



**THE LAW REFORM COMMISSION
OF WESTERN AUSTRALIA**

Project No 5

**Interim Damages in
Personal Injury Claims**

WORKING PAPER

OCTOBER 1968

INTRODUCTION

As part of its first programme the Law Reform Committee has been asked to consider the need for legislation providing for the payment of interim damages in personal injury cases.

The Committee having completed its first consideration of the matter now issues this working paper. The paper does not represent the final views of the Committee.

Comments and criticisms on the paper are invited. The Committee requests that they be submitted by the 15th November 1968.

Copies of the paper are being forwarded to –

The Chief Justice and Judges of the Supreme Court,
The Chairman and members of the Third Party Claims Tribunal,
The Master of the Supreme Court,
The Law Society,
The Law School,
The Magistrates Institute,
K. W. Hatfield, Q.C.,
P. L. Sharp, Q.C.,
The Manager of the Motor Vehicle Insurance Trust,
The Under Secretary, Medical Department, and
Other Law Reform Commissions and Committees with which this Committee is in
correspondence.

The Committee may add to the above list.

The research material on which this paper is based is at the offices of the Committee and may be made available on request.

WORKING PAPER

INTERIM DAMAGES IN

PERSONAL INJURY CLAIMS

1. TERMS OF REFERENCE

"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".

MOVEMENT FOR REFORM

2. Judges and practitioners have for some time now recognised that Judges lack proper powers to deal with claims for damages for personal injury under modern conditions.

3. 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.

4. In 1967 South Australia amended its *Supreme Court Act* by Act No.21 of 1967 (which is set out in full in Appendix A - see the new section 30b), enabling courts, inter alia, to make interim awards of damages.

5. The Winn Committee (the Committee on Personal Injuries Litigation) in July, 1968, published a comprehensive report (Cmnd 3691) covering many aspects of personal injury litigation. The Committee has recommended split trials when prognosis is delayed, though it doubts that the cases involving delay in prognosis are as numerous as is generally thought. The Committee has 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. The Committee rejected the idea of periodic payments (see para. 22(c) below) but at the same time pointed out that this question is being more thoroughly considered by the United Kingdom Law Reform Commission.

6. The Winn Committee recommendations in so far as they relate to our 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 those adopted in this working paper.

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

THE PRESENT POSITION

Separate judgment on the issue of liability

8. The *Rules of the Supreme Court* do not seem to contemplate that, in an ordinary common law action for damages, judgment on the issue of liability shall be entered in advance of the assessment of the quantum of damage.

9. If legislation is to be introduced to provide for interim awards it should provide expressly for the separate trial and entry of final (declaratory) judgment on the issue of liability.

10. The terms of reference (set out in para. 1 above) are limited to liability in personal injury cases but there would seem to be no reason why the provisions of a statute enabling the separate trial of the issue of liability should not apply to claims for damage to both persons and property.

11. It is contemplated that the issues of liability and final quantum of damage would be tried separately where there was –

(a) consent

or

(b) leave of the Court given for cause shown.

Power to make Interim Awards

12. 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*) (1969) 1 Ld.Raym., 399, 91 E.R. 1122; Cf. *Scutt v. Bailey* No.2 (1964), W.A.R. 81.

13. A damages claimant (see para. 3 above) injured in circumstances also giving rise 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*.

14. The *Motor Vehicle (Third Party Insurance) Act, 1943 - 1967*, s.16E(5) (set out in full in Appendix B), gives the Third Party Tribunal set up under that Act power to award a lump sum by way of general damages and periodic payments, with power to review and vary the latter from time to time.

15. It is doubtful whether s.16E(5) empowers the Tribunal to make interim awards (i.e. awards pending stabilisation of the plaintiff's condition) though it is arguable that it does. There is as yet no judicial decision on the matter.

16. The majority of cases of personal injury which arise otherwise than under the *Third Party Tribunal Act* are likely to be compensable under the *Workers Compensation Act*. There are, however, cases which do not fit into either category.

17. This may be advanced as an argument in favour of limiting the power to make interim awards to persons injured in motor vehicle accidents, but it would appear to be just and logical that any such power should be available to all claimants for damages for personal injury however arising.

