

# NSW Law Reform Commission

## REPORT 78 (1996) - PROVISIONAL DAMAGES

### Table of Contents

Table of Contents

Terms of reference

Participants

Summary of recommendations

Cataloguing in Publication

1. INTRODUCTION

BACKGROUND TO THE REFERENCE

COMMENTS ON THE TERMS OF REFERENCE

DEFINITIONS

2. ASSESSMENT OF DAMAGES IN CASES INVOLVING UNCERTAINTY IN THE FUTURE

LUMP SUM ASSESSMENT

ALTERNATIVES TO LUMP SUM ASSESSMENT

Statutory compensation schemes

Periodical payments

Structured settlements

Interim payments

Deferred assessment

Provisional damages

3. ALTERNATIVES TO LUMP SUM AWARDS IN NEW SOUTH WALES

MOTOR ACCIDENTS ACT 1988

Structured settlements

Interim payments

WORKERS COMPENSATION ACT 1987

Structured settlements

INTERIM DAMAGES UNDER THE SUPREME COURT ACT 1970

Judicial interpretation of s 76E

DUST DISEASES TRIBUNAL ACT 1989

Provisional damages

#### 4. ALTERNATIVES TO LUMP SUM AWARDS IN OTHER JURISDICTIONS

SOUTH AUSTRALIA

Application of s **30b**

WESTERN AUSTRALIA

ENGLAND

Interim damages

Provisional damages

The Law Commission's review of provisional damages

*Gradual deterioration*

*Recovery of the plaintiff*

*Death of the plaintiff*

*Flexibility on time limits*

*The overriding discretion of the court*

*More than one application*

*Interaction with death claims*

#### 5. A PROVISIONAL DAMAGES REGIME FOR NEW SOUTH WALES

A GAP IN THE LAW OF NEW SOUTH WALES?

PROPOSAL FOR PROVISIONAL DAMAGES

The arguments

PRIMARY RECOMMENDATIONS

Other recommendations

*Coverage*

*More than one application*

*Time limits*

*Interaction with claims under the*

Law Reform (Miscellaneous Provisions) Act 1944

*Interaction with claims under the Compensation to Relatives Act 1897*

*Other suggestions*

APPENDIX 1: DRAFT BILL

APPENDIX 2: SELECT BIBLIOGRAPHY

APPENDIX 3: TABLE OF LEGISLATION

APPENDIX 4: TABLE OF CASES

## **REPORT 78 (1996) - PROVISIONAL DAMAGES**

### **Terms of Reference and Participants**

To the Honourable Jeff Shaw QC  
Attorney General for New South Wales

Dear Attorney

### **Provisional damages**

We make this final Report to the reference to this Commission dated 28 October 1990.

Professor Michael Tilbury

(Commissioner-in-charge)

The Hon Justice H D Sperling

(Commissioner)

Ms Jane Stackpool

(Commissioner)

Professor David Weisbrot

(Commissioner)

September 1996

### **Terms of Reference**

On 28 October 1990, the then Attorney General, the Honourable John Dowd QC, made the following reference to the Commission:

To inquire into and report upon:

the manner of assessment of damages (whether in respect of tort or other breach of duty) in cases where uncertainty exists as to the future conditions or events relevant to the quantum of the plaintiff's recoverable loss;

the desirability of the introduction of a scheme enabling a court to defer the final assessment of damages in order to allow the quantum of loss to be determined more precisely;

the form of any such scheme, including consideration of the court's power to make orders for *provisional damages* pending final assessment of loss;

any related matter.

### **Participants**

The Law Reform Commission is constituted by the *Law Reform Commission Act 1967*. For the purpose of this reference, the Chairman, in accordance with the Act, created a Division comprising the following members of the Commission:

Professor Michael Chesterman (until December 1995)

The Hon G J Samuels AC QC (until 28 February 1996)

The Hon Justice H D Sperling

Ms Jane Stackpool

Professor Michael Tilbury\*

Professor David Weisbrot

(\* denotes Commissioner-in-Charge)

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Ms Julie Freeman

#### **Administrative Assistance**

Ms Zoya Howes

Ms Jean Dulieu

## REPORT 78 (1996) - PROVISIONAL DAMAGES

### Summary of Recommendations

#### **Recommendation 1 (page 50)**

Provisional damages should be available in personal injury cases in New South Wales.

#### **Recommendation 2 (page 51)**

A provisional damages regime should generally mirror the provisions of the English legislation and the *Dust Diseases Tribunal Act 1989* (NSW).

#### **Recommendation 3 (page 52)**

Provisional damages should extend to all instances of personal injury including cases where the *Motor Accidents Act* or *Workers Compensation Act* govern the assessment of damages.

#### **Recommendation 4 (page 52)**

Provisional damages should also be available in the District Court.

#### **Recommendation 5 (page 53)**

One application for further damages should be permitted subject to the judge at that application granting a further right to the plaintiff to return on the occurrence of further specified deterioration arising from the same injury.

#### **Recommendation 6 (page 53)**

The court may specify the period within which a plaintiff may apply under an award of provisional damages.

#### **Recommendation 7 (page 54)**

Where no period is set by the court or where the plaintiff dies before the end of the period set by the court, the plaintiff's right to apply under an award of provisional damages terminates on the plaintiff's death.

#### **Recommendation 8 (page 54)**

The *Law Reform (Miscellaneous Provisions) Act 1944* should be amended to make it clear that an award of provisional damages is excluded from the restrictions on recoverable heads of damage under s 2(2)(a)(ii) of the Act.

#### **Recommendation 9 (page 55)**

An award of provisional damages should not preclude a dependant's claim under the *Compensation to Relatives Act 1897* (NSW) for death attributable to the specified disease or deterioration. The assessment of damages in such a claim should take into account, as the justice of the case may require, any pecuniary loss already awarded to the deceased in respect of the period after his or her death.

## REPORT 78 (1996) - PROVISIONAL DAMAGES

### 1. Introduction

#### BACKGROUND TO THE REFERENCE

1.1 On 28 August 1990 the New South Wales Law Reform Commission received a reference from the then Attorney General, the Honourable John Dowd, to inquire into and report on:

the manner of assessment of damages (whether in respect of tort or other breach of duty) in cases where uncertainty exists as to the future conditions or events relevant to the quantum of the plaintiff's recoverable loss;

the desirability of the introduction of a scheme enabling a court to defer the final assessment of damages in order to allow the quantum of loss to be determined more precisely;

the form of any such scheme, including consideration of the court's power to make orders for provisional damages pending final assessment of loss; and

any related matter.

1.2 This reference was made following a request by the Chief Justice of New South Wales, the Honourable A M Gleeson AO, that consideration be given to a reference to the Commission on whether provision should be made for orders by the Court for provisional damages in personal injury and other actions.

1.3 The Commission issued a Discussion Paper in January 1992.<sup>1</sup> The focus of the Discussion Paper was provisional damages.<sup>2</sup> The issues surrounding the introduction of provisional damages in New South Wales were discussed, without reaching a conclusion, and comments were invited on the following issues:

the suitability of incorporating a scheme of provisional damages into the current common law personal injury system in New South Wales; and

the suitability of incorporating a scheme of provisional damages under the *Personal Injury Damages Bill 1991* (NSW).

The *Personal Injury Damages Bill* has since lapsed, and is no longer relevant.

1.4 Submissions were received from the Law Society of New South Wales and the Local Court Statute Law Revision Committee, both of which supported the introduction of a system of provisional damages. Ms Anna Lennon, Director of Legal Services, Department of Courts Administration, concluded, on balance, that such a system ought not to be introduced for the reasons outlined in the Discussion Paper.<sup>3</sup>

1.5 Work on the reference was subsequently suspended due to lack of resources and competing priorities of the Commission. It was then decided, owing to the paucity of relevant material, to await the English Law Commission's report on the subject which was published in September 1994.<sup>4</sup> Work recommenced in June 1995 and consultations were held in July with representatives of the insurance industry.<sup>5</sup> Most of the members of the industry were opposed to the introduction of provisional damages in New South Wales.

#### COMMENTS ON THE TERMS OF REFERENCE

1.6 Although a general review of the law relating to the assessment of damages could be conducted in accordance with the first item of the terms of reference, the Commission's inquiry has not been so wide-ranging. It has focused on a consideration of schemes involving interim and provisional damages. The Discussion Paper dealt only with the issue of provisional damages.

1.7 In accordance with the broad scope of the terms of reference, the Commission has not, however, confined its consideration to the assessment of damages for personal injury even though this is the area where the questions arise most clearly.

## DEFINITIONS

1.8 It is important to have the terms “interim damages” and “provisional damages” clearly defined as they are not used consistently in the literature. Statutory schemes may incorporate aspects of either or both without drawing a clear distinction.

1.9 For the purposes of this Report, “interim damages” are damages paid to a plaintiff on account of final damages, that is before the assessment of damages has been completed. They are paid primarily to overcome financial difficulties which a plaintiff might experience pending final assessment. They usually cover ongoing out of pocket expenses incurred as a result of the wrong. They are considered most often in relation to personal injury cases.

1.10 By contrast, “provisional damages” are awarded to a plaintiff as part of a final assessment of damages. The award subjects all losses (including future losses) to immediate assessment, except those attributable to the happening of a specified event or condition which would result in further loss to the plaintiff. The plaintiff is given the right to apply to the court for damages in respect of the further loss if the specified event or condition occurs.

## FOOTNOTES

1. New South Wales Law Reform Commission, *Provisional Damages* (Discussion Paper 25, 1992).
2. For definition see para 1.10 below.
3. DP 25 at para 3.10.
4. England and Wales, Law Commission, *Structured Settlements and Interim and Provisional Damages* (Law Com No 224, 1994).
5. Mr Dallas Booth, Deputy General Manager, Motor Accidents Authority; Ms Isobel Holthause, Senior Corporate Lawyer CTP, NRMA Insurance Ltd; Mr Peter McDonal, CTP Insurance Manager, NRMA; and Mr Ted Williams of the Insurance Council of Australia Ltd.



## REPORT 78 (1996) - PROVISIONAL DAMAGES

### 2. Assessment of Damages in Cases Involving Uncertainty in the Future

2.1 The Commission is asked to report on the manner of assessment of damages where uncertainty exists as to future conditions or events relevant to the quantum of the plaintiff's recoverable loss. Such uncertainties may exist for a number of reasons, and it is helpful to separate them into uncertainties which exist generally and those which are peculiar to the plaintiff's case. Those in the latter group are the focus of this reference.

2.2 Examples of the uncertainties which may arise for cases generally are the impact of inflation and the impact of income taxation on the award in the future where (as in personal injury cases) the award is assumed to constitute a fund upon the capital and income components of which the plaintiff will draw progressively during the period of the loss. In this case a plaintiff will have to pay tax on the (assumed) income from the fund but the future rates of taxation will be unknown. Other examples involve the "vicissitudes of life" in personal injury cases - that is, the unknown factors which affect people generally such as the risk of early death, incurring further or other injury by accident, being prevented from working by strikes, and so forth.<sup>1</sup>

2.3 These uncertainties are dealt with in the following ways:

In respect of taxation and inflation, the courts quantify the present value of the future loss by adopting a discount rate of 3%. This amount was prescribed by the High Court in *Todorovic v Waller*.<sup>2</sup> In New South Wales, damages awarded in contexts which attract the operation of the provisions of the *Motor Accidents Act* or the *Workers Compensation Act*, are discounted at a rate of 5%.<sup>3</sup> This rate is intended to make the appropriate (and only) allowance for inflation, future changes in rates of wages generally or in prices, and for tax upon income from investment of the sum awarded.

In respect of the "vicissitudes of life", the courts make a conventional deduction. In New South Wales that deduction is 15%,<sup>4</sup> although there may be circumstances justifying a departure from it in some cases.<sup>5</sup>

2.4 As to the uncertainties which may arise because of circumstances peculiar to the plaintiff, typical examples in personal injury cases include the plaintiff's life span and the prognosis of the plaintiff's medical condition.<sup>6</sup> In such circumstances the courts do the best they can by means of a "guesstimate" as to, for example, the cost of care, life expectancy and so on.

### LUMP SUM ASSESSMENT

2.5 The compensation principle endeavours to provide a person who has suffered an injury with an equivalent in money for the loss. This is effected by a lump sum payment under the "once-and-for-all" rule which applies at common law.<sup>7</sup> At common law there is no provision for the court to make the award other than in a lump sum.<sup>8</sup>

2.6 It is obviously impossible to arrive at a precise monetary equivalent for future loss in a system which requires speculation by a court as to future events. The reality is that the court cannot look into the future and possibly foresee the social conditions which will exist, or the means of care available and the costs involved.<sup>9</sup> This is particularly so with respect to serious and long term illness.

