

Interim Damages in Personal Injury Claims

Terms of Reference

In 1968 the Committee was asked to consider the need for legislation to provide for hearings limited to the question of liability in personal injury cases where the prognosis as to the plaintiff's condition is in doubt, and the making of awards for the payment of interim damages.

Background of Reference

At the time of the reference it was well established that at common law, damages had to be assessed "once and for all" and there was no power in the court to order interim or periodic payments. It was widely recognised among judges and legal practitioners that in a number of cases, damages claimants¹ of modest means had suffered hardship because the final medical prognosis on which the damages were to be assessed were delayed months or even years. It was felt that there should be some reform addressing the lack of proper power by courts to deal with claims for personal injury damages.

Immediately prior to the reference, South Australia had amended its *Supreme Court Act* to enable its Supreme Court, inter alia, to make interim awards of damages. This prompted the Committee to suggest to the Attorney-General that the law in Western Australia also be reviewed.

Nature and Extent of Consultation

In October 1968 the Committee published a working paper on the subject, and received comments from the Law Society of Western Australia and the following individuals: Chief Justice Wolff and Justice Hale of the Supreme Court of Western Australia; and distinguished legal practitioners and scholars, Mr FT P Burt, Mr PL Sharp, Mr RC Cannon and Professor D Payne. The final report containing the Committee's recommendations was delivered in May 1969.²

Recommendations

The Committee carefully considered all the relevant issues and recommended that the *Supreme Court Act 1935 (WA)* be amended to provide:

- That if any person has notice or reasonably believes that an action for damages for personal injury may be commenced against him then, if such action is not commenced within 12 months of the happening that gives rise to the prospective claim, he may thereafter by notice in writing require the prospective claimant within 42 days from receipt of such notice to commence such proceedings to ascertain such person's liability in respect of such claim.
- That if proceedings are not commenced within that period an application to a judge for an order enforcing compliance should be permitted, the judge being given wide discretionary powers on such application.
- That the court shall be at liberty to order the separate trial of the issue of liability in an action for damages with the consent of all parties or on cause being shown, to enter final declaratory judgment on such issue and to adjourn the final assessment of damages.
- That in any action for damages for personal injury the court shall have power, after having entered final declaratory judgment on the issue of liability, to make an interim award of damages in the plaintiff's favour in respect of special damages to the date of assessment and if necessary periodic payments

¹ Persons injured in circumstances giving rise to a claim for damages at common law.

² Law Reform Committee of Western Australia, *Interim Damages in Personal Injury Claims*, Project No 5 (1969).

thereafter to cover estimated future loss of earnings, hospital and medical expenses and other necessary outgoings pending final assessment.

- That where, by the declaratory judgment referred to above, the defendant's liability to pay damages is reduced in proportion to the plaintiff's degree of contributory negligence, then such interim award shall also be reduced in such proportion provided that the court may order payment of the full amount of special damages already suffered and immediately thereafter to be suffered where not to do so would impose hardship and it appears that a final award of damages would exceed such additional payment.
- That the court shall have a discretionary power to vary or discharge an interim award in so far as it provides for future payments. In exercising its discretion the court shall have regard to whether it is reasonably practicable to make a final assessment.
- That an appeal from a final declaratory judgment to the Full Court of the Supreme Court lies as of right and that such a judgment is not an interlocutory judgment.

Legislative or Other Action Undertaken

The recommendations dealing with the time limit for commencing an action were given effect by s 29 of the *Motor Vehicle (Third Party Insurance) Act Amendment Act (No 2) 1969 (WA)*.³ No other legislative action has been taken with regard to the other recommendations made in the report.

Currency of Recommendations

The recommendations remain current. While the report was produced more than 30 years ago, the legal framework in which the need first arose remains the same. Comparable jurisdictions, such as New South Wales⁴ and South Australia, have enacted legislation to deal with interim payments of damages. A number of judgments, primarily in those jurisdictions, have also allowed for the payment of interim damages.⁵

Action Required

Implementation of the Committee's recommendations requires amendment to the *Supreme Court Act 1935 (WA)*.

Priority — Low–Medium

Legislation is required to bring Western Australia into line with other comparable jurisdictions and also to address the need for reform which first gave rise to the reference. However, as no legislative action has been taken since the report was published more than three decades ago and there appears to have been no further calls for reform in this area of law, the priority of reform has been assessed at the lower end of the scale.

³ The time limit for commencing an action was changed from 12 months to 6 months.

⁴ The *Supreme Court Act 1970 (NSW)* s 76E allows the court to order the defendant to pay interim damages in certain circumstances. The power is not restricted to personal injury actions.

⁵ See for instance, *Dimkovski v Ken's Painting and Decorating Services Pty Ltd* [1999] NSWSC 795; *Howe v Matson and Gould-Hurst* [2001] SADC 13; *McLean v Darlington Point Sawmills Pty Ltd* [2000] NSWSC 787.