18. No case has been submitted for interim awards in property damages cases; nor, in such cases, is there likely to be hardship similar to that referred to in para. 3 above.

19. We cannot foresee any problems arising in cases in which there are joint tortfeasors (see Winn Committee Working Paper, para. 5). Problems as to payment may arise in the case of an uninsured tortfeasor but these would exist regardless of interim award considerations.

20. We are not aware of causes 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 seem to arise.

POSSIBLE BASES FOR ASSESSING INTERIM AWARDS

21. As to what should be included in an interim award there are different points of view.

Total entitlements

22. The award might make allowance for –

- (a) special damages to the date of assessment (for this purpose "special damages" shall include loss of earnings, cf. e.g. *Linke v. Howard* (1967) S.A.S.R. 83 at 84-5);
- (b) general damages 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.

23. The Third Party Tribunal has power to award periodic payments (see paras. 14 and 15 above). Judges and practitioners have indicated that this power should be available in *all*

personal injury claims however arising. This is outside our terms of reference but is under consideration in New South Wales and United Kingdom.

24. The arguments in favour of having the interim award make allowance for general damages (see para. 22(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.

25. 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;
- (d) the claimant may be disinclined to overcome his disabilities if he can keep going back for more general damages.

26. Instead of a decision wholly for or against, it might be thought desirable to provide that the interim award should take in just some of the headings of general damage (see para. 22(b)).

Partial entitlements

27. In the alternative, the award might be limited to items (a) and (c) of para. 22.

28. The arguments in favour of assessment on this basis include –

- (a) simplicity in practical application;

- (b) minimal interference with the status quo and the principle that damages should be assessed "once for all".

29. The question of limiting 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 also arises for consideration.

VARIATION OF AWARDS

30. On whatever basis interim awards are to be made, the court should be empowered to vary the award. The statutory provision should give both parties liberty to apply (on, say, seven days notice) and confer a wide discretion on the court to deal with any application.

31. The South Australian legislation provides that the judge shall not refuse an order for final assessment if a period of four years or more has passed since the date of the declaratory judgment (i.e. the determination of liability). The period selected is arbitrary and it would seem unnecessary to limit the discretion of the court in this way.

PROCEDURE

32. It is anticipated that when the question of liability is in issue, it will be determined in the normal way (i.e. after a trial in open court).

33. If interim awards of damages are to be limited to the items suggested in para. 27, the initial award (if not made in connection with a trial on the issue of liability), and any variations of it, may be made on applications in Chambers, on affidavit evidence unless otherwise ordered.

34. On the issue of costs, the rules of court relating to payment in with a denial of liability may require some modification. The Third Party Tribunal has already made some provision in this regard: see *Third Party Claims Tribunal Rules* - r.120-128, which deal generally with offers to consent to judgment.

STATUS OF THE FINAL DECLARATORY JUDGEMENT

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

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

37. 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.

38. 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".

APPENDIX "A"

AN ACT to amend the *Supreme Court Act, 1935-1966*.

BE IT enacted etc. ...

- Short title
1. (1) This Act may be cited as the *Supreme Court Act Amendment Act (No.2) 1966-1967*.
 - (2) The *Supreme Court Act 1935-1965*, as amended by this Act, may be cited as the *Supreme Court Act 1935-1966*.
 - (3) The *Supreme Court Act 1935-1965*, is hereinafter referred to as "the principal Act".
- Commencement.
2. This Act shall come into operation on a day to be fixed by the Governor by proclamation.
- Incorporation.
3. This Act is incorporated with the principal Act and that Act and this Act shall be read as one Act.
- Enactment of ss.30a and 30b of principal Act
4. The following sections are inserted in the principal Act after section 30 thereof –
- Power to direct payment to infant
- 30a. Where in an action the Court determined that a party (being an infant) is entitled to recover damages from another party, the Court may by final or declaratory judgment finally determining the question of liability between the parties order payment of any amount or amounts of damages, direct to the plaintiff. Any acknowledgement or receipt in writing of any moneys paid on account of any such amount or amounts pursuant to a judgment under this section shall not if the Court so orders be invalid merely on the ground that the person giving the same was under the

age of twenty-one years at the time of his signing or giving the same.