2.7 An award of damages under the once-and-for-all rule will, therefore, almost certainly be wrong. It will result either in under-compensation which disadvantages the plaintiff who is prevented from commencing another action in respect of the injuries, despite further manifestation; or over-compensation for an injury that never manifests itself to the degree expected.<sup>10</sup> Lord Scarman put it well when he said:

The award is final; it is not susceptible to review as the future unfolds, substituting fact for estimate. Knowledge of the future being denied to mankind, so much of the award as is to be attributed to future loss and suffering - in many cases the major part of the award - will almost surely be wrong. There is really only one certainty: the future will prove the award to be either too high or too low.<sup>11</sup>

2.8 Other arguments against once-and-for-all rule awards focus on the financial abilities of the plaintiff.<sup>12</sup> The problems are particularly acute in the case of personal injuries. Mismanagement of funds can leave a plaintiff with no financial security, relying on social security payments once the lump sum has been dissipated. Many plaintiffs do not have the financial acumen to invest a lump sum successfully, quite apart from the fact that the award may not have been sufficient in the first place. Work undertaken as part of the Commission's Accident Compensation reference included a detailed study of the experiences of plaintiffs who had received compensation in a common law negligence action.<sup>13</sup> The findings supported arguments that it is wrong to assume the plaintiff will wisely invest the lump sum award to produce income for the period of incapacity assessed by the court, and that there is often inadequate allowance made for the effects of inflation on the cost of items and services such as wheelchairs, pharmaceuticals and home nursing. However, research undertaken by the English Law Commission for their review of structured settlements, interim awards and provisional damages, suggests that dissipation claims are exaggerated. This was particularly the case where the award was large. The English Law Commission found that victims of personal injury were concerned to preserve capital in order to cover future health care and care assistance costs, at least during the period up to ten years after injury.<sup>14</sup>

2.9 There are nevertheless strong arguments in favour of the once-and-for-all rule. Many argue that the lump sum award is made in the interests of the parties and the community, on the basis that the litigation is settled once and for all, liability is discharged, the matter can be forgotten and the plaintiff can concentrate on mitigating the loss. There is also no doubt that schemes of reviewable and continuing payments incur administrative and legal costs, which ultimately flow through and affect the community at large in the form of decreased services and impact on the availability and cost of insurance. Further, there will always be difficulties in ensuring future payments in a system that requires interim, provisional or periodical payments, as there is no guarantee of the future availability or solvency of the defendant. A lump sum also encourages independence by leaving plaintiffs free to use the award as they think fit.<sup>15</sup>

## ALTERNATIVES TO LUMP SUM ASSESSMENT

2.10 Recognition of the inability of lump sum awards to compensate adequately for future loss in many cases<sup>16</sup> has led to the consideration and development of alternative forms and structures of compensation,<sup>17</sup> not necessarily limited to the context of personal injury.<sup>18</sup> The alternative forms and structures include statutory compensation schemes, provision for periodical payments, structured settlements, deferred assessment, interim damages and provisional damages.

### Statutory compensation schemes

2.11 The most comprehensive solution to the problem of adequately compensating future loss is a statutory compensation scheme. Most schemes of this nature apply in the context of personal injury, are no-fault and involve periodical payments. The current workers' compensation scheme in New South Wales is an example.<sup>19</sup> Such a scheme was recommended for traffic accidents by this Commission in the early 1980s.<sup>20</sup> The *Transport Accidents Act 1988* gave some effect to the recommendations of the Commission but in the context of a fault-based system. The Act was repealed by the *Motor Accidents Act 1988*.

### Periodical payments

2.12 Another option is the statutory modification of the once-and-for-all rule at common law to allow periodical payments. Periodical payments would, obviously, not cover past loss but only future loss. In most cases a comprehensive system of periodical payments would be impractical because of:

resource implications for courts, with plaintiffs repeatedly coming back to the court for assessment; administrative inconvenience and expense to insurers of keeping files open; and the anti-rehabilitative effect it may have in personal injury cases.

This approach has not been adopted in any jurisdiction and would be a radical solution.

### **Structured settlements**

2.13 Structured settlements usually consist of an initial lump sum payment representing compensation for past pain and suffering and expenses already incurred, with the balance of the award used to fund a series of periodical payments over a number of years. In England, where structured settlements are entered voluntarily, the balance of the award is used by the defendant's insurer to purchase life insurance annuities.<sup>21</sup>

2.14 In New South Wales structured settlements are provided for under the *Motor Accidents Act 1988*<sup>22</sup> and the *Workers Compensation Act 1987*.<sup>23</sup> The Commission has been advised by representatives of the insurance industry in New South Wales that there has been no use of the *Motor Accidents Act* scheme to date,<sup>24</sup> largely because it is subject to an open-ended review<sup>25</sup> and is not exempt from tax, unlike its English counterpart where the voluntary structures agreed to by the parties are exempt from tax.<sup>26</sup> However, it can be argued that periodical payments on the lines of the English model may not attract taxation in Australia.<sup>27</sup>

2.15 The English Law Commission has recently reviewed structured settlements and made several recommendations concerning them.<sup>28</sup> In particular the Commission recommended that judges should not be given the power to impose a structured settlement because it was thought that the power would have a detrimental effect on the current flexible regime, which was based on negotiation and agreement between the parties.<sup>29</sup> Further, because the system of structured settlements was still evolving, the Law Commission was reluctant to constrain its development by the premature introduction of a power of imposition. It did, however, make several suggestions to rationalise the existing voluntary regime.<sup>30</sup>

### **Interim payments**

2.16 The general purpose of interim damages schemes is to allow courts to make some provision for a plaintiff by means of interim payments pending trial and final assessment of damages. In New South Wales the power to do this is available under s 76E of the *Supreme Court Act 1970*; in South Australia, under s 30b of the *Supreme Court Act 1930* (SA); and in England, under O 29 r 11 of the *Rules of the Supreme Court*.<sup>31</sup>

### **Deferred assessment**

2.17 Deferred assessment involves the postponement of the assessment of damages until certain aspects of a plaintiff's condition or circumstances become clearer.<sup>32</sup> It is an option which can be most effectively combined with a system of interim payments. Such an approach was recommended by the Commission in 1969.<sup>33</sup>

2.18 The approach of delaying trial until a personal injury plaintiff's condition has stabilised might, however, have undesirable effects. In some cases it might lessen the incentive to rehabilitation, as improvement in a plaintiff's condition would reduce any award. Further, where there is a delay in having the matter heard, financial worries may force a plaintiff to settle for an inadequate amount. There is also the incidence of litigation neurosis.

### **Provisional damages**

2.19 Provisional damages can be seen as a variation of the concept of deferred assessment of damages. Under such a scheme the final assessment of damages is made but the plaintiff is given the option of returning for a further assessment on the occurrence of a certain specified event, the possibility of which is foreseen at the time of assessment, such as the development of a further medical condition or a significant deterioration in an existing condition. In New South Wales provisional damages are available for claims before the Dust Diseases Tribunal.<sup>34</sup> These provisions are largely in line with the general scheme for provisional damages established by s 32A of the English *Supreme Court Act 1981*. However, provisional damages are not generally available in New South Wales or any other Australian jurisdiction, although something similar to provisional damages is theoretically achievable by making a deferred award with interim assessment under the South Australian legislation.<sup>35</sup>

## FOOTNOTES

1. See generally M Tilbury, *Civil Remedies: Remedies in Particular Contexts*, Volume 2 (Butterworths, Sydney, 1993) at paras 9029-9030.
2. (1981) 150 CLR 402 at 409.
3. See *Motor Accidents Act 1988* (NSW) s 71 and *Workers Compensation Act 1987* (NSW) s 151J.
4. *Wynn v NSW Insurance Ministerial Corp* (1995) 70 ALJR 147 at 153 per Brennan CJ; *Hobell v Leonard* (NSW CA, No CA 40209/89, 29 May 1990, unreported) per Samuels JA.
5. *Djapa v Comalco Aluminium Ltd* (NSW CA, No CA 64/86, 3 July 1987, unreported) per Samuels JA.
6. For example, the plaintiff's condition could deteriorate as a result of the onset of syringomyelia, sympathetic ophthalmia, post traumatic epilepsy and mesothelioma: see Law Society of New South Wales, *Submission* (20 March 1992) at 1-2.
7. *Pamment v Pawelski* (1949) 79 CLR 406; *Todorovic v Waller* (1981) 150 CLR 402.
8. H McGregor, *McGregor on Damages* (15th ed, Sweet & Maxwell, London, 1988) at paras 1 and 1795.
9. See *Mundy v GIO* (NSW SC, No 14795/87, 5 June 1995, Spender AJ, unreported) at 3; *Lim v Camden and Islington Area Health Authority* [1980] AC 174 at 183 per Lord Scarman.
10. For a study identifying cases involving under- and over-compensation in South Australia, see M Neave and L Howell, *The Adequacy of Common Law Damages* (Adelaide Law Review Research Paper No 5, 1992) at 71-84.
11. *Lim v Camden and Islington Area Health Authority* [1980] AC 174 at 183. See also comments by Harman LJ in *Jones v Griffith* [1969] 1 WLR 795 at 802.
12. See also DP 25 at para 2.6.
13. New South Wales Law Reform Commission, *Accident Compensation: Traffic Accident Case Studies* (Research Paper 1, 1984).
14. England and Wales, Law Commission, *Structured Settlements and Interim and Provisional Damages* (Law Com No 224, 1994) at 30-31.
15. These arguments are also outlined at DP 25 para 2.3.
16. The English Law Commission also suggests that it is not only deficiencies with the lump sum award, but also increases in the number of claims made that has led to a need to focus on

alternative forms of compensation: see England and Wales, Law Commission, *Structured Settlements and Interim and Provisional Damages* (Law Com No 224, 1994) at 9.

17. In the last twenty five years there have been a number of reviews of personal injury compensation in common law jurisdictions: see England and Wales, *Royal Commission on Civil Liability and Compensation for Personal Injury* (The Pearson Report) (Cmnd 7054 - I-III, March 1978); Ontario, Law Reform Commission, *Report on Compensation for Personal Injuries and Death* (1987); New South Wales Law Reform Commission, *Accident Compensation: A Transport Accidents Scheme for New South Wales* (Report 43, 1984) especially paras 4.4-4.15; Manitoba Law Reform Commission, *Interim Payment of Damages* (Report 87, June 1995).
18. In commercial claims there may be doubts about what profits would have been made, and will now be made, from a particular commercial venture, for example in the circumstances of *Settlement Wines Company Pty Ltd v National General Insurance Co Ltd* (1994) 62 SASR 40.
19. The New Zealand system is also an example: *Accident Rehabilitation and Compensation Insurance Act 1992* (NZ).
20. See New South Wales Law Reform Commission, *Accident Compensation: Report on a Transport Accidents Scheme for NSW* (Report 43, 1984) especially at paras 8.2-8.3 and Recommendation 35.
21. England and Wales, Law Commission, *Structured Settlements and Interim and Provisional Damages* (Law Com No 224, 1994) at para 3.1.
22. Section 81. See para 3.4.
23. Section 151Q. See paras 3.6-3.7.
24. *Consultation* (20 July 1995) with motor insurance industry representatives, including the Motor Accidents Authority.
25. *Motor Accidents Act 1988*, s 81(7) provides that a party to any structured settlement or arrangement may apply to the court at any time for an order varying or terminating the arrangements.
26. England and Wales, Law Commission, *Structured Settlements and Interim and Provisional Damages* (Law Com No 224, 1994) at paras 3.2-3.7.
27. See D Colenbrander, *Tax Implications of Introducing the UK Structured Settlements Model into Australia* (Discussion Paper, Motor Accidents Authority of NSW, 26 October 1995) which concludes (at 13): "The signposts in the case law suggest that index linked periodic payments over a fixed term will be treated as capital in the hands of the plaintiff".
28. England and Wales, Law Commission, *Structured Settlements and Interim and Provisional Damages* (Law Com No 224, 1994) Part 3.
29. England and Wales, Law Commission, *Structured Settlements and Interim and Provisional Damages* (Law Com No 224, 1994) paras 3.37-3.53.
30. England and Wales, Law Commission, *Structured Settlements and Interim and Provisional Damages* (Law Com No 224, 1994) at paras 3.54-3.160.
31. Interim payments are also available in Scotland under the *Rules of Court of Session 1994* (Scot) and in Bermuda under the *Law Reform (Miscellaneous Provisions) (No 2) Act 1977* (Bermuda). See also recommendations in Western Australia Law Reform Committee, *Interim Damages in Personal Injury Claims* (Project 5, May 1969) and Manitoba Law Reform Commission, *Interim Payment of Damages* (Report 87, June 1995).

