BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

No. 1760 of 2013

BETWEEN:

ANDREW BOURNE	**CLAIMANT**
AND	
AVERY RUDDER	**DEFENDANT**

Before the Honourable Mr. Justice William J. Chandler, Judge of the High Court

Appearances:

Mr. C. Anthony Audain and Mr. Brian Barrow for the Claimant
Mrs. Sherica Mohammed-Cumberbatch of Messrs. Carrington and Sealy for the Defendant.

Dates of hearing: 2014 January 29th;
2015 March 13th

DECISION

Nature of application

[1] The application was filed on 3rd December 2013 for an interim payment of $200,000.00 to facilitate surgeries urgently required by the Claimant.

[2] The grounds of the application are that:

(1) The Claimant urgently requires 3 surgeries at an institution outside of Barbados at estimated costs of $65, 500.00 USD for surgeries and hospitalisation as well as outpatient rehabilitation at a cost of $125.00 USD per session.

(2) The Defendant is indemnified by an Insurance Company.

(3) The required treatment is not available in Barbados as it relates to the expertise or the equipment to safely and adequately perform the surgeries which the Claimant requires.

[3] The application is supported by the Claimant's affidavit filed on 3rd December 2013 and an affidavit sworn to by Mr. C. Anthony Audain, Attorney-at-Law for the Claimant on the 12th day of December 2013.

[4] On the 29th January 2014, I made an Order by Consent that the Defendant pay the sum of $130,000.00 to the Claimant within seven days of the Order to facilitate the surgeries required by the Claimant. In consequence, this decision relates only to the balance of $70,000.00. The decision with respect to the balance of $70,000.00 was reserved until 24 February, 2014. I was on sick leave and the matter was further adjourned until 2 June 2014 on which the parties did not answer or appear.

Brief Background

[5] The Claimant sustained personal injuries, loss and damage consequent upon a motor vehicle accident on 4th August, 2013. The Claim Form alleged that the motor vehicle Reg. No. XK11 owned and driven by the Defendant collided with the Claimant, a pedestrian, who was walking along Lower Bay Street in the City of Bridgetown.

[6] The Form I application was filed 8th October 2013.

[7] The Defendant has accepted liability for the accident.

The case for the Claimant

[8] The Claimant's case is contained in the affidavits filed in support previously referred to in this decision.

The Affidavit of the Claimant

[9] The Claimant's affidavit in support recites the occurrence of the accident and the consequential loss and damage sustained. He deposed that he received financial assistance from Bryden's Insurance Company Limited, (BICL) consistently over the past year for his medical care.

[10] He deposed further that his injuries continued to exacerbate and deteriorate necessitating specialist care outside the jurisdiction of Barbados. He contracted an infection whilst at Queen Elizabeth Hospital (QEH) which the physicians on the Island have been unable to adequately treat. He was not satisfied that it would be reasonable for him to continue his treatment at the QEH.

[11] He was recommended to a specialist neurosurgeon (Ms. Deborah Blades MD) in the United States of America who operates in Ohio in the USA. The neurosurgeon reviewed his notes and recommended a course of action which includes surgeries outside of Barbados.

[12] At paragraph 10 of the affidavit, he deposed:

> "That the repair of damaged vertebra must be performed after the repair of the right hemidiaphragm since the possibility of a completely paralyzed diaphragm exists which could lead to total ventilator dependence."

[13] And he further deposed at paragraphs 12 as follows:

> "That my medical condition is one which requires critical care with the utmost urgency. This care is not available in Barbados. The date of the accident is the 4th day of August 2012 and since then I have been unable to receive adequate care to resolve my injuries. These circumstances will admit no further delay." and at paragraph 13, he further deposed:
>
> > "That I am afraid that without immediate intervention by Dr. Blades and her team, ... the damage sustained as a result of injuries will be irreparable and I will suffer permanent damage to my vertebra and my diaphragm."

Mr. Audain's Affidavit

[14] Mr. Audain's affidavit recited the circumstances of the accident and gave an overview of the injuries sustained by the Claimant. He opined that the Claimant's injuries to his client's rib cage and lung would be characterised as severe and that the range of award would be $183,350.00 to $281,200.00 Barbados dollars applying the Judicial College Guidelines.

