



Interest on Section 151Z Recoveries

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The nature of Section 151Z

Section 151Z of the Workers Compensation Act 1987 provides as follows:

Recovery against both employer and stranger

151Z Recovery against both employer and stranger

- (1) If the injury for which compensation is payable under this Act was caused under circumstances creating a liability in some person other than the worker's employer to pay damages in respect of the injury, the following provisions have effect:
 - (a) the worker may take proceedings both against that person to recover damages and against any person liable to pay compensation under this Act for payment of that compensation, but is not entitled to retain both damages and compensation,
 - (b) if the worker recovers firstly compensation and secondly those damages, the worker is liable to repay out of those damages the amount of compensation which a person has paid in respect of the worker's injury under this Act, and the worker is not entitled to any further compensation,
 - (c) if the worker firstly recovers those damages the worker is not entitled to recover compensation under this Act,
 - (d) if the worker has recovered compensation under this Act, the person by whom the compensation was paid is entitled to be indemnified by the person so liable to pay those damages (being an indemnity limited to the amount of those damages),
 - (e) if any payment is made under the indemnity and, at the time of the payment, the worker has not obtained judgment for damages against the person paying under the indemnity, the payment is, to the extent of its amount, a defence to proceedings by the worker against that person for damages,
 - (e1) if any payment is made under the indemnity and, at the time of the payment, the worker has obtained judgment for damages against the person paying under the indemnity (but judgment has not been satisfied), the payment, to the extent of its amount, satisfies the judgment,

(f) all questions relating to matters arising under this section are, in default of agreement, to be settled by action or, with the consent of the parties, by the Commission.

(2) If, in respect of an injury to a worker for which compensation is payable under this Act:

(a) the worker takes or is entitled to take proceedings independently of this Act to recover damages from a person other than the worker's employer, and

(b) the worker also takes or is entitled to take proceedings independently of this Act to recover damages from that employer,

the following provisions have effect:

(c) the damages that may be recovered from the person by the worker in proceedings referred to in paragraph (a) are to be reduced by the amount by which the contribution which the person would (but for this Part) be entitled to recover from the employer as a joint tortfeasor or otherwise exceeds the amount of the contribution recoverable,

(d) the amount of the contribution that the person is entitled to recover from the employer as a joint tortfeasor or otherwise is to be determined as if the whole of the damages were assessed in accordance with provisions of Division 3 as to the award of damages,

(e) if the worker does not take proceedings against that employer or does not accept satisfaction of the judgment against that employer, subsection (1) applies as if the worker had not been entitled to recover damages from that employer, except that:

(i) if the compensation paid by that employer exceeds the amount of the contribution that could be recovered from that employer as a joint tortfeasor or otherwise-the indemnity referred to in subsection (1) (d) is for the amount of the excess only, and

(ii) if the compensation paid by that employer does not exceed the amount of that contribution-subsection (1) (d) does not apply and the employer has, to the extent of the compensation so paid, a defence to an action for such a contribution.

(3) This section applies to proceedings taken independently of this Act by a person to whom compensation is payable under this Act in respect of the death of a worker as a result of an injury.

- (4) If a worker is liable under subsection (1) (b) to repay any money out of damages recovered by the worker, the worker is not liable to repay the money out of any damages payable after the date of recovery by way of periodic or other payments for loss of future earnings or earning capacity or for future expenses.
- (5) For the avoidance of doubt, this section applies and is taken always to have applied to the recovery of compensation or damages, whether or not the compensation or damages were paid under an award or judgment. For example, compensation or damages may be paid under an agreement.

The liability under Section 151Z(1)(b) is a statutory liability which only arises when the worker has recovered damages, and liability for interest does not arise until a worker "receives" damages: *Howard Rotavator Pty Limited v Wilson (1987) 8 NSW LR 498*.

The right of recovery under Section 151Z(1)(d) is also a right to a statutory indemnity in respect of compensation paid by the employer, and the right of indemnity arises at the time of each payment of compensation: *Howard Rotavator Pty Limited Pty Limited (Supra)*.

Section 151Z actions are claims for statutory indemnity, and not claims for damages: *Westpac v Tomassian (1993) 32 NSW LR 207 at 215*.

A claim to enforce the entitlement to indemnity is not a claim in tort. It is a cause of action created by statute for an indemnity against a person liable to pay damages to another: *Tuckwood v Rotherham Corp [1921] 1 KB 526 at 540*.

Common Law entitlement to interest

In *Howard Rotavator Pty Limited (Supra)* Hope JA considered that the ordinary rule in respect of indemnities was correctly set out in *Halsbury's Laws of England 4th Ed, Vol 20, Par 315 at 173*:

"In law an action on a contract of indemnity does not normally lie until the promisee has paid the third person's claim. Where he has paid, the amount so constitutes a debt due to him from the promisor which, save in exceptional circumstances, he may recover with interest (my emphasis) in an action..."