32. See paras 3.13, 4.1, 5.2 and 5.3.
33. New South Wales Law Reform Commission, *Working Paper on Deferred Assessment of Damages for Personal Injuries and Interim Payments During the Period of Postponement of Assessment and on the Relevance of Remarriage or Prospects of Remarriage in an Action Under Lord Campbell's Act* (Working Paper 2, 1969) at 15.
34. *Dust Diseases Tribunal Act 1989* (NSW) s 11A.
35. See paras 4.1-4.10. There is also a possibility of a similar outcome being achieved under the current New South Wales provisions: para 3.13.

## REPORT 78 (1996) - PROVISIONAL DAMAGES

### 3. Alternatives to Lump Sum Awards in New South Wales

3.1 A plaintiff injured in New South Wales can pursue different avenues in a claim for damages, depending on the nature of the accident that caused the injury. Plaintiffs who are injured as a result of a motor vehicle accident can only claim damages pursuant to the *Motor Accidents Act 1988* (NSW). Although the non-economic loss component of an award is always given in the form of a lump sum, the Act allows for structured settlements with respect to economic loss,<sup>1</sup> and interim payments by insurers with respect to hospital, medical and rehabilitation expenses.<sup>2</sup> Plaintiffs who are injured in circumstances where the *Workers Compensation Act 1987* applies and who can bring a common law claim, may obtain a structured settlement in respect of future economic loss.<sup>3</sup> The *Supreme Court Act* allows the award of interim damages to plaintiffs seeking damages in any type of action, excluding motor vehicle accidents.<sup>4</sup> Finally, proceedings for damages in relation to persons suffering from a “dust-related” condition may be brought before the Dust Diseases Tribunal which has the same power to make decisions as the Supreme Court, except that the Tribunal may also make an award of provisional damages.<sup>5</sup>

3.2 Alternatives to lump sum awards were proposed by this Commission as far back as 1969.<sup>6</sup> That paper proposed a scheme which contemplated postponement of an award of damages where there was a chance of improvement or deterioration in a plaintiff’s condition. The postponement could be for a period of up to seven years, with provision for interim payments. These proposals were never implemented.

#### MOTOR ACCIDENTS ACT 1988

3.3 The *Motor Accidents Act 1988* was heralded as a “modified common law scheme” for compensating motor accident victims which would “provide a truly fair and equitable means of compensation to motor accident victims at a cost the community can afford”.<sup>7</sup> In particular, Part 6 of the Act was seen as “the first step towards a general revision of the law of damages for personal injuries”.<sup>8</sup> Significant amendments were made to the Act in 1995 to limit further the availability of damages to a person injured as a result of a motor accident.<sup>9</sup> The changes were introduced on the basis that they were consistent with the primary aims of the motor accidents scheme as originally intended. These were stated to have been:

to address the needs of the severely injured as a priority;

to maintain premiums which are affordable for all vehicle owners; and

to achieve this by limiting damages for non-economic loss in cases of minor injuries.<sup>10</sup>

The Act provides for structured settlements and interim payments.

#### Structured settlements

3.4 Section 81(2) of the *Motor Accidents Act* allows the court to approve a structured settlement with respect to future economic loss and impairment of earning capacity. There is no provision for an alternative to a lump sum to be awarded for non-economic loss. Section 81 has not been used since it came into force. The most likely reason is that s 81(1) requires the agreement of both parties before the section can take effect.<sup>11</sup>

#### Interim payments

3.5 Once liability has been admitted or determined, s 45 of the *Motor Accidents Act* imposes the duty on an insurer to make interim payments for such hospital, medical, pharmaceutical, and certain rehabilitation and respite care expenses as may be incurred by the plaintiff. Subsection (2A) provides that the payments must be “reasonable and necessary”, properly verified and relate to the injury caused.

The payments can only be made once liability has been determined, and the insurer's duty to pay arises from the provisions of the Act, with no specific order required from the court.

## WORKERS COMPENSATION ACT 1987

### Structured settlements

3.6 The *Workers Compensation Act 1987* provides a comprehensive statutory scheme of compensation, while retaining rights at common law in certain circumstances. Where common law damages are claimable, a structured settlement is available under s 151Q.<sup>12</sup> This section provides that damages for future economic loss can, in some cases, be awarded in the form of a structured settlement and mirrors the provisions of s 81 of the *Motor Accidents Act 1988*. The current s 151Q, which like s 81 of the *Motor Accidents Act 1988* requires the consent of the parties to operate, was introduced by the *Workers Compensation Legislation Amendment Act 1995*. The previous s 151Q, introduced by the *Workers Compensation (Benefits) Amendment Act 1989*, differed significantly from the current provision in that the operation of the section did not require agreement between the parties but could be enlivened at the request of either of the parties or if the Court considered that it should apply. The recent amendment was introduced for the stated purpose of bringing "the provision into line with the corresponding provisions of the *Motor Accidents Act*".<sup>13</sup>

3.7 Although there is some evidence of the use of s 151Q before the 1995 amendments<sup>14</sup> it is likely that it will not be used frequently in future for the same reasons discussed above in relation to the *Motor Accidents Act*.<sup>15</sup>

## INTERIM DAMAGES UNDER THE SUPREME COURT ACT 1970

3.8 Since 1991 Part 5 Division 2 of the *Supreme Court Act 1970* has permitted the court to make interim payments in any proceedings for damages.<sup>16</sup> The idea came from the English rules of court<sup>17</sup> and was introduced in New South Wales to ameliorate the distress suffered by plaintiffs, particularly those who might be financially disadvantaged.<sup>18</sup> Although there is little case law explaining the provision, the fact that payment can only be made on the application of the plaintiff suggests that it is a needs-based provision aimed at, for example, catering for immediate medical needs.

3.9 The legislation applies to any proceedings for damages commenced in the Supreme Court, except where Part 6 of the *Motor Accidents Act 1988* applies,<sup>19</sup> and gives the court a wide statutory discretion to award interim payments. The court may make an order for an interim payment or payments at any stage of the proceedings. According to s 76E(3), an order may be made if:

- (a) the defendant has admitted liability; or
- (b) the plaintiff has obtained judgment against the defendant for damages to be assessed; or
- (c) the Court is satisfied that, if the action proceeds to trial, the plaintiff would obtain judgment for substantial damages against the defendant.

3.10 The Court, in making an order, may not order the payment of an amount which exceeds "a reasonable proportion of the damages which in the opinion of the Court are likely to be recovered by the plaintiff",<sup>20</sup> while also taking into account any relevant contributory negligence or cross claims.<sup>21</sup> Section 76E(4) lists three criteria which may prevent the making of an order:

- (4) The Court may not make such an order if the defendant satisfies the Court that:
  - (a) the defendant is not insured in respect of the risk giving rise to the plaintiff's claim for the recovery of damages; and



- (b) the defendant is not a public authority; and
- (c) the defendant would, having regard to the defendant's means and resources, suffer undue hardship if such a payment were to be made.

3.11 The making of any interim payments by a defendant does not amount to an admission of liability.<sup>22</sup> The Court is given power to make orders with respect to interim payments "as may be just" including to vary or to order the repayment of any interim award at either final judgment, discontinuance or withdrawal of the claim, or at any other stage of the proceedings on the application of any of the parties.<sup>23</sup> Where there is more than one defendant, the order for interim payment cannot be made generally against any defendant who may happen to have the most resources, but only against those defendants against whom the interim order has been sought and made.<sup>24</sup>

3.12 A claim for interim damages arising in respect of the death or injury of a person caused by the fault of the owner or driver of a motor vehicle in the use or operation of the vehicle is specifically excluded from s 76E. Such a claim must be brought under Part 6 of the *Motor Accidents Act*.<sup>25</sup> This position is similar to the English legislation where the court has no jurisdiction to order the Motor Insurers' Bureau to make interim payments. The Bureau does, however, make voluntary interim payments based on its own guidelines.<sup>26</sup>

3.13 While the court may order interim payments at any time before the assessment of damages, it is not clear how long a court can postpone final assessment. In *Pettersen v Bacha*<sup>27</sup> the court commented that it has the power to delay final assessment for a number of years. In the case of a child, it was suggested this may be until the child turns eighteen, or perhaps even longer. Part 31 rule 2 of the *Supreme Court Rules* which deals with the separate decision of any question, whether of fact or law, permits questions of liability and damages to be tried separately. The provision is traditionally used where there is a clear division between issues of liability and damages or where there is a degree of complexity in the issue of damages, for example, where there is some doubt about the plaintiff's prognosis and it would be appropriate to wait until his or her condition is settled.<sup>28</sup> The postponement could be effected by the court's power to adjourn trials.<sup>29</sup>

#### **Judicial interpretation of s 76E**

3.14 There have been few decided cases explaining s 76E of the *Supreme Court Act*. *Frellsen v Crosswood Pty Ltd*<sup>30</sup> considered some of the issues when a plaintiff applies for an order for interim damages, the court relying on English decisions interpreting the equivalent English legislation.<sup>31</sup> Justice Sully examined three particular questions raised by the English legislation, which he considered were equally applicable to the New South Wales legislation:

what is meant by the requirement that the court must be satisfied that "the plaintiff would obtain judgment for substantial damages against the defendant";<sup>32</sup>

to what extent must a claimant for an interim payment demonstrate actual need as a pre-condition of the exercise in his or her favour of the court's discretionary power; and

what is the consequence, so far as concerns the satisfaction of the Court, of the claimant/plaintiff having brought the principal action against more than one defendant?

3.15 As to the question of what "satisfied" means for the purposes of s 76E(3)(c), the court applied English authorities directly on point,<sup>33</sup> and concluded that something more than a prima facie case needs to be established by the plaintiff. A plaintiff was not, however, required to prove beyond reasonable doubt that substantial damages would be recovered.

3.16 The English authorities<sup>34</sup> are not so conclusive as to the degree of need which must be demonstrated by a claimant for an interim payment. The New South Wales legislation does not include any *positive* requirement that a plaintiff demonstrate need, hardship or any other prejudice. In *Frellsen*

Justice Sully indicated that the absence of any such need or hardship would no doubt be a factor to be taken into account in the exercise of the court's discretion to award an interim payment award, but that it was not a precondition.<sup>35</sup>

3.17 In respect of the final matter considered by the court, it is important to note there is a difference in wording between the New South Wales and English legislation, in that s 76E does not address the situation "where there are two or more defendants". Despite this, Justice Sully did not see how s 76E(3)(c) could refer to anything other than the particular defendant against whom the interim payment order has been sought.

## DUST DISEASES TRIBUNAL ACT 1989

### Provisional damages

3.18 The *Dust Diseases Tribunal Act 1989* (NSW) establishes the Dust Diseases Tribunal which has jurisdiction with respect to proceedings for damages in relation to persons who are suffering or have suffered from "dust-related" conditions.<sup>36</sup> The Tribunal has the same power to make decisions as the Supreme Court would in relation to similar proceedings,<sup>37</sup> but in addition the Tribunal may make an award of provisional damages under s 11A.<sup>38</sup>

3.19 Section 11A essentially follows the scheme laid down by s 32A of the *Supreme Court Act 1981* (Eng)<sup>39</sup> except that it applies to causes of action in relation to a person suffering from a "dust-related" condition. It must be proved or admitted that there is a chance that, at some definite or indefinite time, the person will, as a result of the relevant breach of duty, develop another dust-related condition. For example, a person suffering from asbestosis may develop mesothelioma.<sup>40</sup> The court may then, under s 11A(2):

- (a) award damages assessed on the assumption that the injured person will not develop another dust-related condition; and
- (b) award further damages at a future date if the injured person does develop another dust-related condition.

3.20 Rules have been passed pursuant to s 11A<sup>41</sup> and these essentially follow the provisions of the English *Rules of the Supreme Court*.<sup>42</sup> One particular aspect to note is that the Rules allow the Tribunal to make an award of provisional damages only if the plaintiff "has pleaded a claim for provisional damages in the proceedings".<sup>43</sup> The Tribunal has advised the Commission that, to date, there has not been any use of provisional damages awards.

