



THE LAW REFORM COMMISSION
OF WESTERN AUSTRALIA

Project No 5

**Interim Damages in
Personal Injury Claims**

REPORT

MAY 1969

REPORT ON INTERIM DAMAGES IN PERSONAL INJURY CLAIMS

TO THE HON. ARTHUR F. GRIFFITH, M.L.C.,
MINISTER FOR JUSTICE

TERMS OF REFERENCE

1. As Project No. 5 of its first programme, 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."

PRESENT LAW

Separate judgment on the issue of liability

2. The Rules of the Supreme Court do not seem to contemplate that, in an ordinary common law action for damages, a judgment on the issue of liability shall be entered in advance of the assessment of the quantum of damage.
3. As a matter of practice, and probably only by consent, it is possible to have a separate trial of the issue of liability and then adjourn the question of the quantum of damage, but no formal judgment can be given on the issue of liability only.

Power to make interim awards

4. At common law it is well established that damages must be assessed "once for all". There is no power in the court to order interim or periodic payments (*Fetter v Beal* (1699) 1 Ld. Raym. 399, 91 E.R. 1122; Cf. *Scutt v Bailey No.2*, 1964 W.A.R. 81).
5. A damages claimant injured in circumstances giving rise to a claim for damages at common law and also to a claim for workers' compensation, may receive periodic payments and hospital and medical expenses under the First Schedule of the *Workers' Compensation Act, 1912-1967*.

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6. The *Motor Vehicle (Third Party Insurance) Act, 1943- 1967*, s.16E(5) , gives the Third Party Tribunal established under that Act power to award by way of general damages either a lump sum or periodic payments or both, with power to review and vary the periodic payments from time to time.

7. It is doubtful whether s.16E(5) empowers the Tribunal to make interim awards (i.e. awards pending the final assessment of damages) though it is arguable that it does. There is as yet no judicial decision on the matter.

MOVEMENT FOR REFORM

8. Judges and legal practitioners have for some time now recognised that the courts lack proper powers to deal with claims for damages for personal injury.

9. Enquiries among members of the legal profession practising in this field in Western Australia indicate that there is a substantial number of cases in which damages claimants (i.e. persons injured in circumstances giving rise to claims for damages at common law) of modest means suffer hardship because the final medical prognosis on which the damages are to be assessed may be delayed months, or even years.

10. In 1967 South Australia amended its *Supreme Court Act* by *Act No.21* of 1967, enabling the Supreme Court, *inter alia*, to make interim awards of damages.

11. The United Kingdom Winn Committee (the Committee on Personal Injuries Litigation) in July 1968, published a comprehensive report (Cmnd 3691) covering many aspects of personal injury litigation. That Committee recommended split trials when prognosis is delayed, though it doubted that the cases involving delay in prognosis were as numerous as is generally thought. It also recommended that the Master be empowered, after liability has been established either by agreement or trial, to order payment of up to one-third of the damages likely to be finally assessed. It rejected, however, the idea of periodic payments (see para. 36(c) below) but at the same time pointed out that this question was being more thoroughly considered by the United Kingdom Law Reform Commission.

12. The Winn Committee recommendations in so far as they relate to this Committee's terms of reference appear to be based on delay in getting cases to court rather than delay in prognosis and their approach to the questions involved has consequently been markedly different from that adopted in this report.

13. The New South Wales Law Reform Commission is at present enquiring into the need for legislation on the subject in that State.

SCOPE OF ENQUIRY

14. In considering this project the Committee has studied -

- The South Australian legislation introduced by Act No. 21 of 1967,
- The reports and comments of the South Australian legislation from the Law Society of South Australia,
- The preliminary comments and papers from the Law Reform Commission of New South Wales,
- The report of the Royal Commission of Inquiry on *Compensation for Personal Injury in New Zealand* (December 1967), and
- The report of the Committee on Personal Injuries Litigation (the *Winn Committee Report* - July 1968, Cmnd 3691).