In *Kwanchi Pty Limited v Kocsis* 40 NSW LR 270 an employer pursued claims for interest both pursuant to Section 83A of the *District Court Act* and on common law grounds. Handley JA observed that compensation payments by an employer benefit the tortfeasor by diminishing the pre-judgment interest payable to an injured worker, so there is no substantial injustice to the tortfeasor if he is ordered to repay compensation with interest. However, as it was determined that there was a statutory right to the interest, it was not necessary to consider the employer's alternative claim for payment of interest on common law grounds.

In *Perrett v Sydney Harbour Foreshaw Authority*, McCallum J of the NSW Supreme Court concluded that to deprive the employer of interest on payments it has made "*would be to fail to indemnify it, contrary to the apparent purpose of Section 151Z(1)(d)*".

In *Victorian WorkCover Authority v Esso Australia Limited* at [70] Kirby J observed that there is "*nothing antithetical in an indemnity to the notion of the recovery of interest. On the contrary, the provision of interest tends to further the purpose of such an indemnity*".

However, in *Victorian WorkCover Authority v Esso Australia Limited* [2001] HCA 53 the High Court majority decision noted at [23]:

"At common law, in the absence of statutory provision, where the Plaintiff made a money claim for a debt or damages, interest from the date when the cause of action accrued could be recovered only under an expressed or implied contractual provision or, in some instances, by the general custom of merchants or the custom of a particular trade or business".

Statutory entitlement to interest

Legislation

Section 83A *District Court Act 1973*

(1A) Where:

- (a) Proceedings have been commenced for the recovery of a debt or liquidated demand, and

- (b) Payment of the whole or part of the debt or demand is made during the currency of the proceedings and prior to or without judgment being given in respect of the debt or demand,

the Court may order that interest be paid at such rate as it thinks fit on the whole or any part of the money paid for the whole or any part of the period between the date when the cause of action arose and the date of payment.

Supreme Court Act 1970

(1A) Where:

- (a) proceedings have been commenced for the recovery of a debt or liquidated damages, and
- (b) payment of the whole or part of the debt or damages is made during the currency of the proceedings and prior to or without judgment being given in respect of the debt or damages,

the Court may order that interest be paid at such rate as it thinks fit on the whole or any part of the money paid for the whole or any part of the period between the date when the cause of action arose and the date of the payment.

Section 100 Civil Procedure Act 2005

(1) In proceedings for the recovery of money (including any debt or damages or the value of any goods), the court may include interest in the amount for which judgment is given, the interest to be calculated at such rate as the court thinks fit:

- (a) on the whole or any part of the money, and
- (b) for the whole or any part of the period from the time the cause of action arose until the time the judgment takes effect.

(2) In proceedings for the recovery of a debt or damages in which payment of the whole or a part of the debt or damages has been made after the proceedings commenced but before, or without, judgment being given, the court may include interest in the amount for which judgment is given, the interest to be calculated at such rate as the court thinks fit:

- (a) on the whole or any part of the money paid, and
- (b) for the whole or any part of the period from the time the cause of action arose until the time the money was paid.

Case Law

In *Mallinson v Scottish Australian Investment Co Limited* [1920] HCA 51, the High Court stated:

“the rule applicable here is stated in Shepherd v Hills as follows, viz, “wherever an Act of Parliament creates a duty or obligation to pay money, an action will lie for its recovery, unless the Act contains some provision to the contrary”; and where the amount is liquidated the action of debt is appropriate. The obligation is nonetheless a debt because the statute gives no particular method of enforcing it”.

In *Victorian WorkCover Authority v Esso Australia* the High Court considered construction of the phrase *“any proceeding for the recovery of debt or damages”*. It was held that the phrase should not be narrowly construed and should be understood as a composite expression, embracing **any proceeding in which a claim for money is made**.

In *Kwanchi*, Clark JA considered that payment of interest was not made under or pursuant to Section 151Z(1)(d), rather *“it is a **statutory claim to reimburse the employer who has paid compensation for being deprived of its money pending payment of that compensation by the tortfeasor”***.

In *Youth off the Streets Incorporated v Wingecarribee Shire Council* [2002] NSWSC 549 (24 June 2002) the tortfeasor sought to argue that where a worker’s concurrent proceedings were settled, the right to indemnity was extinguished together with any right to interest on amounts to compensation paid. Cripps AJ stated:

“...it seems to me highly artificial to construe Section 151Z and Section 91(1A) as having the consequence that if a worker has not sued the tortfeasor the Plaintiff (employer) can recover payments made together with interest, but cannot do so if the worker has sued”.

The tortfeasor was ordered to pay interest.