## FOOTNOTES

1. *Motor Accidents Act 1988* (NSW) s 81.
2. *Motor Accidents Act 1988* (NSW) s 45.
3. *Workers Compensation Act 1987* (NSW) s 151Q. Provision is made for interim payments in certain specified circumstances under the compensation scheme: s 112.
4. Section 76E.
5. *Dust Diseases Tribunal Act 1989* (NSW) s 11A.
6. New South Wales Law Reform Commission, *The Deferred Assessment of Damages for Personal Injuries and Interim Payments During the Period of Postponement of Assessment and on the Relevance of Remarriage or Prospects of Remarriage in an Action under Lord Campbell's Act* (Working Paper 2, 1969).

7. New South Wales, *Parliamentary Debates (Hansard)* Legislative Assembly, 29 November 1988 at 3832.
8. New South Wales, *Parliamentary Debates (Hansard)* Legislative Assembly, 29 November 1988 at 3832.
9. *Motor Accidents Amendment Act 1995* (NSW).
10. New South Wales, *Parliamentary Debates (Hansard)* Legislative Council, 16 November 1995 at 3320.
11. See *Petterson v Bacha* (NSW CA, No CA 40584/94, 9 March 1995, unreported) per Handley JA at 2-3.
12. The Act permits interim awards in respect of statutory compensation where it is clear that some compensation is payable under the Act, but the actual amount has not yet been ascertained because of various specified disputes between employers and insurers and employers and employers: s 112. Compare *Workers Compensation Act 1926* (NSW) s 7B.
13. New South Wales, *Parliamentary Debates (Hansard)* Legislative Council, 31 May 1995 at 418.
14. This was despite considerable problems with construction and application of the section: *Hadley v Michell* (NSW SC, No 16178/90, Lee AJ, 17 December 1991, unreported); *Tomkins v Deniliquin Nursing Home Foundation Ltd* (NSW SC, CLD 14608/92, Wood J, 26 November 1993, 57 pages, unreported) at 38-56; and *Tomkins v Deniliquin Nursing Home Foundation Ltd* (NSW SC, CLD 14608/92, Wood J, 26 November 1993, 5 pages, unreported); as well as judicial calls for reform: *Townsend v Greater Taree City Council* (NSW SC, CLD 16368/92, Loveday AJ, 24 November 1994, unreported).
15. Para 3.4. See also *Wilson v Wilbroco Pty Ltd* (NSW SC, CLD 10652/91, Barr AJ, 8 September 1995, unreported) at 14.
16. As does s 58 of the *District Court Act 1973* (NSW).
17. See *Rules of the Supreme Court 1965* (Eng) O 29 r 9-18.
18. New South Wales, *Parliamentary Debates (Hansard)* Legislative Assembly, 14 March 1991 at 1021. It was also hoped that such arrangements would encourage earlier settlements in some cases.
19. Section 76H.
20. Section 76E(5).
21. Section 76E(6).
22. Section 76F.
23. Section 76G.
24. *Frellsen v Crosswood Pty Ltd* (1992) 15 MVR 343 at 348-349.
25. *Supreme Court Act 1970* s 76H.
26. England and Wales, Law Commission, *Structured Settlements and Interim and Provisional Damages* (Law Com No 224, 1994) at 88-90.

27. NSW CA, No CA 40584/94, 9 March 1995, unreported, at 2-4.
28. P Taylor (ed), *Ritchie's Supreme Court Procedure NSW* (Butterworths) at [31.2.5]. The English Court of Appeal cases cited in support of this proposition merely include dicta as to the desirability of postponement of assessment where there is an element of uncertainty as to the plaintiff's future condition: *Hawkins v New Mendip Engineering Ltd* [1966] 1 WLR 1341 at 1347 per Winn LJ; *Stevens v William Nash Ltd* [1966] 1 WLR 1550 at 1554-5 per Winn LJ. *Bulovec v Mealing* (NSW SC, CLD 2110/76, Master Sharpe, 20 February 1980, unreported) also cited in support, is based merely on the citation of the same two English cases in the English Practice: I H Jacob (ed), *The Supreme Court Practice 1979* Vol 1 (Sweet & Maxwell, London, 1978) at para 33/4/7.
29. In *Hawkins v New Mendip Engineering Ltd* [1966] 1 WLR 1341 the power to adjourn was contained in the then RSC O 36 r 34. Part 34 r 3 of the *Supreme Court Rules 1970* (NSW) allows for adjournment of proceedings in New South Wales.
30. (1992) 15 MVR 343.
31. RSC O 29 r 11.
32. *Supreme Court Act 1970* s 76E(3)(c). Cf RSC O 29 r 11(1)(c).
33. See *Shearson Lehman Bros Inc v MacLaine Watson & Co Ltd* [1987] 1 WLR 480 per Lloyd LJ at 488H-489B; *Gibbons v Wall* (English Court of Appeal, 12 February 1988, unreported); *Ricci Burns Ltd v Poole* [1989] 1 WLR 993; and *Schott Kem Ltd v Bentley* [1991] 1 QB 61.
34. In *Schott Kem Ltd v Bentley* [1991] 1 QB 61, Neill and Glidwell LJJ did not consider that the English rules relating to interim payment orders restricted such an order being made in the absence of evidence, need or prejudice. They did not see any need to place limits on the discretionary jurisdiction of the court to award an interim payment other than those set out in Order 29. They did acknowledge that the practice was for an interim payment in a personal injury action to be limited to sums for which a plaintiff can show a need. A different view was taken in *Breeze v R McKennon & Son Ltd* (1985) 32 BLR 41 at 50, where the court said a plaintiff's evidence should explain why the order is required and cover the need for the plaintiff to have the money. See also *Shearson Lehman Bros Inc v Mclaine Watson & Co Ltd* [1987] 1 WLR 480 at 492.
35. *Frellsen v Crosswood Pty Ltd* (1992) 15 MVR 343 at 348.
36. *Dust Diseases Tribunal Act 1989* (NSW) s 11.
37. *Dust Diseases Tribunal Act 1989* (NSW) s 10(4).
38. This section was added to the Act by the *Courts Legislation Amendment Act 1995* (NSW) and commenced on 1 August 1995.
39. See para 4.20.
40. New South Wales, Legislative Council, *Parliamentary Debates (Hansard)*, 31 May 1995, at 416.
41. *Dust Diseases Tribunal Rules* (NSW) as amended by Rule No 560 of 1995 (published in *Gazette* No 110 of 9 September 1995).
42. RSC, O 37 r 7-10.
43. *Dust Diseases Tribunal Rules* (NSW) r 5(3).

## REPORT 78 (1996) - PROVISIONAL DAMAGES

### 4. Alternatives to Lump Sum Awards in Other Jurisdictions

#### SOUTH AUSTRALIA

4.1 Section 30b of the *Supreme Court Act 1935* (SA) provides for interim payments to be made in any proceedings before that court. Under s 30b(1) where it is found that a party is entitled to damages, the court can enter a declaratory judgment determining liability and postpone the assessment of damages. Subject to a finding that there are special circumstances, a court must order the assessment of damages if such an order is requested after a period of four or more years.<sup>1</sup> Once liability is determined the court can also:

make orders for the assessment of an interim payment on account of damages; and

order the assessment of periodical payments on account of the damages.<sup>2</sup>

4.2 There is a proviso in s 30b(2) which states that the court “shall not include an allowance for pain or suffering or for bodily or mental harm (as distinct from pecuniary loss resulting therefrom)” when making an order for any payments. This proviso is subject to several exceptions, including where the judge is of the opinion that “special circumstances” should apply.

4.3 The legislation was introduced for several purposes, including:

- (1) to enable liability to be determined, by trial if necessary, while the events are still fresh in the memory of witnesses and without the necessity of waiting until the plaintiff’s condition was sufficiently stabilized for the assessment of damages;
- (2) to provide for interim payments of damages, pending final assessment, for the support of a plaintiff and the payment of [that plaintiff’s] debts, with incidental relief to hospitals, doctors and other creditors who would otherwise have to wait; and
- (3) to enable the postponement of final assessment of damages where a plaintiff’s future remained uncertain.<sup>3</sup>

4.4 It has been observed that the principal and most successful use of the section has arisen in cases where the plaintiff’s prognosis is likely to remain uncertain for some years. In such cases the usual course is to have the issue of liability determined expeditiously and to have an interim award made to meet the needs of the plaintiff.<sup>4</sup>

4.5 The benefits of such a provision certainly appear attractive in theory. The section has not been overly used since its introduction over two decades ago.<sup>5</sup> Correspondence from the South Australian Attorney General’s Department<sup>6</sup> indicates that on the occasions where the section is used, the cases have involved substantial future medical expenses. In practice, the parties to the dispute generally agree to a course of action (pre-payment of general damages) on the basis of information tendered by the plaintiff.

#### Application of s 30b

4.6 It is a matter for the court’s discretion whether or not to make a declaratory judgment and order interim payments under this section. In exercising its discretion the court considers all the circumstances, the nature and extent of the plaintiff’s injuries and the seriousness of any possible developments in the plaintiff’s condition. The decision to apply this section is ultimately in the hands of the court,<sup>7</sup> regardless of the plaintiff’s application. This fact has been demonstrated in those cases where the plaintiff has applied for final judgement, but the court has considered that it was in the interests of the plaintiff to pronounce a declaratory judgment and not assess final damages at the time of trial.<sup>8</sup>

4.7 Although s 30b is not limited in terms to any particular type of case, it has generally been applied in personal injury matters.<sup>9</sup> However, there have been other types of cases where the court has exercised its discretion under this section. In *Parnell Transport Industries Pty Ltd v Mala Bore Trading Co Pty Ltd*,<sup>10</sup> a case involving a breach of contract, the court was asked to determine liability and postpone the assessment of damages. The court entered judgment determining liability, and declared that the plaintiff had established its entitlement to damages for the defendant's wrongful termination of the contract. The proceedings were adjourned for the assessment of damages.

4.8 The section does not define any specific factors which the court is required to take into account. In general, the section has been applied where there is uncertainty as to a plaintiff's future medical condition. However, much will depend on the circumstances of the individual case. Other specific factors which the court has had occasion to consider are:<sup>11</sup>

the unknown effect of uncertain labour conditions,<sup>12</sup> or of the outcome of an examination, on the plaintiff's earning capacity;<sup>13</sup> the failure to produce evidence which ought to have been tendered in respect of the extent of damages;<sup>14</sup> the inability of the plaintiff presently to manage a lump sum award;<sup>15</sup> and, the uncertainty of future costs.<sup>16</sup>

4.9 In personal injury matters, where the plaintiff's condition is stable, and the declaratory judgment has been made, s 30b(6) requires the assessment of damages within four years of that judgment. A general postponement of more than four years will be available in special circumstances. There will be cases where four years will be too short a time in which to proceed to the assessment of damages,<sup>17</sup> and despite the stability of the plaintiff's condition, other factors, such as age<sup>18</sup> may make the court postpone assessment.

4.10 The interim payment can be in the form of a lump sum, weekly payments, or whatever is most suitable in the circumstances, such payment not being disproportionate in relation to what the plaintiff may finally receive. On its face, s 30b(2) forbids recovery for non-economic loss. This exclusion is subject however, to certain circumstances, including "serious and continuing illness or disability" and a further category of "special circumstances". The courts have interpreted "special circumstances" in such a way as to enable them to make awards for non-economic loss to the extent that it can be ascertained at the time.<sup>19</sup>

## WESTERN AUSTRALIA

4.11 In claims for damages for death or personal injury caused by a motor vehicle, s 16(4) of the *Motor Vehicle (Third Party Insurance) Act 1943 (WA)* empowers a court to award damages by way of lump sum, periodical payments, or both. The court will not, however, depart from the lump sum award where neither party agrees to periodical payments.<sup>20</sup> Apparently this provision has been seldom used.<sup>21</sup>

4.12 Any orders for periodical payment are, of course, subject to review, although the section does not specify the circumstances which would give rise to such a review. Occasions would include the improved earning capacity of a defendant and changed economic conditions.<sup>22</sup>

4.13 One further problem has been identified with respect to the Western Australian legislation in that it makes no provision where a plaintiff receiving periodical payments dies. Normally the plaintiff's dependants would expect to receive the unexpired portion of the lump sum award. They would be seriously disadvantaged by a scheme of periodical payments.<sup>23</sup>

## ENGLAND

### Interim damages

4.14 A system for the payment of interim damages is provided for in Order 29 of the *Rules of the Supreme Court 1965 (Eng)*. The relevant provisions are similar to those in Part 5 Division 2 of the

*Supreme Court Act 1970* (NSW),<sup>24</sup> and were clearly the model in the framing of the New South Wales provisions.