15. The committee published a working paper on the 8th October 1968 and sent copies to the Chief Justice and Judges of the Supreme Court of Western Australia, the Chairman and members of the Third Party Claims Tribunal, the Master of the Supreme Court, the Law Society, the Law School, the Magistrates Insurance and several practitioners known to be interested in the subject, the Manager of the Motor Vehicle Insurance Trust and other Law Reform Committees and Commissions.

16. The Committee has received comments from Sir Albert Wolff (then Chief Justice), Mr. Justice Hale, The Law Society of Western Australia, F. T. P. Burt, Q.C. (now Mr. Justice Burt), P. L. Sharp Q.C., Professor Payne and R. C. Cannon.

**DESIRABILITY OF THE RIGHT TO ENTER SEPARATE JUDGMENT
ON THE ISSUE OF LIABILITY**

17. As mentioned in para. 2 above, the Committee believes that the *Rules of the Supreme Court* do not contemplate in an ordinary common law action for damages that a judgment on the issue of liability can be entered in advance of the assessment of the quantum of damage.

18. The Committee believes that there is a strong case for and recommends the introduction of legislation to provide for the separate trial of the issue of liability and for the entry of a final declaratory judgment on that issue in claims for personal injury where the condition of the plaintiff is such that no final prognosis can be made in respect thereof.

19. This would serve to overcome two difficulties -

- (a) It would enable a plaintiff, who has obtained a final declaratory judgment on the question of liability, to obtain an interim award of damages.
- (b) It would enable either party to have the issue of liability resolved and avoid the possibility of witnesses leaving the State, becoming untraceable or, with the passage of time, forgetting the circumstances of the accident.

20. In this latter regard the Committee draws attention to the provisions of s.29(2) of the *Motor Vehicle (Third Party Insurance) Act, 1943-1967*. This and the succeeding subsections enable the Trust to give notice after a certain time, calling on the injured person to commence proceedings for the purpose of "ascertaining the liability" of any insured person in respect of personal injury claims arising out of the use of a motor vehicle. If the notice is not complied with provision is made for an application to the court for an order enforcing compliance. On such application the judge is given wide discretionary powers. A somewhat similar provision has been incorporated into the Workers' Compensation legislation (Act No.60 of 1965).

21. The matter of compelling the plaintiff to institute proceedings is not specifically within the Committee's terms of reference. However, it seems reasonable that if the plaintiff is given the opportunity of having an early and separate trial on the issue of liability that the defendant, who may also have good reason for desiring an early trial on this issue (see para. 19(b) above), should be accorded similar rights.

22. The Committee recommends that -

- (a) 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;
- (b) 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.

The right to separate judgment

23. The question arises as to the basis upon which the right to a separate trial leading to a final declaratory judgment on liability should be allowed.

- Should it be -
- (a) as of right;
 - or (b) by agreement of all parties;
 - or (c) with leave of the court for cause shown?

24. It is possible that if the separate trial was allowed as of right it could increase the costs of litigation, in some cases unnecessarily. For this reason alone the Committee believes that a separate trial for the purpose of obtaining a final declaratory judgment on liability should be allowed only if the parties agree, or with leave of the court for cause shown.

25. The Committee recommends that a separate trial of the issue of liability to enable a final declaratory judgment to be given, should be allowed -

- (a) by consent of all parties; or
- (b) by leave of the court for cause shown.

26. It may well be thought that the right to seek a final declaratory judgment on the issue of liability should not be confined to claims for damages for personal injury but should be generally available in all claims for damages for the reasons stated in para. 19(b) above. Although beyond the terms of reference the Committee recommends that the right to a separate trial on the issue of liability to enable a final declaratory judgment to be given should be extended to any action for damages whether for personal injury or otherwise.

DESIRABILITY OF THE POWER TO MAKE INTERIM AWARDS

27. As stated in para. 4 above the present common law rule is that damages must be assessed "once for all" and there is no power in the court to make interim awards.

