Motor Accidents Act NSW: interim/ provisional awards of damages

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Damages are usually paid as a lump sum on a 'once and for all basis'.

Damages can, in some circumstances, be awarded provisionally, on an interim basis, subject to a subsequent full hearing at which the full entitlement to damages is assessed. In such cases credit is given for amounts awarded.

Interim Damages under the Supreme and District Court Acts

s.76E of the *Supreme Court Act* 1970 and s.58 of the *District Court Act* 1973 provide that the Court may order one or more interim payments if:

- liability has been admitted,
- the plaintiff has obtained judgment against the defendant for damages to be assessed, or
- the Court is satisfied that, if the action proceeded to trial, the plaintiff would obtain judgment for substantial damages against the defendant.

The needs of the plaintiff, created by the tort, will be taken into account by the Court in determining the quantum of the interim payment but not necessarily in determining whether an interim payment ought to be made. [*Frellsen v Crosswood Pty Ltd & Ors* (1992) 15 Mvr 343]. An interim payment award does not represent any admission by the defendant.

These sections were inserted in the Acts in 1991 to overcome the problem of a plaintiff being left without financial resources whilst waiting for his/her claim to proceed to judgment.

Claims brought under the *Motor Accidents Act* (the Act) were expressly excluded. The exclusion was apparently due to the fact that s.45 of the Act was seen to provide interim payments albeit on a more limited basis, of out-of-pocket and rehabilitation expenses.

The Stubbs decision was upheld, unanimously, by the Court of Appeal on 31 October 1997.

Interim damages under the *Motor Accidents Act*

The liability of insurers to make interim payments under s.45 requires an admission or partial admission, or determination of, liability.

s.45(2) provides that once liability has been admitted (wholly or in part) or determined (wholly or in part) an insurer is duty bound to make payment to or on behalf of the claimant in respect of reasonable and necessary hospital, medical, pharmaceutical rehabilitation expenses and the cost of respite care, (in respect of a claimant who is seriously injured and in need of constant care over long term), as incurred.

The duty of an insurer to make the interim payments applies only to the extent to which those payments;

(a) are reasonable and necessary; and
(b) are properly verified; and
(c) relate to the injury caused by the fault of the owner or driver of the motor vehicle to which the relevant Third Party policy relates.

The section provides that it is a condition of a Third Party insurer's licence that the insurer must comply with this section.

Court intervention

Prior to the decision of Dowd J in *Stubbs v NRMA Insurance Limited* (unreported, NSW Supreme Court, 18 December 1996) it was a relatively common occurrence for a Court, on application by a plaintiff, to order that a CTP insurer comply with its obligations pursuant to s.45 (see Wills v Black, *Landon v Black* (1990) 12 MVR222 and *Hector v Robinson* (Sup Ct, unreported, 30 November 1990).

Even before *Stubbs* however, there was no effective sanction under s.45 if the insurer failed to make a complete or partial admission of liability. In such cases, particularly involving catastrophic injuries, it was common practice for the issue of liability to be determined expeditiously and separately from damages so that a finding of negligence by the Court would invoke the provisions of s.45(2).

Stubbs v NRMA Insurance Limited

On the 18 December 1996 Dowd J held;

(i) that the sole power of the Supreme Court to make interim payments is included in s.76E of the Supreme Court Act 1970 and that interim awards in actions for damages under Part 6 of the MAA are expressly excluded; and
(ii) that s.45(2) of the MAA is not effective to confer a right of action on the person intended to be benefited but is rather merely part of a network of sections imposing duties on insurers which are conditions of their licence, the performance or non-performance of which is a non-justiciable question.

In other words it was held that the Court has no power to make interim payment awards in MAA cases.

The Stubbs decision was upheld, unanimously, by the Court of Appeal on 31 October 1997.

It is noteworthy however that Powell A J obviously felt compelled to state:

> *Given what appears to have been the intention of the legislature that the scheme established under the Act (MAA) should, in a case such as this, make effective provision for the speedy supply to the*

injured of benefits in the nature of services the subject of s.45(2) of the Act, the means which the Act has provided is unsatisfactory and that, in the circumstances, the matter should be referred to the Government to consider whether some better means - perhaps as simple as the repeal of s.76H of the Supreme Court Act 1970 and s.61 of the District Court Act 1973 - to achieve that intention might be devised.

