# Lump sum preclusion periods

***Jackson v Department of Social Security***
***(Unreported decision of Spender, J, Federal Court, 17 October 1997)***
**Ian Dallas, Bendigo**

*Lump sum preclusion periods under the Social Security Act 1991 ("the Act") are amenable to easy calculation if a person injured immediately receives a pension or benefit and continues to do so until the settlement of a common law action. The situation is far more complex when a 'no fault' compensation scheme is in operation and the plaintiff receives weekly payments of workers' compensation intermittently before the settlement of the damages claim.*

The decision of the Federal Court in *Jackson* has major ramifications for recipients of damages awards, faced with a preclusion period, who have received weekly payments for discrete and separate periods.

Mark Jackson was injured on 11 September 1990 and received workers' compensation benefits in the form of weekly payments from that date until 22 April 1991. He then obtained employment. When he required surgery to his shoulder he received weekly payments from 1 February 1993 until 20 June 1993. He then received Social Security benefits from that time until early 1995. It is important to note that he had two distinct periods when he received workers' compensation.

Common law proceedings for damages for negligence were settled on 25 May 1995 for approximately $142,500 after an amount had been refunded in respect of workers' compensation payments. The settlement included allowances for future and past economic loss.

A delegate of the Secretary for the Department of Social Security ("DSS") decided to preclude payment of benefits for the period 21 June 1993 to 17 December 1995, and to recover the amount of benefits paid to him during the preclusion period. The SSAT set aside this decision, determining that the preclusion period should commence on 23 April 1991. On appeal to the Administrative Appeals Tribunal ("AAT") the decision of the SSAT was overturned. The decision of the AAT was then appealed to the Federal Court.

Spender, J determined that the SSAT was correct and that the preclusion period should commence on 23 April 1991, not the later date of 21 June 1993. The preclusion period should then be suspended for the second period of workers' compensation and recommence when workers' compensation payments ceased.

In examining the formula applicable under the Act for determining the lump sum preclusion period in section 1165 of the Act, it was necessary for the Court to examine the meaning of "the periodic payments period". This is because section 1165(3) provides that

- if periodic compensation payments are made in respect of the lost earnings or lost earning capacity, the lump sum preclusion period is the period that:
  begins on the day after the last day of the periodic payments period; and
- ends after the number of weeks specified in sub-section (4).

The phrase "periodic payments period" as defined in section 17(1) means:

- in relation to a series of periodic payments the period in respect of which the payments are, or are to be, made; and
- in relation to a payment of arrears of a series of periodic payments, the period in respect of which those periodic payments would have been made if they had not been made by way of an arrears payments.

The argument for the appellant in this case was that there had in fact been two compensation periods:

- from the date of injury, 11 September 1990, to 22 April, and
- the period during which compensation had been paid as a result of the surgery from 1 February 1993 to 20 June 1993.

Spender, J criticised the decision of the AAT which proceeded on the basis that *even if there was a number of periodic payments for compensation, albeit separated by a discrete period of twenty-one weeks, the total period spanning two payments periods and the interregnum might appropriately be described as the periodic payments period.*

It appears from Spender, J's judgment that in fact the AAT had misquoted section 1165(3) by referring to periodic payments *periods* in the plural rather than the singular.

Spender, J followed the decision of the Full Court of the Federal Court in *Blunn v Cleaver* (1993) 47 FCR 111 which held that where there is not a continuous period but a number of separate periods of compensation paid, there was not a "series of periodic compensation payments". More precisely there was a "number of series of periodic compensation payments". In this case therefore each of the periods of workers' compensation payments constituted a "periodic payment period". His Honour held that rather than interpreting the phrase "the last day of the periodic payments period" as meaning "the last day of the *last* periodic payments period", the preclusion period should commence from the day after the last day of the *first* periodic payments period.

The question the Court then had to determine was whether the preclusion period should run uninterrupted from the last day of the first compensation period or whether it should be suspended during the second compensation period. His Honour noted that the latter course had been adopted by the SSAT in attempting to come to a sensible resolution and to give

effect to the statutory intention *"that a person should not be entitled to retain compensation affected payments during periods for which a common law damages claim had recompensed him."*

Spender, J considered that section 1165(3) implied that there be no overlap between the lump sum preclusion period and any periodic payments period, and that therefore the approach adopted by the SSAT was correct. He therefore determined that the preclusion period should run from 23 April 1991 to 30 January 1993, should be suspended during the second period that workers' compensation payments were made, and should then resume on 21 June 1993 when compensation payments ceased.