4.15 Like their New South Wales counterpart, the provisions are not limited to personal injury cases and, indeed, in certain circumstances it is possible for interim payments to be made in respect of sums other than damages, for example, a claim for possession of land or an order for an account.<sup>25</sup> Application may be made at any time after the period allowed for a defendant to acknowledge service of a writ.<sup>26</sup> While the needs of the plaintiff will be a relevant consideration in most cases, the provisions are not expressly needs based.<sup>27</sup>

4.16 Matters of which the court must be satisfied before making an order for interim damages are listed in O 29 r 11(1) and are broadly similar to those in s 76E(3) of the *Supreme Court Act 1970* (NSW). The additional provision in r 11(1)(c) with respect to situations where there are two or more defendants has been discussed above.<sup>28</sup>

4.17 Rule 11(1) provides that the court shall make such interim payments as it thinks just and makes provisions limiting the quantum of any interim payment in similar terms to s 76E(5) and 76E(6) of the *Supreme Court Act 1970* (NSW).<sup>29</sup> As in New South Wales an order will not be made if the defendant is either not insured, is not a public authority, or is not a person with the ability to meet any payments required.<sup>30</sup> The final category differs from New South Wales in that the defendant must suffer "undue hardship" as the result of meeting any order.

4.18 As with s 76G of the *Supreme Court Act 1970* (NSW) the court may make adjustments on the conclusion of proceedings in accordance with O 29 r 17.

4.19 The court has no jurisdiction to order interim payment by the Motor Insurance Bureau where that body has been joined as a defendant.<sup>31</sup>

### **Provisional damages**

4.20 In England the introduction of provisions dealing with provisional damages arose from recommendations by the English Law Commission.<sup>32</sup> These new provisions were introduced in 1982 as s 32A of the *Supreme Court Act 1981*:

(1) This section applies to an action for damages for personal injuries in which there is proved or admitted to be a chance that at some definite or indefinite time in the future the injured person will, as a result of the act or omission which gave rise to the cause of action, develop some serious disease or suffer some serious deterioration in his physical or mental condition.

(2) Subject to subsection (4) below, as regards any action for damages to which this section applies in which a judgment is given in the High Court, provision may be made by rules of court for enabling the court, in such circumstances as may be prescribed, to award the injured person:

- (a) damages assessed on the assumption that the injured person will not develop the disease or suffer the deterioration in his condition; and
- (b) further damages at a future date if he develops the disease or suffers the deterioration.

Order 37 rules 7-10 of the *Rules of the Supreme Court 1965* (Eng) make provision as allowed by s 32A(2). A *Practice Direction*<sup>33</sup> was also issued which came into effect with the scheme in 1985. The *County Court Rules* O 22 r 6A provide that O 37 r 7(2) and r 8-10 of the *Rules of the Supreme Court* shall apply in the English County Courts.<sup>34</sup>

4.21 The legislation is principally aimed at “chance” cases, that is, those cases in which plaintiffs can prove there is a possibility that a disease will develop, or their condition will deteriorate, at some stage during their life. In such cases a lump sum award may not compensate them properly, as such an award provides compensation for future loss based on present estimates. The legislation is designed to provide plaintiffs with a more accurate award in personal injury cases by making it possible for them to claim further damages only when the specified disease or deterioration occurs.

4.22 The types of diseases which have been made the subject of an award of provisional damages include those associated with respiratory organs,<sup>35</sup> mesothelioma,<sup>36</sup> epilepsy,<sup>37</sup> blindness,<sup>38</sup> and leukaemia.<sup>39</sup> More than one disease or deterioration can be comprehended in the one order.<sup>40</sup> These cases indicate that injuries of relatively grave proportions are envisaged, despite the fact the words “chance” or “serious” are not defined. The few applications for an award of provisional damages have provided slender precedent for the circumstances in which an award of provisional damages will be made.<sup>41</sup>

4.23 Despite this, a threshold test of sorts has been established. In *Willson v Ministry of Defence* Justice Scott Baker posed three questions for consideration:

whether it is proved that there is a chance;

whether it is proved that there is a chance of some serious deterioration in the plaintiff’s physical condition; and

whether the court should exercise its discretion in [the plaintiff’s] favour in the circumstances of the case?<sup>42</sup>

4.24 For a “chance” to exist it was held that it had to be “measurable rather than fanciful”.<sup>43</sup> Referring to the facts of the case before him, Justice Scott Baker added: “However slim those chances may be, I think that they are measurable within the meaning of this section”. As to “serious deterioration in [the plaintiff’s] condition”, his Lordship said:

In my judgment, what is envisaged here is something beyond ordinary deterioration. Whether deterioration is serious in any particular case seems to me to be a question of fact depending on the circumstances of that case, including the effect of the deterioration on the plaintiff.<sup>44</sup>

Although seriousness was a question of fact in each case, there should be “some clear cut event which, if it occurs, triggers an entitlement to further compensation”.<sup>45</sup>

4.25 The *Practice Direction* in relation to provisional damages issued in 1985<sup>46</sup> requires the judge to specify the disease or type of deterioration:

(a) which, for the purpose of the award of immediate damages, has been assumed will not occur;

(b) which will entitle the plaintiff to further damages if it occurs at a future date.<sup>47</sup>

Paragraph 3 of the *Practice Direction* also requires that the judge is normally to “specify the period within which the application for further damages must be made”. The English Law Commission has noted a tendency in the cases to set no limit at all.<sup>48</sup> But even if a limit is specified, the plaintiff may apply on more than one occasion within the specified period for an extension of time.<sup>49</sup>

4.26 In Discussion Paper 25 the Commission pointed out a number of possible shortcomings with the scheme, namely the additional expenses associated with further reviews; financial uncertainty for a defendant who will not be sure whether a further payment may need to be made; the possible bankruptcy of a defendant; and the fact that the words “chance” and “serious” were not defined.<sup>50</sup>



## **The Law Commission's review of provisional damages**

4.27 The English Law Commission has itself recently re-examined provisional damages as part of a general review of damages, and considered a number of particular issues under the following headings:

Gradual deterioration

Recovery of the plaintiff

Death of the plaintiff

Flexibility on time limits

The overriding discretion of the court

More than one application

Interaction with the *Fatal Accidents Act 1976*.

### ***Gradual deterioration***

4.28 A criticism made of the provisions as they stood was that they excluded many cases involving a "gradual deterioration of the plaintiff's condition", rather than a specified future event. The Law Commission's provisional view was not to extend the coverage of the legislation, noting that a "clear policy reason, such as repeated injustice" would be required before any change could be considered.<sup>51</sup>

### ***Recovery of the plaintiff***

4.29 A question raised during consultation by the Law Commission was whether the provisions should be extended to include cases where the "medical uncertainty concerns the extent to which the plaintiff will recover from an already existing condition". This would involve an immediate assessment based on the "most favourable" prognosis with the right for the plaintiff to seek further damages if the existing condition had not improved as predicted.

4.30 This approach was rejected on the grounds that it would "restore uncertainty to the first award" and might encourage plaintiffs not to seek full recovery in order to provide a basis for a successful application in the future. There were concerns expressed about the ability of experts to predict recovery, as opposed to deterioration, and also that a defendant might feel justly grieved if a plaintiff recovered sooner than anticipated on even the most favourable prognosis available at the time.<sup>52</sup>

### ***Death of the plaintiff***

4.31 Another problem, which has been raised by Deputy Judge Crowther in *Molinari v Ministry of Defence*,<sup>53</sup> involves cases where there is a possibility that a plaintiff may, as a result of injuries sustained, suffer a substantial deterioration and consequently die. Traditionally in such cases, the prospect of deterioration in the plaintiff's condition and consequent death would result in a decrease in damages awarded. If the provisional damages regime were to apply, damages would be assessed on the basis that the deterioration and death would not occur. The plaintiff could then return to court and receive increased damages despite the imminent certainty of death following upon the deterioration. This would result in injustice by over-compensating the plaintiff.

4.32 The Law Commission accepted that this was an extreme case and concluded that judges would make appropriate use of the flexibility of the system in such circumstances:

Where clear injustice to a defendant would result from a provisional award, and the plaintiff would suffer less injustice from a traditionally assessed lump sum, the traditional approach should be taken.<sup>54</sup>

No recommendations were made as to reform in this area.<sup>55</sup>

### ***Flexibility on time limits***

4.33 It was also suggested that the specification of time limits for further assessment was unnecessary because the rules of court allowed application for an extension of time in any case. The Law Commission rejected this argument as assuming that the court would usually satisfy requests for an extension. It was considered also that an indefinite period could conceivably be prejudicial to some defendants.<sup>56</sup>

### ***The overriding discretion of the court***

4.34 The Law Commission asked in its consultation paper whether the court's overriding discretion to order provisional damages was too wide. They concluded that no change was warranted as, on balance, the discretion ensured "flexibility and is therefore the most appropriate machinery for dealing with existing uncertainties".<sup>57</sup>

### ***More than one application***

4.35 The Law Commission dealt with a problem arising under O 37 r 10(6) of the *Rules of the Supreme Court 1965* which provides:

Only one application for further damages may be made in respect of each disease or type of deterioration specified in the order for the award of provisional damages.

The Law Commission pointed out that, while the provision required the specification of the disease or type of deterioration, it made no provision for a specification of body parts, so that if arthritis developed in a plaintiff's leg and the plaintiff claimed further damages in respect of this deterioration, the plaintiff would be precluded from claiming further damages if arthritis developed in another limb at a later date as a result of the same injury.

4.36 After considering various solutions to the problem involving additional further assessments relating to the same disease or deterioration, and noting the need for clearly defined limits to be imposed, the Law Commission recommended that the following provision be added to O 37 r 10(6):

that more than one application may be made where the disease of deterioration so specified occurs in more than one position on the body of the plaintiff provided that the possible positions are specified at the time of making the order.

4.37 The Law Commission did not consider that such a provision would lead to anything more than a very small increase in the use of the English court system.<sup>58</sup> For the purpose of their review the Law Commission conducted a survey of 761 plaintiffs who had received awards of damages for personal injury at any time from 1992 up to ten years before (the accidents having occurred between 1967 and 1991). Only 4% of plaintiffs receiving settlements of £20,000 and more claimed provisional damages.<sup>59</sup> No statistics were collected to enable the production of annual figures showing the number of applications for provisional damages.

### ***Interaction with death claims***

4.38 The English Law Commission considered at some length the effect of provisional damages awards on actions under the English equivalents<sup>60</sup> of the *Law Reform Miscellaneous Provisions Act 1944* (NSW) ("estate claims") and the *Compensation to Relatives Act 1897* (NSW) ("dependants' claims").<sup>61</sup> In both cases a problem may arise where provisional damages are awarded but the plaintiff dies as a result of the specified disease or deterioration before the claim is brought for further damages. In the case of estate claims, the issue is whether or not the provisions of the *Law Reform (Miscellaneous Provisions) Act* preclude the plaintiff's estate from claiming damages for lost earning capacity or loss of earnings during the lost years,<sup>62</sup> a head of damage which would usually have been

prominent in any claim for further damages by the plaintiff before his or her death. The Law Commission, agreeing with dicta of the English Court of Appeal in *Middleton v Elliot Turbomachinery Ltd*,<sup>63</sup> was of the view that the estate would be able to claim damages for the lost years. The reason is that the benefit which survives to the estate is the judgment already obtained, not the plaintiff's cause of action (which is merged in the judgment). The position is, therefore, essentially the same as where the plaintiff has obtained judgment for damages to be assessed. The case is, therefore, outside the scope of the restrictions in the *Law Reform (Miscellaneous Provisions) Act*.