28. Many cases of personal injury which give rise to claims other than under the *Motor Vehicle (Third Party Insurance) Act* are likely to be compensable under the *Workers' Compensation Act*. There are, however, cases which do not fit into either category.

29. It would appear to be just and logical that any power to make interim awards should be available with regard to all claimants for damages for personal injury, no matter how the injury arises.

30. No case has been submitted for interim awards in property damage cases. In any event, in such cases there cannot be hardship similar to that referred to in para. 9 above, i.e. hardship caused through delayed prognosis.

31. The Committee cannot foresee any problems arising in cases where a claim is made against joint tortfeasors. Problems as to payment may arise in the case of an uninsured tortfeasor but these would exist regardless of interim award considerations.

32. In cases where the claimant is guilty of contributory negligence he may suffer hardship if his interim award (particularly in respect of loss of earnings) is reduced in proportion to his degree of blame. This is dealt with below.

33. The Committee is not aware of cases of hardship in fatal accident claims; there is no delay in getting before the Court or Third Party Tribunal in this State, and the main basis for interim payments (i.e. hardship caused by delay in prognosis) does not arise.

34. The Committee believes that a case is made out for, and it recommends, the introduction of legislation to enable the court to make an interim award of damages in all personal injury cases once liability is either agreed or decided by the court. This is accepted by all the commentators on the working paper.

POSSIBLE BASIS FOR ASSESSING INTERIM AWARDS

35. Differing views have been advanced as to what should be included in the interim award.

Total entitlement

36. The award might make allowance for -

- (a) special damages to the date of assessment, i.e. all out-of-pocket expenses, hospital, medical and dental expenses, loss of wages or of income;
- (b) general damages as far as they can be assessed to the date of the making of the interim award under the separate headings of -
 - (i) physical injury;
 - (ii) pain and suffering;
 - (iii) loss of capacity to enjoy life;
 - (iv) loss of expectation of life;
 - (v) any other general damage suffered;
- (c) periodic payments to cover estimated future loss of earnings, hospital and medical expenses and other necessary outgoings pending further hearing.

37. The arguments in favour of having the interim award make allowance for general damages (see para. 36(b)) include-

- (a) this is what the claimant is entitled to at this date;
- (b) should he die before final assessment, his proper entitlement already awarded will become part of his estate.

38. The arguments against it include -

- (a) general damages should not be so fragmented for assessment;
- (b) re-assessment of general damages from time to time, possibly by different judges, would be fraught with difficulties, and if over-payment should occur it could well create a situation without remedy;
- (c) there is no reason why, in the event of the claimant's death, the beneficiaries of the estate should receive a windfall (e.g. damages for pain and suffering awarded to a claimant);
- (d) the claimant may be disinclined to overcome his disabilities if he can keep returning to the court for additional general damages.

39. Instead of a decision wholly for or against total entitlement it might be thought desirable to provide that the interim award should take in some only of the headings of general damage listed under para. 36(b) above.

Partial entitlement

40. In the alternative, the award might be limited to items listed under para. 36(a) and (c).

41. It might be considered desirable to limit the loss of earnings part of the special damages to a proportion of the earnings, as in Workers' Compensation cases, as an incentive to the claimant to resume work.

42. Sir Albert Wolff, who was one of the first to advocate this reform, has indicated that the claimant should be entitled to receive all he can establish to the date of hearing, with an amount for future contingencies. He recommends adoption of the South Australian legislation.

P.L. Sharp, Q.C. who has a wide practical experience in this jurisdiction, is of the same opinion and he says that awards should not be restricted to economic loss. He would include-

- "(a) medical and hospital expenses to date;
- (b) loss of earning capacity between date of accident and trial;
- (c) compensation for physical damage which has occurred and which can be determined with precision;
- (d) periodic payments to cover estimated future loss and hospital and medical expenses".

43. On the other hand Mr. Justice Burt, Professor Payne and R. C. Cannon would limit awards to those set out in para. 36(a) and (c), while Mr. Justice Hale would limit the award to the terms set out, in para. 36 (a) only, but he would permit more than one interim award. Mr. Justice Burt also suggests that interim periodic payments should not continue for more than three years.