Power to make interim assessment of damages

30b. (1) Where in any action the Court determines that a party is entitled to recover damages from another party, it shall be lawful for the Court to enter declaratory judgment finally determining the question of liability between the parties, in favour of the party who is entitled to recover damages as aforesaid, and to adjourn the final assessment thereof.

(2) It shall be lawful for the Court when entering declaratory judgment and for any Judge of the Court at any time or times thereafter –

(a) to make orders that the party held liable make such payment or payments on account of the damages to be assessed as to the Court seems just;

and

(b) in addition to any such order or in lieu thereof, to order that the party held liable make periodic payments to the other party on account of the damages to be assessed during a stated period or until further order:

Provided, however, that where the declaratory judgment has been entered in an action for damages for personal injury, such payment or payments shall not include an allowance for pain or suffering or for bodily or mental harm (as distinct from pecuniary loss resulting therefrom) except where serious and continuing illness or disability results from the injury or except that, where the party entitled to recover damages is incapacitated or partially incapacitated for

employment and being in part responsible for his injury is not entitled to recover the full amount of his present and continuing loss of earnings, or of any hospital, medical or other expenses resulting from his injury, the Court may order payment or payments not to exceed such loss of earnings and expenses and such payment or payments may be derived either wholly or in part from any damages to which the party entitled to recover damages has, but for the operation of this proviso, established a present and immediate right or except where the Judge is of opinion that there are special circumstances by reason of which this proviso should not apply.

(3) Any order for payment of moneys on account of damages made hereunder may be enforced as a judgment of the Court.

(4) Where the Court adjourns assessment of damages under this section, it may order the party held liable to make such payment into Court or to give such security for payment of damages when finally assessed as it deems just.

(5) When damages are finally assessed credit shall be given in the final assessment for all payments which have been made under this section and the final judgment shall state the full amount of damages, the total of all amounts already paid pursuant to this section and the amount of damages then remaining payable, and judgment shall be entered for the last-named amount.

(6) Where the Court adjourns assessment of damages under this section, any party to the proceedings may apply to any Judge of the Court at any time and from time to time –

(a) for an order that the Court proceed to final assessment of the damages;

or

- (b) for the variation or termination of any order which may have been made for the making of periodic payments.

On the hearing of any such application the Judge shall make such order as he considers just. Provided that, in an action for damages for personal injury, upon an application for an order that the Court proceed to final assessment of damages, the Judge to whom such application is made shall not refuse such order if the medical condition of the party entitled to recover damages is such that neither substantial improvement nor substantial deterioration thereof is likely to occur or if a period of four years or more has expired since the date of the declaratory judgment unless the Judge is of opinion that there are special circumstances by reason of which such assessment should not then be made.

(7) If it appears to the Court that a person in whose favour declaratory judgment has been entered has without reasonable cause failed to undertake such reasonable medical or remedial treatment as his case might have required or require, it shall not award damages for such disability, pain or suffering as would have been remedied but for such failure.

(8) If at any time it appears to a Judge that a person in whose favour declaratory judgment has been entered and who is incapacitated or partially incapacitated for employment, is not sincerely or with the diligence which should be expected of him in the circumstances of his case, attempting to rehabilitate himself for employment any payment or payments under subsection (2) of this section shall not include by way of allowance for loss of earnings a sum in excess of seventy-five per centum of such person's loss of earnings.

