the reasonable and simple interest rate, because this roughly substitutes for a detailed calculation of interest on each of the damage, which has been incurred for a period of time from the date of injury to the date of judgment.⁽¹²⁰⁾

Though each of these methods has their own advantages and disadvantages, the justification to choose one method instead of the others will depend on what kind of investment is commonly prevailing that the victim could use to make benefit. In the case of Vietnam, the calculation of pre-judgment interest on compound interest rate is appropriate because savings accounts are available for every person and the banks usually offer compound interest rate for time deposit.⁽¹²¹⁾ Nevertheless, daily compound interest is not available so that monthly or annual compound interest rate is highly recommended for the calculation of damages.

In the current practice of the court of Vietnam, the prejudgment interest is not of any concern. It has not considered the victim's loss of use of money as a part of past damages. The award is usually calculated by adding up the value of damage as it happened without taking into account the victim's loss of benefit on the money they have paid for the damage. As a result, the victim is deprived of the benefit, which they would have received if they had not paid for the damage. Consequently, this approach does not enable the victim to recover full compensation for what they have lost. It only makes good the tortfeasor, as he or she can use the delayed payments for the victim's

losses in order to make benefit for his or her own. Therefore, the prejudgment interest should be recognized as an indispensable part of past damages recoverable to the plaintiffs at the time of judgment and the court must take this issue into account while assessing damages for past losses.

On the assumption that the victim would receive compound interest rate by investing their money in the market if they did not pay for the damage in the past, the award granted to the victim for their past losses will be calculated in the following formula.

$$P = D (1 + r)^n$$

The formula says that if the victim did not have to pay for the damage in the past, which was equal to D , they would invest that money in the market from the time of payment to the date of judgment, which amounted to n year(s). If the investment provided compound interest rate r during this period, the victim would get an amount of money P in total at the date of judgment. Therefore, the award for the past damage D must be the amount equivalent to P , which consists of the money the victim has paid and the prejudgment interest on that money.

For example, the victim was injured by the negligence of the tortfeasor three years before he reaches the trial. Within one year from the time of accident the injured had paid 100,000 Yen for medical treatment. If the injured did not have to pay for this damage, he could invest this money in the market for two years to get interest. Suppose the market offered compound interest rate of 5% per year, compounded annually, the injured would get an amount of P in total for his two-year investment, which include the capital and the benefit. The value of P will be as follow:

$$P = 100,000 \times (1 + 0.05)^2 = 110,250$$

Therefore, the award for medical expenses within one year from the date of accident should be 110,250 Yen instead of 100,000 Yen, which was the value of damage at the time it occurred.

CONCLUSION

In general, the Civil Code of Vietnam appears to be a highly appreciated success of the legislature in integrating all regulations into a comprehensive code. It has contributed much to the development of the socio-economy of the country and facilitated the courts in bringing justice to people. It enables the tortfeasor to foresee their pecuniary liability for the wrong they have done. It also allows the tort victims to know what they will be entitled to recover when damage to them is caused by the tortfeasors. However, there still remain obstructive elements in law and interpretation by the courts that prevent tort victims from receiving full compensation. This research has been designed to find ways of coping with these issues with a hope that it will contribute to the development of tort law in Vietnam. It expects to make some changes in the law and current perception of the courts on the assessment of pecuniary damages so as to give the injured full compensation in reality.

The research proposes that the full compensation rule provided in article 610 of the CCV should mean that the damages must be sufficient to bring the victims to the living conditions they would have been in if the accident had not happened. Accordingly, the court should take into account the victim's earnings increase in the assessment of damages for loss of earnings. Meanwhile, the victim's pension payment during the time of early retirement should not be deducted from the damages for loss of earnings. The research has also recommended that the damages for caring service should be calculated on the commercial price of the service, regardless of the caretaker's loss of earnings. In addition, it proposes that the plaintiff in fatal cases should be entitled to recover the victim's loss of earnings before death. And the damages for loss of dependency will be assessed on the victim's ability to support the dependant.

Another issue, which the courts of Vietnam have never taken into account, is the need to reduce the future damages to present value. The research affirms that the court must consider this issue; otherwise the victim will be over-compensated after receiving the damages.

Accordingly, it proposes that the court should use the “inflate-discount” method to deduct the accumulation benefit from the future damages so as to avoid over-compensation to the victim. In addition, the courts should award the plaintiff the interest on the damages that are accrued before the date of judgment.