This decision is obviously of immense significance for recipients of damages awards who have received compensation and then returned to work full time before again receiving compensation. This will often be the case, where a return to work is unsuccessfully attempted or surgery is required. In the writer's experience this decision has not yet changed the Department's method of assessing preclusion periods.

DSS preclusion periods must be carefully considered when relevant to advising clients about settlement. Spender J's decision is required reading for the prudent personal injuries lawyer. ■

**Ian Dallas** is a Partner at Arnold Dallas & McPherson in Bendigo, Victoria. He can be contacted on **phone** 03 5441 4588 or **email** iandal@netcon.net.au

28

FRIDAY, MARCH 6, 1998
THE AUSTRALIAN FINANCIAL REVIEW

# Court for doctors do-little

**Andrew Burrell**

The strong threat of medical negligence litigation means doctors could no longer treat patients in a "cavalier fashion", says Melbourne plaintiff barrister Mr Jack Rush QC.

Mr Rush, who has been involved in several high-profile medical damages cases, claimed the medical profession had improved its performance in recent years but still needed to "take a good look at itself".

"The days when doctors could treat people in a cavalier fashion have gone," Mr Rush said.

"Things like informing patients, that's improved in recent years, primarily as a result of cases that have found doctors to be guilty of negligence."

With thousands of costly and complex medical damages cases before the courts, there is growing anxiety – from both the medical and legal professions – about the steady rise in the number of patients suing doctors and hospitals.

Last week, the County Court of Victoria announced it was establishing Australia's first specialist law list for medical litigation in response to the rise over the past decade. Experts predict other States will follow. The Medical Defence Union's medico-legal consultant, Dr Craig Lilienthal, said while the union had no objections to the new list, it held serious concerns at the steep rise in claims.

He said the incidence of claims was doubling "about every five years", while the costs of medical litigation and the damages awarded were outstripping even the rise in claims.

"What we are concerned about is, among other things, the affordability of this process," Dr Lilienthal said. "As the cost of medical defence goes up and the cost of providing medical defence goes up, so the cost of obtaining it goes up.

"So we at the MDU have got to charge higher premiums and the doctors have to pass that on to their patients, so we all pay.

"Is that what the community really wants? We've already seen GPs in country areas stop [certain procedures], so already we're seeing services lost to the community."

Mr Peter O'Bryan, of Galbally & O'Bryan, said the recent rise in popularity of elective surgery – including procedures such as liposuction and laser eye surgery – and the medical profession's increasingly commercial nature, had contributed to the boom in medical damages claims.

**"Patients were not adequately warned of the risks with certain procedures."**

Patients were not adequately warned of the risks associated with certain procedures, he said.

"I think there's been a significant increase in persons bringing actions for elective surgery which have arisen principally out of the medical profession advertising in the newspapers – people going along expecting certain results and being very disappointed with the results," Mr O'Bryan said.

Victorian County Court Judge Tom Wodak, who will administer the new list, said the growing number of medical cases reflected an increasingly litigious society. Lawyers had begun "marketing themselves" by advertising no-win, no-fee arrangements and firms were specialising in certain types of cases.

However the establishment of the medical damages list did not necessarily mean there had been an increase in the number of negligent doctors and hospitals, he said. Australia had been at the forefront of medical litigation, especially in cases involving people who contracted HIV while undergoing medical treatment.

More recently, he had noticed a growing number of cases with allegations of failure to diagnose, especially involving terminal conditions. "I think [the HIV cases] demonstrated to the public that one didn't have to accept without question something that had happened to you, and that maybe you could sue," Judge Wodak said.

Judge Wodak said medical cases were generally longer and more expensive than other civil litigation – the average time for a case to reach trial is about 18 months – because they often involved complex technical evidence from medical and other scientific experts.

He said the establishment of the medical list would allow cases to be more easily fast-tracked through the County Court system, a process begun in earnest several years ago.

Reproduced with permission of The Australian Financial Review