It is important to note that the decision of *Harrison* has not changed the existing interpretation of s15B of the CLA regarding damages for loss of capacity to provide domestic services (that is, *Sullivan v Gordon* claims). The wording of this section differs from that in the sections that were the subject of *Harrison*, and are not affected by this decision. Accordingly, for claims under s15B of the CLA, *both* thresholds must be met in order to qualify for damages. ■

Notes: **1** [2002] NSWCA 260. This case concerned the interpretation of s72 of the *Motor Accidents Act* 1988 which was in essentially the same terms as s128 of the *Motor Accidents Compensation Act* 1999. **2** [2005] NSWCA 388. This case concerned the interpretation of s15 of the *Civil Liability Act*. **3** [2008] NSWCA 67. **4** *Ibid,* at [157] per Mason P. **5** *Ibid,* at [181]. **6** *Ibid,* at [20] per Spigelman CJ. **7** This is implicit from the findings of Spigelman CJ at [20]. **8** *Harrison*, at [181].

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Interim payment of damages

Eldridge v Royal Alexandra Hospital for Children [2008] NSWSC 886

By Libby Brookes

The recent decision of Grove J of the Supreme Court of NSW in *Eldridge v Royal Alexandra Hospital for Children* [2008] NSWSC 886 gives an example of the matters a court will consider when ordering an interim payment of damages.

In this case, 18-month-old Bryce Eldridge was scheduled for surgical removal of his left kidney due to a Wilms tumour at the Children's Hospital, Westmead, on 31 March 2005. The plaintiffs alleged that, during the surgery, the artery supplying blood to Bryce's right kidney was divided, resulting in ischaemia and death of the right kidney.

In June 2006, Bryce underwent a living kidney transplant from his father. Claims were brought for Bryce and his parents, with his mother, the second plaintiff, claiming damages for nervous shock and his father, the third plaintiff, claiming damages for psychiatric injury and the physical injury of the loss of a kidney.

The surgeon, the second defendant, admitted a breach of duty of care causing ischaemia to the right kidney, resulting in the need for kidney dialysis and transplant, but denied liability. The plaintiffs applied for interim payments of $200,000 for Bryce, and $50,000 for each of his parents.

In considering the application, Grove J considered ss82(1), (3) and (5) of the *Civil Procedure Act* 2005 (NSW) (CPA).

Section 82(3)(c) of the CPA specifies that the court must be satisfied that, were the proceedings to go to trial, the plaintiff would obtain judgment for a substantial amount against the defendant. Here, the second defendant did not admit liability and, accordingly, the plaintiffs were unable to rely on s82(3)(a) of the CPA. Grove J confirmed that the plaintiff is required to prove that he or she *would* succeed at trial as opposed to *probably succeed*, and his Honour referred to the judgment of Brereton J in *Spencer v Australian Capital Territory* [2007] NSWSC 303.[1]

The second defendant opposed the amount sought on the basis that Bryce needed a significantly smaller sum for assistance and care as a result of his injuries in the interim period prior to trial.

His Honour found that the plaintiff did not have to make out his need in order to obtain a payment for interim damages, relying on the judgment of Scully J in *Frellsen v Crosswood Pty Limited* (1992) 15 MVR 343. His Honour concluded that the amount that can be claimed for an interim payment is not limited to an amount needed to fulfil current needs.[2]

Grove J also considered s82(5) of the CPA, which provides that the court can award an interim payment so long as it does not exceed a reasonable amount of damages that the plaintiff would be likely to receive on settlement or judgment.

His Honour was satisfied that an award of $200,000 for the first plaintiff would be exceeded at trial or settlement, and that this represented a proportion of the likely assessment.[3] Accordingly, the defendant was ordered to make an interim payment to Bryce of $200,000.

Regarding the interim payment applications by the second and third plaintiffs, Grove J noted that the opposing parties adduced conflicting psychiatric evidence and that the amount of $50,000 claimed by each the second and third plaintiffs was in proportion to their overall likely recovery of damages under s82(3)(c) of the CPA. Although his Honour found that the second and third plaintiffs were likely to succeed, he could not say that they *would* succeed and accordingly their claims for an interim payment failed.

Ultimately, the court confirmed that to be successful in an application for an interim payment the court must be satisfied that the plaintiff will succeed at trial and that substantial damages are likely to be awarded. There is no formula to determine an amount that represents pre-trial needs, but the amount claimed must be in proportion to the total damages likely to be recovered from the defendant at settlement or judgment. ■

Notes: **1** *Eldridge v Royal Alexandra Hospital for Children* [2008] NSWSC 886 at [14]. **2** *Ibid,* at [8]-[12]. **3** *Ibid,* at [16].

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