END NOTES

- (*) Graduate student of the master’s program of the Graduate School of Law, Nagoya University.
- (1) Nhu Trang, *Moi ngay co 30 nguoi chet, 70 nguoi bi tan tat do tai nan*, [30 deaths and 70 injuries in accidents every day], available at Vnexpress electric newspaper <http://vnexpress.net/Vietnam/Xa-hoi/2002/12/3B9C378B/> visited December 17, 2002.
- (2) English scholars usually use the term “head of damage” to denote a kind of damage or the title of damage which the victim is able to recover. For example loss of earnings is a head of damage. See e.g. HAROLD LUNTZ, *ASSESSMENT OF DAMAGES* (1974), 29 – 39; DAVID KEMP QC, *DAMAGES FOR PERSONAL INJURY AND DEATH* (4th ed., 1980), at 41; GRAHAM STEPHENSON, *TORTS* (2nd, ed., 2000), at 616 – 21; CATHERINE ELLIOTT AND FRANCES QUINN, *TORT LAW* (3rd ed. 2001), at 293.
- (3) Article 130 of the Constitution of Socialist Republic of Vietnam 1992 requires the judge and juror to use law as single authority to decide the case. No precedent is permissible. The law mentioned here is a set of legal documents issued by relevant state organs pursuant to the provision of *Luat Ban hanh cac Van ban Phap luat* [Law on Normative Legal Documents] (1996).
- (4) Dinh Mai Phuong & Nguyen Tuan Anh, *Van de boi thuong thiet hai ngoai hop dong trong Bo luat dan su Viet Nam* [Compensation for tort damage in the CCV], *TAPCHI DAN CHU VA PHAPLUAT* [DEMOCRACY AND LAW JOURNAL] (July 2001), at 9. Up to now, there is only one official document that the court could use as an authority to decide the case, namely *Thong tu lien tich so 01/TTLT ngay 19 thang 6 nam 1997 cua Toa an nhan dan toi cao, Bo Tu phap, Bo Tai chinh huong dan viec xu ly va thi hanh an ve tai san* [the Inter-ministry Circular

No. 01/TTLB dated June 19, 1997 of the Supreme People's Court, Ministry of Justice and Ministry of Finance instructing the relevant judicial agencies to deal with asset while making judgment and during the execution process]. Hereafter referred as the Inter-ministry Circular No.1.

- (5) DONALD HARRIS, REMEDIES IN CONTRACT AND TORT, 190 – 91 (1988); PETER CANE, TORT LAW AND ECONOMIC INTERESTS, 484 – 5 (1991); DAN B. DOBBS, THE LAW OF TORTS – VOLUME 1, at 2 (2001).
- (6) See PETER CANE, ATIYAH'S ACCIDENT, COMPENSATION AND THE LAW, 119 (6th ed., 1999).
- (7) [1880] 5App Case 25 (English case).
- (8) *Id.*
- (9) See *Lim Poh Choo v. Camden and Islington Area Health Authority* [1980] AC174 (English case); See also CANE, *supra* note 6, at 119 – 21.
- (10) See HAVEY MCGREGOR, MCGREGOR ON DAMAGES, par. 1257 – 62, 1271 – 83 (14th ed., 1980).
- (11) RICHARD A. EPSTEIN, TORTS, 436 – 7 (1999).
- (12) See LUNTZ, *supra* note 2, at 5; See also CANE, *supra* note 6, at 119.
- (13) See BRYAN A. GARNER, BLACK'S LAW DICTIONARY, 1315 (7th ed., 1999).
- (14) LUNTZ, *supra* note 2, at 5.
- (15) *Id.*
- (16) JOHN MUNKMAN, DAMAGES FOR PERSONAL INJURIES AND DEATH, 2 (9th ed., 1993); BASIL S. MARKESINIS, THE GERMAN LAW OF OBLIGATIONS – VOLUME II: THE LAW OF TORTS, at 914 (3rd ed., 1997); BASIL S. MARKESINIS AND SIMON F. DEAKIN, TORT LAW, 751 – 2 (4th ed., 1999); CHRISTIAN VON BAR, THE COMMON EUROPEAN LAW OF TORTS – VOLUME 2, at 138 – 42 (2000); CATHERINE ELLIOTT AND FRANCES QUINN, TORT LAW, 290 – 1 (3rd ed., 2001).
- (17) FREDRICK J. HOLDING, The Challenge of Personal Injuries to Medicine, Law, and Economy, in DAMAGES FOR PERSONAL INJURIES 86, 98 – 104 (Fredrick J. Holding et al. ed., 1993).
- (18) See CANE, *supra* note 6, at 119 – 20.
- (19) *Id.*; DAN B. DOBBS, THE LAW OF TORTS – VOLUME 2, at 1048 – 9.
- (20) See generally RICHARD LEWIS, DEDUCTING BENEFIT FROM DAMAGES FOR PERSONAL INJURY (1999); A. EPSTEIN, *supra* note 11, at 449 – 51 (1999).

