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Insurance CaseNote

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Show me the money! Applications for interim payments

The New South Wales Court of Appeal recently clarified the requirements for an application for interim payments in the case of *Forster v Hunter New England Area Health Service* [2010] NSWCA 106. The appeal arose following the decision of Hulme J of the Supreme Court of New South Wales, in which he dismissed an application by the parents of Michael Forster (**Deceased**) for an interim payment in the sum of $20,000.

Facts

On 11 August 2007, the deceased was admitted to Manning Base Hospital at Taree. The deceased presented with complaints of abdominal pain that had progressively worsened over the preceding week. An initial examination was conducted, blood samples were taken and the deceased was prescribed antacids and Lignocaine (a drug with anaesthetic and antiarrhythmic effects). The deceased was later discharged.

Shortly after discharge, the deceased died as a result of peritonitis secondary to a perforated duodenal ulcer.

The deceased's parents brought a claim in negligence against Hunter New England Area Health Service claiming that the hospital's failure to provide adequate medical treatment resulted in the death of the deceased and in turn caused them to suffer psychological damage.

In December 2009 the defendant consented to an order for an interim payment of $20,000 to the parents of the deceased. By Notice of Motion filed on 15 February 2010 the parents sought a further interim payment of $20,000, which was the subject of the present appeal.

Decision of the Supreme Court

Section 82 of the *Civil Procedure Act* 2005 (**Act**) provides that a court can order a defendant to make an interim payment to a plaintiff as part-payment of the damages sought to be recovered in proceedings upon one or more conditions being satisfied. The relevant condition which was the subject of this appeal provided that an interim payment can be made if:

"the court is satisfied that, if the proceedings went to trial, the plaintiff would obtain judgment for substantial damages against the defendant." (section 82(3)(c))

Hulme J applied the decision of Mathews AJ in *Matouk v Hungry Jacks* [2009] NSWSC 1176 in which he interpreted section 82(3)(c) of the Act to require "comfortable satisfaction"[1] in order to apply the section. With this in mind, Hulme J turned his attention to the three expert reports tendered that explored the issue of whether the defendant was negligent. Two of the experts considered that the defendant breached its duty, whilst the third expert found that no negligence was evident.

Consequently, Hulme J held that:

"in this case where there are experts that are diametrically opposed, I find myself unable to conclude at the level of comfortable satisfaction that the plaintiff would obtain judgment."[2]

Decision of the Court of Appeal

The Court of Appeal (comprising McColl JA, Macfarlan JA and Sackville AJA) affirmed that the "comfortable satisfaction" criterion was the appropriate test to be applied for an application for interim payment. This test requires the court to reach its conclusion only on the balance of probabilities and in doing so have regard to the gravity of any allegations made and the seriousness of the consequences that may flow from such an order.[3] Macfarlan JA did not consider that the use of the words "would obtain judgment" altered this test. He further stated that the words did not introduce a requirement of certainty, or even near certainty, for the success at trial test to be satisfied.[4]

After re-examination of the material provided by the three experts, the Court of Appeal concluded that the trial judge was in error in giving weight to the third report, which denied any liability on the part of the defendant. This was because the report simply provided a concluded opinion without any reasoning to support it. The Court applied the test in *Makita (Australia) Pty Ltd v Sprowles* [2001] NSWCA 305 at 60 that:

"Courts cannot be expected to act upon opinions the basis of which is unexplained."

The result was that the only expert evidence on the issue of negligence favoured the applicants. The Court was satisfied on the balance of probabilities that if the proceedings went to trial that the plaintiff would obtain judgment for substantial damages against the defendant.[5] The appeal was allowed and an order was made for the defendant to pay $20,000 to the plaintiff by way of an interim payment.

1 *Forster v Hunter New England Area Health Service* [2010] NSWSC 74 at 6.
2 Ibid at 26.
3 *Forster v Hunter New England Area Health Service* [2010] NSWCA 106 at 23.
4 Ibid at 25
5 Ibid at 33.

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Implications

This case demonstrates that the threshold for satisfying an application of interim payment is the "balance of probabilities" test. The words "would obtain judgment" do not require a more rigorous standard of proof to be applied by the courts. The implication for defendants is that they must ensure that all expert reports are served by the date required by the relevant practice note or by the date ordered by the court. In addition, parties need to critically examine their experts' opinions prior to those opinions being committed to writing to ensure that they do not fall foul of the principles espoused in *Makita*.

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