4.39 In the case of dependants' claims, the issue is whether or not the plaintiff's claim has been finally determined; if it has, the dependants are precluded from bringing a claim in respect of the same injury after the plaintiff's death.<sup>64</sup> While the Law Commission's view was that the plaintiff's claim was not final so as to preclude a dependants' claim,<sup>65</sup> it considered that the position should be clarified and recommended that:

Where a person who has been awarded provisional damages later dies because of the act which caused the injury for which damages were awarded, the damages awarded shall not bar an action relating to the death under the *Fatal Accidents Act 1976*; but any of the damages intended to compensate for future pecuniary loss shall be taken into account by the court when assessing any loss in relation to any dependency claim brought under the *Fatal Accidents Act*, where it is just to do so.<sup>66</sup>

## FOOTNOTES

1. Section 30b(6).
2. Section 30b(2).
3. Chief Justice King (SA), *Letter to NSWLRC* (5 December 1990). See also *Ikonomos v Lesiuk* (1973) 6 SASR 111 at 113.
4. Chief Justice King (SA), *Letter to NSWLRC* (5 December 1990). This general practice was confirmed by the Compulsory Third Party Department of the SGIC who represent the defendant in coming to such arrangements: R A W Daniell, Compulsory Third Party Department, SGIC, *Letter to NSWLRC* (19 November 1990).
5. See H Luntz, *Assessment of Damages for Personal Injury and Death* (3rd ed, Butterworths, Sydney, 1990) at para 1.3.5.
6. South Australia, Attorney General's Department, *Letter to NSWLRC* (31 October 1990).
7. In *Ikonomos v Lesiuk* (1973) 6 SASR 111, the court stated that the language of s 30b does not place the onus on either the plaintiff or the defendant; the language of the section is at large and it is the duty of the court in every case to apply it and to weigh the whole of the circumstances.
8. See *Revesz v Orchard* [1969] SASR 336; *Angelopoulos v Angelopoulos* (1978) 80 LSJS 409.
9. For example, see *Nathan v Vos* [1970] SASR 455; *Grabkowski v Majchrowski* (1978) 19 SASR 290; *Fedele v Lyell McEwin Health Services* (SA SC, No SCGRG87-2616, 25 March 1994, unreported).
10. SA SC, No 2933 of 1987, 16 August 1990, unreported.
11. M J Tilbury, *Civil Remedies: Principles of Civil Remedies*, Volume 1 (Butterworths, Sydney, 1990) at para 3027.
12. *Forst v Graves* (1967) 52 LSJS 464.

13. *Preston v Mercantile Mutual Insurance Co Ltd* (1970) 55 LSJS 566.
14. *Revesz v Orchard* (1969) 54 LSJS 611.
15. *Revesz v Orchard* (1969) 54 LSJS 611.
16. *Walker v Tugend* (1981) 28 SASR 194 at 197.
17. For example see *Haye v Braggins* (1994) 175 LSJS 346, where the interim assessment was made in 1988 and the final assessment was made in 1994. In *Beasley v Marshall* (1985) 124 LSJS 458 the interim assessment was made in 1978; there was a trial for the final assessment in 1985, although the court was of the opinion that the matter was really suited to a further interim assessment.
18. See *Brown v South Australia* (1984) 114 LSJS 396.
19. *Forst v Graves* (1967) 52 LSJS 464 at 466; *Nathan v Vos* [1970] SASR 455 at 467-8.
20. This is despite the court's view that lump sum damages in the particular case are unsatisfactory where there are so many 'imponderables': see Jackson CJ in *Hall v Fare* [1973] WAR 156 at 160.
21. One case is *Chan v Mills* (WA SC, No 1407/95, Steytler J, 3 November 1995, unreported) at 42; but see comments at 38-39, and those by Brinsden J in *Farr v Schultz* (1988) 1 WAR 94 at 117.
22. *Musca v Colombini* [1970] WAR 33.
23. See H Luntz, *Assessment of Damages for Personal Injury and Death* (3rd ed, Butterworths, Sydney, 1990) at para 1.3.3.
24. See paras 3.8-3.17.
25. RSC 1965 O 29 r 12.
26. RSC 1965 O 29 r 10.
27. *Schott Kem Ltd v Bentley* [1991] 1 QB 61.
28. See para 3.15.
29. See para 3.10.
30. RSC 1965 O 29 r 11(2); compare s 76E(4) of the *Supreme Court Act 1970* (NSW).
31. *The Supreme Court Practice 1995* (Sweet & Maxwell, London, 1994) at para 29/11/4.
32. England and Wales, Law Commission, *Report on Personal Injury Litigation - Assessment of Damages* (Law Com No 56, 1973) at paras 239-244. These recommendations were broadly endorsed by the Pearson Report in its recommendations for "declaratory judgments": England and Wales, *Royal Commission on Civil Liability and Compensation for Personal Injury* (The Pearson Report), March 1978 at para 585.
33. *Practice Direction (Provisional Damages: Procedure)* [1985] 1 WLR 961, amended by *Practice Direction (Provisional Damages: Amended Procedures)* [1995] 1 WLR 507.
34. A recent description of the operation of the system and the procedure for claiming provisional damages may be found in J Wilkins, "Provisional damages 10 years on (1)" (1996) 140 *Solicitors Journal* 432; "Provisional damages 10 years on (2)" (1996) 140 *Solicitors Journal* 449.

35. *Vincent v London Electricity* (England, High Court, 18 March 1994, Mr Kay QC, unreported) noted in *Current Law Year Book 1994* at para 1633.
36. *Phillips v Ministry of Defence* (England, Queen's Bench, 87/NJ/2339, 29 July 1988, unreported).
37. *Barratt v Furniss* (England, Queen's Bench, 13 October 1987, unreported) at 13, *Wood v Cleaver* (England, Birkenhead County Court, 2 August 1993, HHJ Crowe, unreported) noted in *Current Law Year Book 1994* at para 1566.
38. *Cronin v Redbridge London Borough Council*, *The Times*, 20 May 1987.
39. *Molinari v Ministry of Defence* [1994] PIQR Q33.
40. So, in *Walker v Brigham & Lowan (Hull) Ltd* (England, CA, 29 May 1996, unreported) at 2, it was noted that the judge at first instance, in assessing damages, excluded any compensation for:
  1. The risk of the plaintiff contracting mesothelioma.
  2. The risk of the plaintiff contracting lung cancer.
  3. The risk of the plaintiff's asbestosis worsening to the point at which it will be proper to classify his disabilities as 'severe'.
41. *Willson v Ministry of Defence* [1991] 1 All ER 638 at 641J-642A.
42. *Willson v Ministry of Defence* at 641-642.
43. *Willson v Ministry of Defence* at 642.
44. *Willson v Ministry of Defence* at 642.
45. *Willson v Ministry of Defence* at 644.
46. *Practice Direction (Provisional Damages: Procedure)* [1985] 1 WLR 961, amended by *Practice Direction (Provisional Damages: Amended Procedures)* [1995] 1 WLR 507.
47. [1985] 1 WLR 961 at para 1.
48. England and Wales, Law Commission, *Structured Settlements and Interim and Provisional Damages* (Law Com No 224, 1994) at para 5.4. But see, for example, *Wood v Cleaver* (Birkenhead County Court, 2 August 1993, HHJ Crowe, unreported) (noted in *Current Law Year Book 1994*, at para 1566) where the judge awarded general damages with an entitlement to return for further damages if epilepsy developed within five years of a certain date.
49. RSC O 37 r 8(3).
50. DP 25 at para 3.10.
51. England and Wales, Law Commission, *Structured Settlements and Interim and Provisional Damages*, (Law Com No 224, 1994) at paras 5.6-5.8.
52. England and Wales, Law Commission, *Structured Settlements and Interim and Provisional Damages*, (Law Com No 224, 1994) at paras 5.9-5.12.
53. [1994] PIQR Q33.

54. England and Wales, Law Commission, *Structured Settlements and Interim and Provisional Damages*, (Law Com No 224, 1994) at para 5.16.
55. England and Wales, Law Commission, *Structured Settlements and Interim and Provisional Damages*, (Law Com No 224, 1994) at paras 5.13-5.16.
56. England and Wales, Law Commission, *Structured Settlements and Interim and Provisional Damages*, (Law Com No 224, 1994) at paras 5.17-5.19.
57. England and Wales, Law Commission, *Structured Settlements and Interim and Provisional Damages*, (Law Com No 224, 1994) at para 5.20.
58. England and Wales, Law Commission, *Structured Settlements and Interim and Provisional Damages*, (Law Com No 224, 1994) at paras 5.21-5.23.
59. England and Wales, Law Commission, *Structured Settlements and Interim and Provisional Damages*, (Law Com No 224, 1994) at paras 1.7 and 5.22.
60. That is, *Law Reform (Miscellaneous Provisions) Act 1934* (Eng) and *Fatal Accidents Act 1976* (Eng), respectively
61. England and Wales, Law Commission, *Structured Settlements and Interim and Provisional Damages* (Law Com No 224, 1994) at paras 5.24-5.38.
62. See *Law Reform (Miscellaneous Provisions) Act 1944* (NSW) s 2(2)(a)(ii).
63. English Court of Appeal (Civil Division), 19 October 1990, Mustill, Butler-Sloss and Beldam LLJ, unreported.
64. *Read v Great Eastern Railway Co* (1868) LR 3 QB 555; *McCann v Shephard* [1973] 1 WLR 540.
65. England and Wales, Law Commission, *Structured Settlements and Interim and Provisional Damages* (Law Com No 224, 1994) at para 5.31.
66. England and Wales, Law Commission, *Structured Settlements and Interim and Provisional Damages* (Law Com No 224, 1994) at para 5.37.

## REPORT 78 (1996) - PROVISIONAL DAMAGES

### 5. A Provisional Damages Regime for New South Wales

#### A GAP IN THE LAW OF NEW SOUTH WALES?

5.1 The discussion of various statutory provisions in Chapter 3 indicates that, while provisional damages have been made available for claims before the Dust Diseases Tribunal, they have not been generally provided for in New South Wales. This gap has been filled in England by s 32A of the *Supreme Court Act 1981* (Eng) and O 37 r 7-10 of the *Rules of the Supreme Court*. The assessment of damages can also be postponed in South Australia under s 30b of the *Supreme Court Act 1935* (SA).

5.2 While neither the *Supreme Court Act 1970* (NSW) nor the *Supreme Court Rules 1970* (NSW) expressly provide for the award of provisional damages in the Supreme Court, there is still a theoretical possibility that the powers of the Court as they stand could produce a similar outcome. This could be achieved by assessing damages for all but the specified chance and then relying on substantial interim damages pending the deferred assessment. Such an outcome would rely on the Court's power to determine separately the questions of liability and damages,<sup>1</sup> to adjourn the trial for the assessment of damages<sup>2</sup> and to award interim damages under Part 5 Division 2 of the *Supreme Court Act*. Thus, in *Bulovec v Mealing*<sup>3</sup> the matter was adjourned indefinitely "until the plaintiff's condition stabilised to the extent where a proper prognosis can be given". The result is supported by comments of Justice Handley in *Petterson v Bacha*.<sup>4</sup>

5.3 In the Commission's view, it is unsatisfactory to rely on these powers to achieve a provisional damages regime. First, s 76E, despite its potentially broad reach, is clearly intended to be a temporary measure. Secondly, the indefinite or even extended deferral of the assessment of damages cannot be preferred over a scheme which provides a greater degree of finality by means of an assessment of damages with the option of returning on the occurrence of a specified chance event. This chapter will, therefore, focus on the possibility of an express introduction of provisional damages in New South Wales.

#### PROPOSAL FOR PROVISIONAL DAMAGES

##### The arguments

5.4 The argument in favour of the introduction of provisional damages is simply that they will achieve greater justice in appropriate cases by avoiding the possibility of under-compensation. The Commission recognises the limited nature of provisional damages. We believe that wider concerns regarding uncertainty with respect to awards of damages should be dealt with by extensive examination of structured settlements and periodic payments.

5.5 Summarised, the arguments against the introduction of provisional damages, which were outlined in the Discussion Paper,<sup>5</sup> are:

the additional costs which will be incurred by all parties, including insurers, under such a scheme;

the financial uncertainty which will exist for a defendant, awaiting an assessment of damages;

the possibility that a defendant may become bankrupt or insolvent and thereby deny a plaintiff his or her entitlement; and

the negative effects that protracted litigation may have on the parties in general and on the recovery of the plaintiff in particular.

#### PRIMARY RECOMMENDATIONS

5.6 The Commission recognises that the arguments for and against the introduction of provisional damages are finely balanced. However, there are a limited number of cases which would clearly benefit from the availability of provisional damages, and which could not be adequately dealt with by the

provisions currently available in New South Wales. The Commission has, therefore, come to the view that provisional damages should be made available to provide for greater certainty with respect to the exceptional cases envisaged.

5.7 Consideration has been given to the possibility of extending provisional damages to cover losses other than those arising from personal injury. This might, for example, include commercial matters where the extent of the damage is subject to an event which may occur, such as the possible failure of a component of machinery. The Commission is of the view that there is currently no demonstrated need for such an extension.

#### **Recommendation 1**

**Provisional damages should be available in personal injury cases in New South Wales.**

5.8 The Commission is also of the view that the English provisions<sup>6</sup> and s 11A of the *Dust Diseases Tribunal Act 1989* (NSW) should, generally, provide the model for provisional damages in New South Wales. Draft legislation is appended to this Report.