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- (21) See translation of the CCV by the World Legal Information Institute (hereafter referred as WorldLii), available at <http://www.worldlii.org/vn/legis/cc73/s610.html>.
- (22) The Supreme People's Court, De tai "Mot So Van De Ap Dung Quy Dinh Cua Bo Luat Dan Su Ve Boi Thuong Thiet Hai Ngoai Hop Dong Trong Cong Tac Xet Xu Cua Toa An Nhan Dan" [A Working Study on the Application of a Number of Provisions of the CCV Relating to Tort Compensation in the Court's Practice], at 20 (2000) (unpublished paper, on file with the Supreme People's Court). Hereafter referred as the Working Study 2000.
- (23) The CCV, Article 613 (3).
- (24) See *supra* note 21.
- (25) See MARKESINIS AND DEAKIN, *supra* note 16, at 742.
- (26) A. EPSTEIN, *supra* note 11, at 442.
- (27) See the Supreme Court Act 1982, art. 4 (England).
- (28) The method assumes that the victim's annual loss is multiplicand, and the multiplier is the number of years in which the losses will last. The court will multiply multiplicand by multiplier in order to get the sum of damages for a period of time.
- (29) ANDREW BURROWS, REMEDIES FOR TORTS AND BREACH OF CONTRACT, 197 – 204 (2nd ed., 1994).
- (30) See the Supreme Court Act 1981, section 32A (England).
- (31) See CANE, *supra* note 6, at 110 – 11.
- (32) HIROSHI ODA, JAPANESE LAW, 220 (1992); JAPAN INTERNATIONAL COOPERATION AGENCY (JICA), JAPANESE LAWS – VOLUME 3, at 943 (1998).
- (33) See JICA, *supra* note 32, at 944 – 5.
- (34) See B. DOBBS, *supra* note 19, at 1047.
- (35) See Cong van 248/HDLN ngay 7 thang 10 nam 1997 cua Toa an Quan su Trung uong huong dan ve viec boi thuong thiet hai ngoai hop dong. [An Official Letter of the Military High Court No. 248/HDLN dated 10 October 1997 on awarding compensation for tort victims]. Hereafter referred as the Official Letter No. 248.
- (36) See Article 610 (3) of the CCV, available at <http://www.worldlii.org/vn/legis/cc73/s610.html>.
- (37) See CANE, *supra* note 6, at 118.
- (38) *Id.*; MARKESINIS AND DEAKIN, *supra* note 16, at 748.
- (39) See CANE, *supra* note 6, at 118; ELLIOTT AND QUINN, *supra* note 16,

- at 299.
- (40) See CANE, *supra* note 6, at 118; MARKESINIS AND DEAKIN, *supra* note 16, at 748.
- (41) R. Lewis, *The Damages Act 1996: The Future for Multipliers and Structured Settlements*, 1996, JPIL 332, 336; See also CANE, *supra* note 6, at 118.
- (42) See CANE, *supra* note 6, at 117.
- (43) ODA, *supra* note 32, at 220.
- (44) See the Working Study 2000, *supra* note 22, at 19, 21.
- (45) Though the damages for loss of earnings provide the victim with a sum of money to fill up the gap between what they will receive from current job and what they would have received if they had not been injured, the award does not ensure that the pension payments of the injured will be unchanged. That is because the assessment of damages for lost earnings is based on the victim's net income, which does not include the victim's contributions to the pension scheme, while their pension payments depend on their contributions to the pension scheme.
- (46) These two elements are keys to calculate the pension payments; thus any change in either of them could lead to the change in pension payments. See Nghi dinh cua Chinh phu so 12-CP ngay 26 thang 01 nam 1995 ve Bao hiem xa hoi [the Government Decree No. 12-CP dated January 26, 1995 on worker pension] (amended by Government Decree No. 01/ND-CP dated January 9, 2003) art. 29. Hereinafter referred as Government Decree No. 12-CP/1995.
- (47) Hereinafter referred as the Labor Code.
- (48) The employer will contribute 15% of their salary fund. The employee has to pay 5% of their monthly income to the fund. Meanwhile, the contribution of the Government and other sources is not made clear in the law. See the Labor Code, art. 149.
- (49) The English court also allows the victim to recover damages for loss of pension. See Lim Poh Choo, *supra* note 9; Burrows, *supra* note 29, at 203.
- (50) The pension rate is defined according to the time that workers have contributed to the pension scheme. In case the pension is paid monthly, this rate does not exceed 75% of the monthly earning average. See Government Decree No. 12/CP, *supra* note 46, article 27.
- (51) Taking the above two examples as illustrations for the assessment, we assume that the injured will get the notional retirement age after