- (9a) Notwithstanding anything in the *Survival of Causes of Action Act, 1940*, when damages are finally assessed under this section for the benefit of the estate of a deceased person where the deceased person died after action brought and declaratory judgment has been entered in favour of such person, the damages finally assessed may include such damages in respect of any of the matters referred to in section 3 of that Act as the Court deems proper.
- (b) Where a party dies after declaratory judgment has been entered in his favour but before final assessment of his damages in circumstances which would have entitled any person to recover damages, solatium or expenses by action pursuant to Part II of the *Wrongs Act, 1936-1959*, it shall be lawful for the executor or administrator or the deceased to proceed in the same action for the recovery of such damages, solatium or expenses for the benefit of such person notwithstanding the declaratory judgment or that the deceased has received moneys thereunder, provided, however, that in any such proceedings all moneys paid to the deceased pursuant to the declaratory judgment in excess of any actual and subsisting pecuniary loss resulting to him from the wrongful act of the party held liable shall be deemed to have been paid towards satisfaction of the damages shall be payable in respect of the injury sustained by the deceased. In any proceedings hereunder, the declaratory judgment and any finding of fact made in the course of proceedings consequent thereupon shall enure as between the party held liable and the executor or administrator of the deceased.
- (c) Where a party dies in the circumstances referred to in the preceding paragraph of this subsection except that the death of the deceased is not wholly attributable to the personal

injury, the subject of the declaratory judgment, but was accelerated thereby, it shall be lawful for proceedings to be taken and for the Court to assess damages, solatium or expenses as in the preceding paragraph but such damages, solatium or expenses shall be proportioned to the injury to the person for whom and for whose benefit the proceedings are taken resulting from such acceleration of death;

(d) The Court may, if the justice of a case so requires, assess damages under paragraph (a) of this subsection notwithstanding the commencement or prosecution of proceedings under paragraph (b) or (c) of this subsection and the damages so assessed shall be for the benefit of the estate of the deceased and no damages shall be awarded under paragraph (b) or (c) of this subsection.

(10) In the exercise of the powers conferred by this section the Court shall have regard to the facts and circumstances of the particular case, as they exist from time to time, and any allowance, or the final assessment, as the case may be shall be, such as to the Court may seem just and reasonable as compensation to the person actually injured or to his or her dependants as the case may be.

Amendment of
principal Act s.50 –
Appeals to Full Court

5. Section 50 of the principal Act is amended by inserting after the words "every judgment" first occurring therein the words "including every declaratory judgment entered pursuant to section 30b of this Act and any final assessment made thereon" and by inserting in paragraph (b) subsection (3) thereof after subparagraph (v) the following subparagraph –

(va) Any assessment of damages not being a final assessment made pursuant to section 30b of this Act.

APPENDIX "B"

Section 16E (5) of the Motor Vehicle (Third Party Insurance) Act 1943-1967

(5) On the hearing by the Tribunal of any action or proceedings referred to in subsection (1) of this section, the Tribunal shall have and may exercise all or any of the powers in relation to that action or those proceedings and the parties thereto as a judge would, but for the enactment of this section, have had, but without in any way limiting these powers, the Tribunal shall have the following further powers –

- (a) to award by way of general damages either a lump sum or periodical payments or a lump sum and periodical payments, such periodical payments to be for such period and upon such terms as the Tribunal determines;
- (b) at any time either of its own motion or on the application of any party to the action or proceedings –
 - (i) to review any periodical payment and either continue, vary, reduce, increase, suspend, or determine it, or to order payment to the claimant of a further lump sum; or
 - (ii) to order that any such periodical payments be redeemed by payment of a lump sum;
- (c) to award to any party such costs as the Tribunal deems proper.

APPENDIX "C"

Section 35(1) (a) of the Judiciary Act 1903-1966

35. (1) The appellate jurisdiction of the High Court with respect to judgments of the Supreme Court of a State or of any other Court of a State from which at the establishment of the Commonwealth an appeal lay to the Queen in Council, shall extend to the following judgments whether given or pronounced in the exercise of federal jurisdiction or otherwise and to no others, namely:

- (a) Every judgment, whether final or interlocutory, which –
 - (1) is given or pronounced for or in respect of any sum or matter at issue amounting to or of the value of One thousand five hundred pounds; or
 - (2) involves directly or indirectly any claim, demand, or question, to or respecting any property or any civil right amounting to or of the value of One thousand five hundred pounds; or
 - (3) affects the status of any person under the laws relating to aliens, marriage, divorce, bankruptcy or insolvency.

but so that an appeal may not be brought from an interlocutory judgment except by leave of the Supreme Court or the High Court -



**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.