In *Kwanchi (Supra)* Clarke JA made the following observations:

“Section 81A(1A) of the District Court Act expressly provides that interest may be awarded where the whole or part of the debt or demand is paid within the currency of the proceedings. It follows that the power to award interest does not depend upon the debt becoming the subject of a Judgment. Where an employer sues a tortfeasor to enforce its indemnity pursuant to Section 151Z(1)(d) (which is not relevantly different from Section 64(1)(b) of the 1926 Act), and where the tortfeasor does not pay the amount claimed prior to Judgment, the District Court is, in the event it finds for the employer, empowered under Section 83A of the District Court Act to make an award of interest in favour of the employer.

*Likewise, if the tortfeasor pays the amount claimed after service of a Statement of Claim but prior to Judgment, the employer can maintain its claim for interest. Where an award is made, it is made pursuant to the statutory power of the Court and the **interest is not, strictly speaking, an amount ordered to be paid under the indemnity.***

Stated succinctly, the payment of interest is not a payment made under par (d) or pursuant to it. The claim for interest is a statutory claim to reimburse the employer who has paid compensation for being deprived of its money pending payment of that compensation by the tortfeasor”.

In *Howard Rotavator (Supra)* Hope JA considered that the amount of interest is not the subject of the statutory indemnity, rather it is the subject of and arises from an Order made by a Judge of the District Court pursuant to Section 83A of the *District Court Act 1973*.

In *WorkCover Authority of Victoria v Esso Australia Limited*, Kirby J specifically noted at [108] that

“in many cases, the payment of the indemnity will be clear-cut, liability will be obvious and the need to bring proceedings unnecessary. The incentive to prompt payment, which the obligation of interest affords, therefore still has relevance. There is no fundamental incompatibility by adding that incentive, by way of (the Supreme Court Act) to the entitlements that otherwise accrue under (the Workers’ Compensation Legislation). Indeed the commercial character of the transaction between employers and their insurers (on the one hand) and between a third party and the worker (on the other), adds to the impression that payment of ***interest as recompense for depriving a party of an entitlement that can only be enforced by the bringing of proceedings, is compatible with the scheme of the two Acts read together.***”

Period of claim

The liability under Section 151Z(1)(b) is a statutory liability which only arises when the worker has recovered damages, and liability for interest does not arise until a worker “receives” damages:

Howard Rotavator Pty Limited v Wilson (1987) 8 NSW LR 498

The right of recovery under Section 151Z(1)(d) is also a right to a statutory indemnity in respect of compensation paid by the employer, and the right of indemnity arises at the time of each payment of compensation: *Howard Rotavator Pty Limited Pty Limited (Supra)*.

Hope JA in *Howard Rotavator (Supra)* also noted that the right to interest arises because the employer has been out-of-pocket in respect of compensation paid to a worker, and that the tortfeasor is bound in law to repay that compensation. His Honour stated:

“As from that time (the time of each payment of compensation) the employer has been out of pocket in respect of money which is it entitled to recover from the tortfeasor. I see no reason why...the interest should not have been made to run...from the time of the making of the respective payments of compensation to the worker”.

In *Kwanchi (Supra)* Handley JA agreed that the employer’s right to indemnity under Section 151Z(1)(d) accrues as and when each payment of compensation is made.

Calculating interest

In *Perrett v Sydney Harbour Foreshore Authority (2009) NSWSC 1026* at [110] McCallum J of the NSW Supreme Court, following the decision of Lord Denning MR in *Jefford v Gee [1971] All ER 1202* at 1208, accepted that where payment had been made regularly over a number of years, it was appropriate for interest to be calculated on the basis of the total loss since the first payment and to allow interest for the whole period at half the rate.

Conclusion

There is no doubt that where proceedings have been commenced an entitlement to interest arises pursuant to the relevant statute, currently pursuant to Section 100 of the *Civil Procedure Act 2005*, even where payment is made before Judgement.

The situation is less clear in relation to whether interest is recoverable in circumstances where the employer is indemnified voluntarily by a tortfeasor without the need for Court proceedings. In such a situation, Section 100 of the *Civil Procedure Act* is not enlivened, and it is therefore necessary to rely on a common law entitlement to interest.

I have been unable to find any decided cases directly on point, which probably reflects the reality that workers' compensation insurers are reluctant to submit to the costs of litigation in circumstances where a complete recovery of payments have been voluntarily forthcoming.

Such an approach raises questions in relation to financial management when one considers, for example, that a recovery of \$500,000.00 received five (5) years from the date of *first* payment would yield a claim for interest exceeding \$100,000.00.

In these circumstances, the prudent approach would be for an employer to request at the earliest opportunity agreement from a tortfeasor for interest to be payable in addition to the statutory indemnity, calculated from the date of each payment. In the absence of such agreement, recovery proceedings should be commenced claiming the principal (statutory indemnity), interest and costs.

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