44. The Law Society agrees that interim awards should include the items set out in para. 36(a) and (c) and rejects the view put forward by Mr. Sharp that an interim award should include compensation for physical damage which has occurred and which can be determined with precision. It has suggested however that in cases of hardship the judge can award an "advance" on general damages while he is satisfied that the final award of damages will exceed the amount advanced: e.g. if the judge considered that the final award was likely to exceed say \$10,000, then, in an appropriate case, he could award up to say \$4,000 as an interim award.

45. The Committee favours the view that the interim award should provide only for the matters mentioned in para. 36(a) and (c). "The concept of awarding damages "once for all" should be interfered with as little as possible. The only justification, which the Committee can find for interfering with this rule is on the grounds of economic hardship. It is hard to imagine cases of economic hardship sufficient to justify the award of an "advance" of general damages as contemplated by the Law Society.

46. The Committee accordingly recommends that -

legislation be introduced to empower the court, after it has entered a final declaratory judgment on the issue of liability (whether by consent or after a contested hearing) to make an interim award in respect of special damages to the date of hearing, and if necessary periodic payments thereafter to cover estimated future loss of earnings, hospital and medical expenses and other necessary outgoings pending further hearing.

47. However, a problem may arise where the issue of liability is not decided wholly in the plaintiff's favour but the blame is apportioned between the plaintiff and the defendant. In such cases the question is whether the interim award proposed above should be reduced in proportion to the plaintiff's degree of fault, or whether the interim award should cover the full amount assessed in respect of the terms mentioned in para. 36(a) and (c) on the understanding that when the damages are finally assessed the additional amount awarded is deducted.

48. The Committee believes that economic hardship should be relieved where this is possible, and it believes that -

notwithstanding the claimant's contributory negligence the court hearing the application should have power to order payment of up to the full amount of special damages suffered by the plaintiff where not to do so would impose hardship and it appears that a final award of general damages would exceed such additional payment.

POWER TO VARY OR TERMINATE INTERIM AWARDS

49. The Committee believes also that the court should have power to vary or discharge an interim award in so far as it provides for future periodic payments. One commentator suggests placing a time limit of three years on the running of an interim award giving periodic payments. In South Australia the matter is left to the discretion of the court. It is provided however, that normally the court must proceed to final assessment on the application of a party if it appears that the claimant's condition will neither get better nor deteriorate, or a period of four years has expired since the date of the final declaratory judgment, which will have the effect of automatically terminating the order for periodic payments.

50. The Committee considers that this should be left to the discretion of the court and recommends that the legislation simply provide that the court may discharge the interim order when it is satisfied that the claimant's condition is stable enough to make an assessment of damages reasonably practicable.

PROCEDURE FOR OBTAINING INTERIM AWARD

51. When liability is in issue the making of an interim award would normally follow the entry of the final declaratory judgment - i.e. after a trial in open court.

52. When liability is admitted on the pleadings or is otherwise agreed to be not in issue and an interim award is required, it is contemplated that the plaintiff will move for and obtain judgment under the existing rules of court and have both the matter of his entitlement to an interim award and the quantum thereof considered in open court.

53. The Committee initially considered that such awards could be dealt with in chambers on affidavit evidence. However, Mr. Justice Hale has pointed out that the primary rule should always be that as much as possible of the work of any court should be done openly in public. The Committee accepts that view and accordingly recommends that the granting of the final declaratory judgment and the making of interim awards should be in open court.

PROCEDURE AND STATUS OF DECLARATORY JUDGMENT

54. The Committee believes that once the proposed legislation is passed, then as a matter of practice many cases of interim awards will be agreed because the items included in the above recommendations are readily quantifiable. For the same reasons, it believes that interim payments will often be paid without the necessity of a court order, in the same way that many workers' compensation entitlements are paid without an order from the Workers' Compensation Board.

55. One commentator on the working paper has suggested that the costs of the application for an interim award should be borne by the applicant unless the court in its discretion otherwise decides.