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twenty years from the date of settlement and get pension rate of 75%. In the first example, the loss of earnings is constant for the last five years so that the earning average during this five-year period will be 150,000 Yen per month. Thus, the loss of pension will then be 112,500 Yen per month ($150,000 \times 0.75$). In the second example, although the earnings of current job at the time of retirement are as high as the previous job could offer the earning average between these two jobs are different. The average income of the previous job is 770,000Yen per month ($[740,000 + 755,000 + 770,000 + 785,000 + 800,000]/5$) while this figure of the current job is 755,000 Yen per month ($[710,000 + 732,500 + 755,000 + 777,500 + 800,000]/5$). Therefore, the victim still incurs loss of pension payment, which is 11,250 Yen ($[770,000 - 755,000] \times 0.75$) per month.

- (52) See infra chapter three, section I & II.
- (53) Pension scheme is not compulsory for employer who uses less than ten workers; therefore, workers in that company will be free to join optional insurance policy with the money the employer has paid to their salary. See the Labor Code art. 141.
- (54) For example, if employer A is paying 100,000 Yen to employee B, which B has to extract 5,000 Yen to pay for pension scheme and receives 95,000 Yen net income, A also has to pay 15,000 Yen to B's pension scheme as a requirement of the law. Accordingly, if A and B do not have to participate in compulsory pension scheme, the employer A is willing to pay directly 115,000 Yen to B for doing the service without any change in the cost of service.
- (55) For example, the employer pays directly employee A 400,000 Yen per month at the time of accident and 60,000 Yen to the employee's pension scheme. After the accident, the employer could only pay 200,000 Yen per month for the victim's service and 30,000 Yen to his pension fund. Supposed that these two jobs have the same earning increase rate, the damages for A's loss of earnings will be 190,000 Yen per month ($400,000 \times 0.95 - 200,000 \times 0.95$). Meanwhile, if B is a free worker who does the same job and has the same injury like A, B's loss of earnings will be 230,000 Yen per month ($460,000 - 230,000$).
- (56) In comparison with the worker, who participates in compulsory pension scheme, the free worker will not enjoy a less favorable condition. If the free worker uses part of his earnings to participate in pension scheme

or buy a similar insurance policy. The benefit received from this investment will be equivalent to the pensions that worker participating in compulsory pension scheme will receive after retirement. As such, they are treated equally under tort system.