Attendant/nursing care and s.45 of the MAA

Probably the most important need of a catastrophically injured plaintiff is for care to enable a plaintiff to leave hospital (or an institution) and to live in his/her own home. Not many people can afford the cost of such care. Thus the plaintiff will either be detained in an institution or will be cared for, on a voluntary basis, by family and friends at great personal cost to all involved.

s.45(2) provides for interim payment of the cost of *respite* care in respect of a claimant who is seriously injured and in need of constant care over a long term.

There is, however, no specific provision for the payment of *nursing/attendant care* for a plaintiff who is seriously injured.

Whilst a plaintiff in a non-MAA can apply to the Court for interim damages to meet the cost of the care, no such right exists for the victim of a motor vehicle accident.

Equipment, home & transport modification & s.45

s.45(2) makes no provision for payment of equipment, home and transport modifications which are generally required to accommodate the needs of the very seriously injured accident victims.

Again a plaintiff in non-MAA cases can apply to the Court for interim damages to cover the cost of equipment, home and transport modifications whilst a plaintiff in an MAA case can not.

Loss of income

s.45 makes no provision for payments for loss of income. Thus, plaintiffs in MAA cases are often faced with severe financial pressures whilst awaiting settlements. Such pressures can result in premature and inadequate settlements and/or a breakdown in family and personal relationships.

Again plaintiffs in non-MAA cases, who suffer economic difficulties as a result of their inability to work, can apply to the Court for interim damages. Plaintiffs under the MAA can not.

Summary of problems

Plaintiffs under the MAA are unable to apply to the Court for interim/provisional damages.

Prior to *Stubbs*, a plaintiff could, if liability had been admitted or determined, wholly or partially, receive interim payments for medical, pharmaceutical and rehabilitation costs and the cost of respite care. If an insurer failed to pay in those circumstances, a plaintiff could apply to the Court for an expedited hearing on liability in order to obtain a favourable determination so as to invoke the provisions of s.45(2).

Since *Stubbs*, a plaintiff cannot apply to the Court for interim payments. Thus a grievously injured plaintiff might be left wholly without support from an insurer because of a bona fide dispute as to whether or not hospital, medical, pharmaceutical, rehabilitation and care expenses are reasonable and necessary. The Motor Accidents Authority has no mechanism to decide such questions and clearly no action could be taken against an insurer's licence for failure to pay such expenses where they are genuinely in dispute. It is submitted that the resolution of such disputes is the function of the Courts.

Even if s.45(2) was held to be enforceable by the Courts, the section does not provide for payment of attendant/nursing care, equipment, home modifications, transport modifications or loss of income.

s.76E of the Supreme Court Act and its District Court equivalent discriminate against plaintiffs in MAA cases.

Options

a. Amend the provisions of the Supreme Court and District Court Acts to remove the exclusion of MAA cases.
b. Amend s.45 of the MAA to allow Courts to enforce insurers' obligations to pay, but only if s.45 is expanded to include attendant/nursing care, the provision of equipment and home and transport modifications in appropriate cases.

It is submitted that the adoption of either option would:

1 Overcome the hardship caused by the *Stubbs* decision.
2 Eliminate the discrimination against plaintiffs in MAA cases.
3 Enable seriously injured plaintiffs to engage carers (other than family and friends), thus reducing stress, financial and emotional pressure on family and friends.
4 Provide plaintiffs with a proper means to pay for necessary medical, pharmaceutical and like expenses.
5 Enable catastrophically injured plaintiffs with the means to pay for necessary equipment, aids, home and transport modifications.
6 Reduce the likelihood that doctors and other providers of medical services will withhold or refuse medical and other treatment due to non-payment of their fees.
7 Alleviate general financial hardship on plaintiffs and their families.
8 Encourage and promote rehabilitation by providing speedy delivery of services.
9 Overcome unfairness created by the amendment to s.73 of the MAA which has effectively prohibited the payment of interest on past loss.
10 Reduce the insurers' influence over plaintiffs.
11 Remove the burden currently placed on the Motor Accidents Authority to determine issues which ought to be the domain of the Courts.
12 Give insurers greater incentive to meet their s.45(2) obligations. ■

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APLA Membership at January 1998

NSW	418
Queensland	254
Victoria	176
South Australia	56
Western Australia	26
ACT	16
Northern Territory	13
Tasmania	11
International	40
TOTAL	1,010