The Committee respectfully disagrees with this suggestion. There appears to be no reason for interfering with established rules as to costs. A defendant can be protected against incurring unnecessary costs by an amendment to the rules of court giving him power to offer to consent to an interim order, on the same basis that he can now offer to consent to judgment for a total

figure of damages (see S.C. Rules O. 22R.6 - Cf. Rules of the Third Party Claims Tribunal, 1967, rules 120-128).

STATUS OF FINAL DECLARATORY JUDGMENT

56. The legislation may provide - as does the aforementioned South Australian Act - that a judgment on the liability issue is to be called a final declaratory judgment. It may be, however, that such a judgement will be regarded as "interlocutory" (see s.35(1) (a) of the *Judiciary Act 1903-1966*).

57. One effect of this would be that leave would be required to appeal to the High Court from such judgment.

58. More important, under O.70 R.26 of the *High Court Rules*, an interlocutory order does not operate to bar the court in its appellate jurisdiction from making such order as it considers just. Accordingly, on an appeal against final assessment - made say several years after judgment on the liability issue - the High Court may possibly vary the judgment on liability as an "interlocutory order".

59. If the High Court should rule that the final declaratory judgment is in fact an interlocutory order, then there is a possibility that an appeal after the final assessment will reopen the question of liability which, if found in favour of the defendant, will mean that he has paid moneys under the interim award which he cannot then recover. This is a risk that the Committee doubts that a defendant will take. The Committee assumes that if the defendant is aggrieved at a final declaratory judgment and at an interim award made in consequence thereof, he will appeal at once and ask for a stay of execution of the interim award. The Committee assumes that this stay would normally be granted, in which case the defendant would not be prejudiced. However, the importance of this aspect of any proposed legislation should not be minimized. An adverse decision of the High Court on the status of the final declaratory judgment could, in all cases where there is a dispute as to the liability, effectively stultify the whole purpose of this legislation.

60. In any event this is a risk that cannot be avoided and one over which the State has little or no control, except to the extent that it can indicate by appropriate amendment to the

Supreme Court Act that within this State such a declaratory judgment is regarded as a final judgment.

SUMMARY OF RECOMMENDATIONS

61. A summary of the Committee's recommendations is set out below and a draft Bill to amend the *Supreme Court Act* is contained in the Appendix.

62. It is not thought necessary to amend the *Local Courts Act*, for the reason that cases warranting interim awards will normally involve claims beyond the jurisdiction of the local court.

63. It is also unnecessary to amend the *Motor Vehicle (Third Party Insurance) Act* because the Tribunal is given the same powers as a Judge.

Recommendations

64. The *Supreme Court Act* be amended to provide -

- (1)
 - (i) 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;
 - (ii) 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.
- (2) 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.

- (3) 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 rate of assessment and if necessary periodic payments thereafter to cover estimated future loss of earnings, hospital and medical expenses and other necessary outgoings pending final assessment.
- (4) 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.
- (5) 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.
- (6) 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 (see s.60).

CHAIRMAN:	B. W. Rowland
MEMBER:	C. le B. Langoulant
MEMBER:	I. W. P. McCall

26th May 1969.

LEGISLATIVE COUNCIL

Read 1"

1969.

(Introduced by

A BILL FOR

AN ACT to amend the *Supreme Court Act 1935-1964*.

BE IT enacted ...etc.

1. (1) This Act may be cited as the *Supreme Court Act Amendment Act 1969*,
(2) In this Act the *Supreme Court Act 1935-1964* is referred to as the principal Act.
(3) The principal Act as amended by this Act may be cited as the *Supreme Court Act 1935-1969*.

2. The principal Act is amended by adding after section 24 the following new sections -

24A. (1) Where any person has notice or reasonably believes that an action for damages for personal injury may be commenced against him then, if no such action is commenced within twelve months of the happening which could have given rise to such prospective claim, he may thereafter by notice in writing to the prospective claimant require him within forty-two days from service on him of such notice to commence legal proceedings for the purpose of ascertaining the liability of the person issuing the notice.