#### **Recommendation 2**

**A provisional damages regime should generally mirror the provisions of the English legislation and the *Dust Diseases Tribunal Act 1989* (NSW).**

#### **Other recommendations**

##### **Coverage**

5.9 **Application to Motor Accidents Act and Workers Compensation Act.** Section 76H of the *Supreme Court Act 1970* (NSW) expressly excludes the operation of Part 5 Division 2 in situations where the *Motor Accidents Act* applies. This is because the *Motor Accidents Act* already makes provision for interim payments.<sup>7</sup> However, there is no reason to exclude provisional damages from situations in which the *Motor Accidents Act* applies. The sections of the *Motor Accidents Act* which modify the common law of damages make no provision for the award of provisional damages. There is similarly no reason for excluding provisional damages with respect to injuries to which the *Workers Compensation Act* applies.

#### **Recommendation 3**

**Provisional damages should extend to all instances of personal injury including cases where the *Motor Accidents Act* or *Workers Compensation Act* govern the assessment of damages.**

5.10 **Application to District Court and Local Courts.** Most claims for provisional damages will, no doubt, be brought in the Supreme Court. However, the Commission can see no arguments against making provisional damages available in the District Court. It is possible that, even with the Court's jurisdictional limit (currently \$250,000), a plaintiff could receive otherwise minor injuries, yet still be subject to the possibility of a more serious injury arising at a later date. The damages for this serious injury could fall under the jurisdictional limit of the District Court. In England provisional damages have been made available in the County Courts by s 51 of the *County Courts Act 1984* (Eng) and O 22 r 6A of the *County Court Rules*. The Local Courts' jurisdictional limit for matters involving recovery of damages<sup>8</sup> is such that a provisional damages regime would be of little or no practical relevance in the Local Courts.

#### **Recommendation 4**

**Provisional damages should also be available in the District Court.**



### ***More than one application***

5.11 The award of further damages should be final, subject to the judge at that application granting a further right to the plaintiff to return on the occurrence of further specified deterioration arising from the same injury. The Commission's view is that this recommendation achieves a balance between fairness to the plaintiff and the need for finality in assessment. Cases in which more than one application is necessary should be rare.<sup>9</sup>

#### **Recommendation 5**

**One application for further damages should be permitted subject to the judge at that application granting a further right to the plaintiff to return on the occurrence of further specified deterioration arising from the same injury.**

### ***Time limits***

5.12 Order 37 rule 8(2) of the English Rules of Court provides that the Court may specify the period within which the plaintiff may make an application under an award of provisional damages. The Law Society of New South Wales has submitted that the entitlement to make an application for provisional damages should only end with the plaintiff's death.<sup>10</sup> The Commission generally supports the view of the Law Society but recognises that there may conceivably be circumstances where a court would wish to set a fixed period.

#### **Recommendation 6**

**The court may specify the period within which a plaintiff may apply under an award of provisional damages.**

#### **Recommendation 7**

**Where no period is set by the court or where the plaintiff dies before the end of the period set by the court, the plaintiff's right to apply under an award of provisional damages terminates on the plaintiff's death.**

### ***Interaction with claims under the Law Reform (Miscellaneous Provisions) Act 1944***

5.13 The Commission agrees with the English Court of Appeal and the English Law Commission that where the plaintiff dies before a claim is brought for further damages, the plaintiff's estate may pursue the claim for further damages and the damages recoverable will not be affected by the restrictions on the recoverability of heads of damage under s 2(2) of the *Law Reform (Miscellaneous Provisions) Act 1944* (NSW).<sup>11</sup> The point should, however, be clarified by an amendment to the *Law Reform (Miscellaneous Provisions) Act 1944*.

#### **Recommendation 8**

**The *Law Reform (Miscellaneous Provisions) Act 1944* should be amended to make it clear that an award of provisional damages is excluded from the restrictions on recoverable heads of damage under s 2(2)(a)(ii) of the Act.**

### ***Interaction with claims under the Compensation to Relatives Act 1897***

5.14 The Commission also agrees with the recommendation of the English Law Commission that the relationship between awards of provisional damages and dependants' claims requires legislative clarification.<sup>12</sup> The Commission is of the view that where provisional damages are awarded but the plaintiff dies of the specified disease or deterioration before a claim is brought for further damages, dependants' claims should not, in principle, be excluded under the *Compensation to Relatives Act 1897* (NSW) to the extent to which damages in the lost years can be attributed to the specified disease or

deterioration and are not already encompassed in the initial damages award.<sup>13</sup> Damages should, however, be assessed in any such claim in such a way as prevent overlap between the plaintiff's claims (including any claims made by the deceased plaintiff's estate) and the dependants' claims.

#### **Recommendation 9**

**An award of provisional damages should not preclude a dependant's claim under the *Compensation to Relatives Act 1897 (NSW)* for death attributable to the specified disease or deterioration. The assessment of damages in such a claim should take into account, as the justice of the case may require, any pecuniary loss already awarded to the deceased in respect of the period after his or her death.**

#### ***Other suggestions***

5.15 Consideration has been given to the other concerns discussed by the English Law Commission.<sup>14</sup> Generally we have concluded that they are not sufficiently substantive to warrant action.

5.16 The Law Society, which supports the introduction of provisional damages, has suggested that a provisional damages regime should be subject to the following:<sup>15</sup>

Awards of Provisional Damages should be available for "chance" cases only.<sup>16</sup>

In the event of a Court making an award of Provisional Damages on the basis that there is a chance of a specific event occurring in the future the Court will not make any award for that possibility. Rather it will authorise the plaintiff to return to Court for further assessment of damages in the unlikely event that the condition or disease occurs.

An award of Provisional Damages must specify the disease or type of deterioration contemplated.

An award should only be made if the plaintiff specifically claims the relief.

On making an award the Court should have regard to the fact that:

- (a) the defendant is a public authority; or
- (b) the defendant is insured in respect of the plaintiff's claim; or
- (c) the defendant's financial position.<sup>17</sup>

The entitlement to make an application for Provisional Damages should only end with the plaintiff's death.

5.17 The Commission's proposal for provisional damages concurs with all these suggestions except that which lists matters to which the Court should have regard in making an award. It was noted in the Discussion Paper that, while similar proposals had been made by both the English Law Commission and the Pearson Commission, the proposals were not ultimately included in the English provisions.<sup>18</sup> We have come to the conclusion that it is primarily for the plaintiff to assess the risk of making an application for provisional damages against a particular defendant, and it is not the role of the court to pre-empt the plaintiff's decision. In any event, they are factors which are already relevant to the Court's overall discretion.

#### **FOOTNOTES**

1. *Supreme Court Rules Pt 31 r 2.*

2. *Supreme Court Rules* Pt 34 r 4. Part 33 applies to a trial for assessment of damages: Pt 35 r 1(1).
3. NSW SC, CLD 2110/76, Master Sharpe, 20 February 1980, unreported.
4. NSW CA, No CA 40584/94, 9 March 1995, unreported. Compare *Hawkins v New Mendip Engineering Ltd* [1966] 1 WLR 1341 and *Stevens v William Nash Ltd* [1966] 1 WLR 1550 where it was envisaged that the assessment of damages would take place within a relatively short period of time.
5. DP 25 at para 3.10.
6. *Supreme Court Act 1981* (Eng) s 32A; *Rules of the Supreme Court 1965* (Eng) O 37 r 7-10: See para 4.20.
7. Section 45. See para 3.5.
8. Set at \$40,000 by s 12(1) of the *Local Courts (Civil Claims) Act 1970* (NSW).
9. See para 4.37.
10. See submission of the Law Society of New South Wales reproduced at para 5.16.
11. See para 4.38.
12. See para 4.39.
13. For example, where an award has been made for loss of earnings in the years notionally lost other than by reason of the specified disease or deterioration.
14. See paras 4.27-4.37.
15. Law Society of New South Wales, *Submission* (20 March 1992) at 4.
16. The Law Society has adopted the terminology of the Law Commission's report on assessment of damages and personal injury litigation: England and Wales, Law Commission, *Report on Personal Injury Litigation: Assessment of Damages* (Law Com No 56, 1973). "Chance" cases are defined as cases where the "injury apparent at the trial may in the future be rendered much worse by some catastrophic event". In such cases it is not certain whether the catastrophic event will occur. Chance cases are seen as different to "forecast" cases, which are illustrated by the example of arthritis: "There may be medical evidence that arthritis will occur in a damaged joint in due course, which will cause a certain degree of disability and pain": Law Society of New South Wales, *Submission* (20 March 1992) at 2-3.
17. This mirrors the provisions in s 76E(4) of the *Supreme Court Act 1970* (NSW) which deal with interim damages. See *RSC O 29 r 11(2)* which also deals with interim damages.
18. DP 25 at para 3.6.

## REPORT 78 (1996) - PROVISIONAL DAMAGES

### Appendix 1: Courts Legislation Amendment (Provisional Damages) Bill 1996

[STATE ARMS]  
New South Wales

### Courts Legislation Amendment (Provisional Damages) Bill 1996

#### Explanatory note

##### Overview of Bill

The object of this Bill is to implement the recommendations of the New South Wales Law Reform Commission contained in its *Report on Provisional Damages* (LRC 78, 1996). In particular the Bill:

(a) amends the *Supreme Court Act 1970* and the *District Court Act 1973*:

to allow the Supreme Court and the District Court to award provisional damages to an injured person where it is proved or admitted to be a chance that in the future the injured person will develop a serious disease or further deterioration in his or her physical or mental condition as a result of the act or omission that gave rise to the cause of action, and

to provide that an award of provisional damages must specify the disease or type of deterioration in respect of which a further award of damages may be made and may specify the time period within which an application for further damages may be made, and

to allow an award of damages to be made in respect of more than one disease or type of deterioration, and

(b) amends the *Law Reform (Miscellaneous Provisions) Act 1944* so that an award of provisional damages recoverable for the benefit of the estate of a deceased person can include economic loss, and

(c) amends the *Compensation to Relatives Act 1897* so that an assessment of damages in relation to a dependant's claim must take into account any other compensation awarded to the deceased person for economic loss.

##### Outline of provisions

**Clause 1** sets out the name (also called the short title) of the proposed Act.

**Clause 2** provides for the commencement of the proposed Act on a day or days to be proclaimed.

**Clause 3** is a formal provision giving effect to the amendment to the *Supreme Court Act 1970* set out in Schedule 1.

**Clause 4** is a formal provision giving effect to the amendment to the *District Court Act 1973* set out in Schedule 2.

**Clause 5** is a formal provision giving effect to the amendment to the *Law Reform (Miscellaneous Provisions) Act 1944* set out in Schedule 3.

**Clause 6** is a formal provision giving effect to the amendment to the *Compensation to Relatives Act 1897* set out in Schedule 4.

**Schedule 1** makes the amendments to the *Supreme Court Act 1970* described above.

**Schedule 2** makes the amendment to the *District Court Act 1973* described above.

**Schedule 3** makes the amendment to the *Law Reform (Miscellaneous Provisions) Act 1944* described above.

**Schedule 4** makes the amendment to the *Compensation to Relatives Act 1897* described above.

## [STATE ARMS]

### New South Wales

#### Courts Legislation Amendment (Provisional Damages) Bill 1996

##### Contents

- 1 Name of Act
- 2 Commencement
- 3 Amendment of Supreme Court Act 1970 No 52
- 4 Amendment of District Court Act 1973 No 9
- 5 Amendment of Law Reform (Miscellaneous Provisions) Act 1944 No 28
- 6 Amendment of Compensation to Relatives Act 1897 No 31

##### Schedules

- 1 Amendment of Supreme Court Act 1970
- 2 Amendment of District Court Act 1973
- 3 Amendment of Law Reform (Miscellaneous Provisions) Act 1944
- 4 Amendment of Compensation to Relatives Act 1897

## [STATE ARMS]

### New South Wales

#### Courts Legislation Amendment (Provisional Damages) Bill 1996

## **A Bill for**

An Act to amend the *Supreme Court Act 1970*, the *District Court Act 1973*, the *Law Reform (Miscellaneous Provisions) Act 1944* and the *Compensation to Relatives Act 1897* to enable the award of provisional damages in proceedings for personal injuries.

## **The Legislature of New South Wales enacts:**

### **1 Name of Act**

This Act is the *Courts Legislation Amendment (Provisional Damages) Act 1996*.

### **2 Commencement**

This Act commences on a day or days to be appointed by proclamation.

### **3 Amendment of Supreme Court Act 1970 No 52**

The *Supreme Court Act 1970* is amended as set out in Schedule 1.