- (57) *See* Parry v. Cleaver [1970] AC 1 (English case).
- (58) *Id.*
- (59) Parry v. Cleaver [1970] AC 1.
- (60) [1956] AC 185 (English case) (the court held that the damages had to be measured on the victim's real loss that excluded the income tax).
- (61) Parry [1970] AC 1.
- (62) The CCV art. 613 (3).
- (63) *Id.*
- (64) The CCV art. 613 (3). The "reasonable expenses" in this situation is understood to cover the expenses for mobility, food, boarding that the caretaker has to spend while caring for the injured. *See* the Working Study 2000, *supra* note 22, at 20.
- (65) The Supreme People's Court of Vietnam considers this interpretation of Article 613 (3) as reasonable and recognizes it in the forthcoming Resolution of the Justice Council.
- (66) *See* Hunt v. Sever [1994] 2 AC 350. (The court distinguishes the situation in this case and the situation in *Donnelly v. Joyce* [1974] Q.B. 454, in which the court decided that the six-year-old boy was entitled to recover the cost of caring service provided by his mother).
- (67) *See* MARK LUNNEY & KEN OLIPHANT, TORT LAW – TEXT AND MATERIALS, 745 – 6 (2000).
- (68) *Server*, [1994] 2 AC 350 (Judgment 2 by Lord Bridge).
- (69) Law Commission Consultation Paper No. 144, *Damages for Personal Injury: Medical, Nursing and other Expenses*, (1996), paragraphs 3. 59 – 68; *See* also LUNNEY & OLIPHANT, *supra* note 67, at 746; and CANE, *supra* note 6, at 126.
- (70) *See* *Cunningham v. Harrison* [1973] Q.B. 942, 951 – 2. (Writing for the court, Lord Denning said that the plaintiff should be entitled to recover the value of the service of his wife and the plaintiff should hold this money on trust for his wife and paid it over to her.)
- (71) Law Commission Consultation Paper No. 262 (1999), *Damages for Personal Injury: Medical Nursing and other Expenses; Collateral Benefit*, par. 3.62, 3.67; LUNNEY & OLIPHANT, *supra* note 67, at 746.
- (72) *See* Article 614 of the CCV.

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- (73) See the time limitation for the recovery in Article 616 (2) of the CCV.
- (74) Legal duty is the duty provided in the law. In this case, one family member is legally obliged to take care of the other members. See *Luat Hon nhan va Gia dinh 2000* [Law on Family and Marriage 2000], chapter VI.
- (75) See the Official Letter No. 248, *supra* note 35, at section 3(a).
- (76) *Id.*; the Military High Court, *De tai “Nang cao chat luong giai quyet boi thuong thiet hai ngoai hop dong trong cac vu an Hinh su cua Toa an Quan su hien nay”* [A Working Study on Improving Quality of Settlement Related to the Compensation in Criminal Cases Brought before Military Courts], 81 – 3 (2003) (On file with the Military High Court).
- (77) Inability to work is one of two requirements that the dependants must satisfy in order to become eligible for the damages. See the Official Letter No. 248, *supra* note 35, at section 3.
- (78) See Nguyen Duc Mai, *Boi thuong thiet hai do tinh mang bi xam pham* [Compensation for Wrongful Death], 6 – 7 (this unpublished paper is a preliminary study preparing for the release of the Official Letter No. 248, on file with the author); the Supreme People’s Court, “*Cong trinh nghien cuu khoa hoc cap bo so 97-98-042/DT ve Van de ap dung mot so che dinh cua Bo luat Dan su trong thuc tien xet xu cua Toa an*” [Research Paper No. 97-98-042/DT on the Practical Application of some Provisions of the CCV within the Court System] 66 – 7 (unpublished paper, on file with the Supreme People’s Court).
- (79) See Nguyen Duc Mai, *supra* note 78, at 7 – 9.
- (80) See generally KEITH S. ROSENN, *LAW AND INFLATION*, 3 – 32 (1982).
- (81) BLACK’S LAW DICTIONARY, 782 (7th ed., 1999).
- (82) See MARKESINIS AND DEAKIN, *supra* note 16, at 742.
- (83) More than eighty years ago, the Supreme Court of the United States held that the damages awarded must represent the present value of future losses. See *Chesapeake & Ohio Railway Company v. Kelly*, Administratrix of Kelly, 241 U.S. 485 (1916).
- (84) See Steven Landsman Winer, *Adjusting Damage Awards for Future Inflation*, WISCONSIN LAW REVIEW (May, 1982), 397, at 408.
- (85) *Wells v. Wells* [1999] 1 AC 345.
- (86) See Michael I. Krauss & Robert A. Levy, *Calculating Tort Damages for Lost Future Earnings: The Puzzles of Tax, Inflation and Risk*, 31 GONZAGA LAW REVIEW, 325, at 329, 364.