(2) If the prospective claimant does not commence such legal proceedings within the said period of forty-two days the person issuing the notice may apply to a Judge for an order under subsection (4) of this section.

(3) An application to a Judge for such an order shall be made by summons supported by affidavit and a copy of the summons and of all affidavits in support shall be served on the prospective claimant at least fourteen days before the date fixed for the hearing.

- (4) Upon the hearing of such application the Judge may -
- (a) order that the prospective claimant commence legal proceedings to recover damages within such time as the Judge may specify; or
 - (b) refuse such application; or
 - (c) adjourn it for such period and on such terms and conditions as the Judge may deem necessary with liberty to either party to apply; or
 - (d) make any such other or further order he deems just or proper in the circumstances,

and on the hearing of any adjourned application the Judge shall have the same powers in regard thereto as are conferred on him by this subsection on an original application.

(5) A Judge may, notwithstanding that the time specified in an order made under sub-section (4) of this section for the commencement of legal proceedings has expired, from time to time extend such time.

(6) When an order is made under subsections (4) or (5) of this section, proceedings to recover damages shall not be commenced after the expiration of the time therein specified as being the time within which such proceedings must be commenced.

(7) Nothing in this section shall prevent or affect the application of the provisions of subsections (9), (10), (11) or (12) of section 7 of the *Workers' Compensation Act 1912-1967*.

24B. In any action for damages if all parties to the proceedings consent the Court shall, or for cause shown by any party the Court may, order the separate trial of the issue of liability and on the hearing of such issue it shall enter a final declaratory

judgment determining the question of liability between the parties and if this results in a party being entitled to recover damages it shall adjourn the final assessment thereof unless all parties agree to the contrary.

24C. In any action for damages for personal injury when a final declaratory Judgment has been entered on the issue of liability the Court may at any time prior to the final assessment of damages -

- (a) order that the party held liable make to the other party payment in respect of special damages incurred to that time, including -
 - (i) loss of earnings;
 - (ii) hospital, medical and dental expenses;
 - (iii) other expenses; and

- (b) order that the party held liable make to the other party during a stated period, or until further notice, periodic payments to cover special damages expected to be incurred in the future, including -
 - (i) loss of earnings;
 - (ii) hospital, medical and dental expenses;
 - (iii) other expenses.

24D. (1) Where the Court adjourns the final assessment of damages pursuant to s.24B of this Act, a Judge may, on the application of a party to the proceedings -

- (a) from time to time vary any order that may have been made under s .24C
 - (b);

- (b) terminate any order that may have been so made; or

- (c) direct that the Court proceed to a final assessment of damages.

(2) On the hearing of an application under subsection (1) of this section the Judge shall make such order as he considers just: provided that, in an action for damages for personal injury, on an application that the Court proceed to final

assessment of the damages, the Judge shall order accordingly if it shall appear that the condition of the party entitled to recover damages is sufficiently stable to make a final assessment of damages reasonably practicable.

24E. Notwithstanding a finding of contributory negligence against a plaintiff in a final declaratory judgment made under section 24B of this Act in an action for damages for personal injury the Court may order payment of up to the full amount of the damages referred to in paragraphs (a) and (b) of section 24C of this Act where it appears to the Court -

- (a) that not to do so would result in hardship to the party entitled to damages and
- (b) that any final award of general damages would exceed the amount by which the damages would have been reduced because of the plaintiff's contributory negligence.

24F. When damages are finally assessed in an action for damages for personal injury credit shall then be given for all payments which have been made pursuant to orders made under sections 24C, 24D or 24E of this Act and the final judgment shall state the full amount of damages, the total of all amounts previously paid pursuant to any such orders, and the amount of damages then remaining payable; and judgment shall be entered for the last-named amount.