### **4 Amendment of District Court Act 1973 No 9**

The *District Court Act 1973* is amended as set out in Schedule 2.

### **5 Amendment of Law Reform (Miscellaneous Provisions) Act 1944 No 28**

The *Law Reform (Miscellaneous Provisions) Act 1944* is amended as set out in Schedule 3.

### **6 Amendment of Compensation to Relatives Act 1897 No 31**

The *Compensation to Relatives Act 1897* is amended as set out in Schedule 4.

## **Schedule 1 Amendment of Supreme Court Act 1970**

(Section 3)

### **[1]Part 5 Powers**

Insert after Division 2 of Part 5:

#### **Division 3Provisional damages**

##### **76I Orders for provisional damages for personal injuries**

- (1) This Division applies to proceedings for damages for personal injuries in which there is proved or admitted to be a chance that in the future the injured person will, as a result of the act or omission that gave rise to the cause of action, develop some serious

disease or suffer some serious deterioration in his or her physical or mental condition.

(2) The Court may, in any proceedings for damages to which this Division applies, award the injured person (on such terms as it thinks just):

(a) damages assessed on the assumption that the injured person will not develop the disease or suffer the deterioration in his or her condition, and

(b) further damages at a future date if he or she develops the disease or suffers the deterioration.

(3) An order for the award of provisional damages:

(a) must specify the disease or type of deterioration in respect of which an award of further damages may be made, and

(b) may specify the period within which an application for further damages may be made.

(4) The Court may, on application made by the plaintiff, by order extend the period (if any) specified under subsection (3). The Court may make more than one such order.

(5) An order for the award of provisional damages may be made in respect of more than one disease or type of deterioration, and may specify under subsection (3), in respect of each disease or type of deterioration, a different period within which an application for an award of further damages may be made.

#### **76J Termination of application for further damages**

(1) If the Court specifies a period within which an application for further damages may be made, the plaintiff's ability to apply for further damages terminates at the end of the specified period or the earlier death of the plaintiff.

(2) If no period is specified, the plaintiff's ability to apply for further damages terminates on the death of the plaintiff.

(3) Subsections (1) and (2) do not preclude a claim for further damages by the plaintiff's estate.

(4) In this section, *period* includes a period as extended under section 76I.

#### **76K Number of applications for further damages**

(1) A plaintiff may only make one application for further damages in respect of each disease or type of deterioration specified in the order for the award of provisional damages under this Division.

(2) However, when deciding an application for further damages, the Court may make an order granting a right to make a further application in such circumstances as may be specified in the order. Such an order may allow the further application to be made within or after the period within which the first application may be made.

(3) Successive orders may be made under subsection (2) in connection with successive applications by the plaintiff.

**76L Other limitations on damages not affected**

Nothing in this Division is to be construed as prejudicing any duty of the Court under any enactment or rule of law to reduce or limit the total damages that would have been recoverable apart from the provisions of this Division.

**[2]Fourth Schedule Savings and transitional provisions**

Insert after clause 2:

**3 Courts Legislation Amendment (Provisional Damages) Act 1996**

Division 3 of Part 5, as inserted by the *Courts Legislation Amendment (Provisional Damages) Act 1996*, applies to proceedings for personal injuries whether the proceedings were commenced before, on or after the commencement of that Division.

**Schedule 2 Amendment of District Court Act 1973**

(Section 4)

**Part 3, Division 3 Actions: Procedure**

Insert after Subdivision 4 of Division 3 of Part 3:

**Subdivision 5 Provisional damages**

**62 Application of provisions of Supreme Court Act relating to provisional damages**

The following provisions of the *Supreme Court Act 1970*:



- (a) Division 3 of Part 5, and
- (b) clause 3 of the Fourth Schedule,

apply to and in respect of proceedings for damages for personal injuries in the Court in the same way as they apply to and in respect of proceedings for damages for personal injuries in the Supreme Court.

**Schedule 3 Amendment of Law Reform (Miscellaneous Provisions) Act 1944**

(Section 5)

**Section 2 Effect of death on certain causes of action**

Insert after section 2 (2):

- (2A) For the avoidance of doubt, subsection (2) (a) (ii) does not apply to an award of provisional damages under:
  - (a) section 76I of the *Supreme Court Act 1970*, or
  - (b) section 62 of the *District Court 1973*, or
  - (c) section 11A of the *Dust Diseases Tribunal Act 1989*.

**Schedule 4 Amendment of Compensation to Relatives Act 1897**

(Section 6)

**Section 4A**

Insert after section 4:

**4A Provisional damages**

If a deceased person has been awarded provisional damages under:

- (a) section 76I of the *Supreme Court Act 1970*, or
- (b) section 62 of the *District Court Act 1973*, or
- (c) section 11A of the *Dust Diseases Tribunal Act 1989*,

an assessment of damages in accordance with section 3 must take into account such part of the provisional award or any other award as has already compensated the deceased person's economic loss for the period beyond the date on which the person died.

## REPORT 78 (1996) - PROVISIONAL DAMAGES

### Appendix 2: Select Bibliography

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- WILKINS, J, "Provisional damages 10 years on (2)" (1996) 140 *Solicitors Journal* 449

**REPORT 78 (1996) - PROVISIONAL DAMAGES**

**Appendix 3: Table of Legislation**

## **New South Wales**

<b>Compensation to Relatives Act 1897</b>	4.38, 5.14
<b><i>District Court Act 1973</i></b>	
s 58	3.8
<b><i>Dust Diseases Tribunal Act 1989</i></b>	3.18
s 10(4)	3.18
s 11	3.18
s 11A	2.19, 3.1, 3.18, 3.19, 3.20, 5.8
s 11A(2)	3.19
<b><i>Dust Diseases Tribunal Rules</i></b>	
r 5(3)	3.20
<b><i>Law Reform (Miscellaneous Provisions) Act 1944</i></b>	4.38
s 2(2)	5.13
s 2(2)(a)(ii)	4.38
<b><i>Motor Accidents Act 1988</i></b>	2.11, 2.14, 3.1, 3.3, 3.6, 3.7, 5.9
s 45	3.1, 3.5
s 45(2A)	3.5
s 71	2.3
s 81	2.14, 3.1, 3.6
s 81(1)	3.4
s 81(2)	3.4
s 81(7)	2.14
Pt 6	3.3, 3.9, 3.12
<b><i>Motor Accidents Amendment Act 1995</i></b>	3.3

**Supreme Court Act 1970**

s 76E	2.16, 3.1, 3.12, 3.14, 3.17, 5.3
s 76E(3)	3.9, 4.16
s 76E(3)(c)	3.14, 3.15, 3.17
s 76E(4)	3.10, 4.17, 5.16
s 76E(5)	3.10, 4.17
s 76E(6)	3.10, 4.17
s 76F	3.11
s 76G	3.11, 4.18
s 76H	3.9, 3.12, 5.9
Pt 5 division 2	3.8, 4.14, 5.2, 5.9

**Supreme Court Rules 1970**

Pt 31 r 2	3.13, 5.2
Pt 33	5.2
Pt 34 r 3	3.13
Pt 34 r 4	5.2
Pt 35 r 1(1)	5.2

**Transport Accidents Act 1988**

2.11

**Workers Compensation Act 1926**

s 7B	3.6
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**Workers Compensation Act 1987**

	3.1, 3.6, 5.9
s 112	3.1, 3.6
s 151J	2.3
s 151Q	2.14, 3.1, 3.6, 3.7

**Workers Compensation Legislation Amendment Act 1995** 3.6

**Workers Compensation (Benefits) Amendment Act 1989** 3.6

## South Australia

### **Supreme Court Act 1930**

s 30b	2.16, 2.19, 4.1, 4.6, 4.7, 5.1
s 30b(1)	4.1
s 30b(2)	4.1, 4.2, 4.10
s 30b(6)	4.1, 4.9

## Western Australia

### **Motor Vehicle (Third Party Insurance) Act 1943**

s 16(4)	4.11
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## Bermuda

**Law Reform (Miscellaneous Provisions) (No 2) Act 1977** 2.16

## England and Wales

### **County Courts Act 1984**

s 51	5.10
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### **County Court Rules**

O 22 r 6A	4.20, 5.10
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**Fatal Accidents Act 1976** 4.27, 4.38, 4.39

**Law Reform (Miscellaneous Provisions) Act 1944** 4.38

**Supreme Court Act 1981**

s 32A 2.19, 3.19, 4.20, 5.1, 5.7

s 32A(2) 4.20

**Rules of the Supreme Court 1965**

O 29 r 9-18 3.8, 3.16, 4.14

O 29 r 10 4.15

O 29 r 11 2.16, 3.14

O 29 r 11(1) 4.16, 4.17

O 29 r 11(1)(c) 3.14, 4.16

O 29 r 11(2) 4.17, 5.16

O 29 r 12 4.15

O 29 r 17 4.18

O 36 r 34 3.13

O 37 r 7-10 3.20, 4.20, 5.1, 5.7

O 37 r 7(2) 4.20

O 37 r 8-10 4.20

O 37 r 8(2) 5.12

O 37 r 8(3) 4.25

O 37 r 10(6) 4.35, 4.36

**New Zealand**

**Accident Rehabilitation and Compensation Insurance Act 1992** 2.11

**Scotland**

***Rules of the Court of Session 1994***

2.16



**REPORT 78 (1996) - PROVISIONAL DAMAGES**

**Appendix 4: Table of Cases**

Angelopoulos v Angelopoulos (1978)	4.6
Barratt v Furniss (1987)	4.22
Beasley v Marshall (1985)	4.9
Breeze v R McKennon & Son Ltd (1985)	3.16
Brown v South Australia (1984)	4.9
Bulovec v Mealing (1980)	3.13, 5.2
Chan v Mills (1995)	4.11
Cronin v Redbridge London Borough Council (1987)	4.22
Djapa v Comalco Aluminium Ltd (1987)	2.3
Farr v Schultz (1988)	4.11
Fedele v Lyell McEwin Health Services (1994)	4.7
Fitch v Hyde-Cates (1982)	4.38
Forst v Graves (1967)	4.8, 4.10
Frellsen v Crosswood Pty Ltd (1992)	3.11, 3.14, 3.16, 3.17
Gibbons v Wall (1988)	3.15
Grabkowski v Majchrowski (1978)	4.7
Hadley v Michell (1991)	3.7
Hall v Fare [1973]	4.11
Hawkins v New Mendip Engineering Ltd [1966]	3.13, 5.2
Haye v Braggins (1994)	4.9
Hobell v Leonard (1990)	2.3
Ikonomos v Lesiuk (1973)	4.6
Jones v Griffith [1969]	2.7
Lim v Camden and Islington Area Health Authority [1980]	2.6, 2.7
McCann v Shephard	4.39
Middleton v Eliot Turbomachinery Ltd (1990)	4.38
Molinari v Ministry of Defence [1994]	4.22, 4.31
Mundy v GIO (1995)	2.6
Musca v Colombini [1970]	4.12

Nathan v Vos [1970]	4.7, 4.10
Pamment v Pawelski (1949)	2.5
Parnell Transport Industries Pty Ltd v Mala Bore Trading Co Pty Ltd (1990)	4.7
Pettersen v Bacha (1995)	3.4, 3.13, 5.2
Phillips v Ministry of Defence (1988)	4.22
Preston v Mercantile Mutual Insurance Co Ltd (1970)	4.8
Read v Great Eastern Railway Company (1868)	4.39
Revesz v Orchard [1969]	4.6, 4.8
Ricci Burns Ltd v Poole [1989]	3.15
Schott Kem Ltd v Bentley [1991]	3.15, 3.16, 4.15
Settlement Wines Company Pty Ltd v National General Insurance Co Ltd (1994)	2.10
Shearson Lehman Bros Inc v Maclaine Watson & Co Ltd [1987]	3.15, 3.16
Stevens v William Nash Ltd [1966]	3.13, 5.2
Todorovic v Waller (1981)	2.3, 2.5
Tomkins v Deniliquin Nursing Home Foundation (1993, 5 pages)	3.7
Tomkins v Deniliquin Nursing Home Foundation (1993, 57 pages)	3.7
Townsend v Greater Taree City Council (1994)	3.7
Vincent v London Electricity (1994)	4.22
Walker v Brigham & Lowan (Hull) Ltd (1996)	4.22
Walker v Tugend (1981)	4.8
Willson v Ministry of Defence [1991]	4.22, 4.23, 4.24
Wilson v Wilbroco Pty Ltd (1995)	3.7
Wood v Cleaver (1993)	4.22, 4.25