- (87) In Vietnam, stock market is newly born and not so attractive to laypeople, who are not doing business. Though the government sometimes issues bonds to mobilize capital, they are not available for various terms. That will lead the court to difficult situation to calculate the damages.
- (88) Vnexpress electric newspaper, *Muoi su kien kinh te xa hoi nam 2002* [Ten notable socio-economic events in the year 2002], available at <http://www.vnexpress.net/vietnam/xa-hoi/2002/12/3B9C3898/> (visited on Monday, December 30, 2002).
- (89) 434 P.2d 665 (Alaska 1967).
- (90) *Id.*, at 676.
- (91) 634 F.2d 30 (the 2nd Circuit 1980).
- (92) *Id.*, at 39.
- (93) *Id.*
- (94) See Winer, *supra* note 84, at 408.
- (95) The court in Osaka area usually applies this method. See JICA, *supra* note 32, at 944.
- (96) The court in Tokyo area usually uses this method in its calculation. See JICA, *supra* note 32, at 944.
- (97) See JICA, *supra* note 32, at 945.
- (98) See Kagayama Shigeru & Takeuchi Hitatoshi, *Izzitsu Rieki no Santei ni Okeru Chyukan Rieki Kojo Hoshiki no Mondaiten nitsuite* (The Problems of Deducting Interim Benefit from Future Losses), HANREI TIMES No. 714, 18 – 21 (February 2, 1990).
- (99) See Jones & Laughlin Steel Corp. v. Pfeifer, 462 U.S. 523, 538. (1983); Kagayama Shigeru & Takeuchi Hitatoshi, *supra* note 98, at 18 – 20.
- (100) See Ejan Mackaay & Claude Fabien, *Civil Law and the Fight Against Inflation: A Legal and Economic Analysis of the Quebec Case*, 44 LOUISIANA LAW REVIEW (January 1984) 719, at 720 – 21.
- (101) *Id.*, at 752 – 3.
- (102) AHARON YORAN, THE EFFECT OF INFLATION ON CIVIL AND TAX LIABILITY, 43 – 9 (1983).
- (103) S. ROSENN, *supra* note 80, at 3.
- (104) See United States v. English, 521 F.2d 63, 75 (9th Cir. 1975).
- (105) See Beaulieu v. Elliot, 434 P.2d 665, 670 – 1 (Alas., 1967); Kaczkowski v. Bolubasz, 491 Pa. 561, 579 (Pa. 1980).
- (106) See Feldman v. Allegheny Airlines, Inc., 328 F. Supp. 1271 (D. Conn. 1974), *aff'd*, 524 F.2d 384, 386 – 7 (2d Cir. 1975).

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- (107) See *Wells v. Wells*, [1999] 1 AC 345; *Iain Goldrein, Multipliers and Lump Sum Payment*, 148 NEW LAW JOURNAL No. 6851 (July 1998), 1149.
- (108) See *Jefford v. Gee*, [1970] 2 Q.B. 130; *Crown Cent. Petroleum Corp. v. National Union Fire Inc. Co.*, 768 F.2d 632, 634. (5th Cir. 1985); see also MCGREGOR, *supra* note 10, at par. 473; CANE, *supra* note 6, at 121.
- (109) See *Cavnar v. Quality Control Parking*, 696 S.W. 2d 549, 552.
- (110) Diane Rawson, *Reforming Texas Tort Reform: The Case Against Prejudgment Interest on Future Damages*, 46 BAYLOR LAW REVIEW (1994), 1111, at 1117.
- (111) See *Cavnar v. Quality Control Parking*, 696 S.W. 2d 549, 554; see CANE, *supra* note 6, at 121.
- (112) See *supra* note 108.
- (113) See *Cavnar v. Quality Control Parking*, 696 S.W. 2d 549, 555 (Texas) (1985).
- (114) Texas Finance Code §§ 304.104 (1998).
- (115) Robert J. Sergesketter, *Interesting Inequities: Bringing Symmetry and Certainty to Prejudgment Interest Law in Texas*, 32 HOUSTON LAW REVIEW, 231, 239 – 41 (1995).
- (116) 696 S.W. 2d 549 (Texas 1985).
- (117) *Id.*, at 554.
- (118) Texas Finance Code, §§ 304.104.
- (119) The Supreme Court Act 1981, section 35A (England).
- (120) See MCGREGOR, *supra* note 10, at par. 473; BURROWS, *supra* note 29, at 296; CANE, *supra* note 6, at 121.
- (121) Vietnam Commercial Bank and Industrial and Commercial Bank all offer compound interest rate for time deposit in savings account, and simple interest rate for demand deposit. See <http://www.icb.com.vn/e/acc02.php> and <http://www.vietcombank.com.vn/English/Content/Services/Saving.htm> (visited August 15, 2003).