3. Section 58 of the principal Act is amended by adding after paragraph (m) of subsection (1) the following new paragraph -

- (n) Appeals from a Judge or the Third Party Claims Tribunal established under the *Motor Vehicle (Third Party Insurance) Act 1943-1969* giving a final declaratory judgment pursuant to section 24B of this Act.

4. Section 60 of the principal Act is amended by adding after the word "action" in line two of subsection (2) the words

“and a final declaratory judgment made pursuant to section 24B of this Act.”



**THE LAW REFORM COMMISSION
OF WESTERN AUSTRALIA**

Project No 5

**Interim Damages in
Personal Injury Claims**

SUPPLEMENTARY REPORT

AUGUST 1969

SUPPLEMENTARY REPORT ON

INTERIM DAMAGES IN PERSONAL INJURY CLAIMS

To: The Honourable Arthur F. Griffith, M.L.C.
Minister for Justice.

1. On 26th May last, the Committee presented you with its report on Project No. 5, dealing with interim damages in personal injury claims. The Committee's principal recommendation was that the court should be empowered to enter a final declaratory judgment on the issue of liability and adjourn the final assessment of damages and, pending the final assessment, to make interim awards to cover the plaintiff's loss of earnings, hospital medical and other expenses as therein mentioned.

2. The Committee did not specifically consider the case where the plaintiff died as a result of his injuries after the judgment on liability but before the court had finally assessed the damages. It is important to ensure that his estate, and his dependants, are not prejudiced in such a situation.

3. Under the present law, the survival of causes of action is provided for by s.4 of the *Law Reform (Miscellaneous Provisions) Act 1941*, but the applicability of that section, as at present drafted, to "split trials" is uncertain. It could be argued that the plaintiff had no cause of action at his death, since it had merged in the final judgment on liability.

4. We recommend therefore that s.4 of the *Law Reform (Miscellaneous Provisions) Act 1941* be amended to provide that damages may be recovered for the benefit of the plaintiff's estate as if he had not obtained a judgment in his lifetime against the wrong-doer. On the other hand, so that his estate is no better off it should also be provided that any payments made pursuant to an interim award must be taken into account in assessing the damages payable to the estate.

5. The *Fatal Accidents Act 1959* also calls for consideration in this context. That Act provides that where the death of a person is caused by a wrongful act which would have entitled him to maintain an action and recover damages, his dependants can sue the wrongdoer to compensate them for the loss of their financial dependency. The Act contemplates that the cause of action must subsist at the time of the death and it could be argued here also that in the case of "split trials" no cause of action existed at death because it had been merged in the judgment on liability.

6. It is therefore desirable to amend the *Fatal Accidents Act* also to clarify the position. The amendments should be similar to that required to the *Law Reform Act*, and to provide that an action may be brought for the benefit of the dependants, notwithstanding that the deceased had prior to his death obtained a judgment on liability and an interim award. It is not necessary here to provide that any interim payments are to be taken into account, since the dependants right of action is independent of the right of action given a deceased's estate.

7. The New South Wales Law Reform Commission has suggested a different solution in the case where death supervenes, in line with its broader approach on the whole question of interim damages in personal injury claims. Some of our commentators also suggested a broader approach, but others urged that the existing system should not be unnecessarily disturbed. We prefer the more limited approach and our recommendations in this report are aimed simply at ensuring that the rights given to a deceased's estate, and to his dependants, under the present law are not inadvertently taken away.

8. Summary of recommendations

(1) That the *Law Reform (Miscellaneous Provisions) Act 1941* be amended to provide that where a person dies as the result of his injuries after a final declaratory judgment on the issue of liability but before the final assessment of damages, damages may be recovered for the benefit of his estate as if he had not obtained a judgment in his lifetime against the wrongdoer.

(2) That the *Fatal Accidents Act 1959* be amended to provide that, notwithstanding that the deceased had obtained before his death a final declaratory judgment on the issue of

liability and, an interim award of damages his dependants can maintain an action under that Act.

CHAIRMAN:	B.W. Rowland
MEMBER:	C. le B. Langoulant
MEMBER	I. W. P. McCall

19th August 1969.