[15] He categorised the injuries to the Claimant's back, as severe and feature disc lesions and/or fracture of discs or of vertebral bodies or soft tissue injuries leading to chronic conditions where despite treatment (usually involving surgery) there remained disabilities such as continuing severe pain and discomfort which would attract an award of $150,000.00 BDS.

[16] The spinal damages so far he calculated is US$65,000.00 or $140,000.00 BDS and further opined that the sum of $200,000.00 was reasonable in proportion to the claim or sum which was awardable to the Claimant.

[17] The Claimant's injuries are taken from the reports of Dr. Selma Jackman and Dr. Deborah Blades. Dr. Jackman's report is dated 14th January, 2013 and is as follows:

> "Mr. Bourne was admitted to the QEH on three separate occasions between August 2012 up to the present time.
>
> His first admission was from 4th August to 17th 2012.
> He had a period of loss of consciousness and sustained fractures of ribs 4-9 on his right side with evidence of contusion/laceration of the underlying lung. There was also suspicion of a right pneumothorax.
> He also had a soft tissue injury to his scalp and upper extremities. During this hospitalization he was treated for his rib fractures, lung contusion and haemo-pneumothorax.
> He was discharged with a planned follow-up Surgical Outpatient appointment in two weeks.
> He was seen in SOPD on two occasions - the 28th of August 2012 when it was noted that his chest pain had returned following some physical activity.
> At the second visit on 11th November the prescribed analgesics seemed to be effectively controlling his pain. At that time, review of his chest ray showed some improvement in the state of the lung even though it was not yet back to normal. Continued use of the incentive spirometer was advised and a follow-up appointment planned for 16th October.
>
> He next presented to QEH on 27th September 2012. He was febrile with

severe anaemia, an elevated WBC, dehydration and a CAT scan of the chest showing a fluid collection with consolidation of the middle and lower lobes of his right lung.

He had a mini right thorocotomy and drainage of his empyema. His infection was further treated with appropriate antibiotics and chest physiotherapy.

He was discharged on 9th October 2012 with a three week appointment to the surgical Outpatients' Clinic.

Mr. Bourne's next admission was from 28th October to 20th December 2012 where he presented with increasing abdominal distension over the preceding week and fever over the four days prior to his admission.

The pain he noted now appeared to be in his chest and back and was associated with shortness of breath on exertion and at rest. The pain was particularly severe and sharp when he moved, coughed, sneezed or breathed deeply. He also noted abdominal bloating, feeling warm to touch, that his appetite had diminished over the past three months and this was associated with weight loss.

His daughter noted that his skin and eyes were mildly yellow on his day of presentation.

At examination on admission he was propped up at 45 degrees, was pale, mildly jaundiced and using a re-breathing mask

He was febrile (T 37.3) tachycardic (PR= 131). His RR was 24 bpm. His respiratory efforts were poor and there was decreased air entry in both lung bases. There were healed scars in his 3rd and 5th right intercostal spaces.

His abdomen was distended, soft with mild generalized tenderness, His liver span was increased at 17cms in the mid-clavicular line & there was a fluid

thrill.

He had pitting oedema extending to his mid tibia.

A detailed CNS exam revealed diminished power in his knees and hips (grade 4/5), reduced knee and ankle reflexes with normal light touch and pinprick sensations.

A CXR showed a right pleural effusion.

His CAT scan was reported as showing consolidation of his right lobe with two hypodense lesions in the right lobe of his liver and the suggestion of a perforation in the region of the third part of the duodenum. A compression fracture of T8 was noted.

On 30th October he went to Bracebridge Medical Centre where he had percutaneous dranage [sic] of his abcesses - the right pleural space (purulent fluid aspirated and a drain left is-situ) [sic], right lobe of liver- as well as sampling of the tissues of the paraspinous process of T8/9.

He developed respiratory distress post procedure requiring the use of a BIPAP mask to maintain his oxygenation.

He was assessed by the Respiratory Physician as possibly having ARDS (acute respiratory distress syndrome) and arranged for him to be bronchoscoped. This was performed on 1st November. No endobronchial lesion was found. There was extrinsic compression of the right mid and lower lobe bronchi and nil else of significance.

In view of his thoracic spine fracture, he was seen and assessed by Neurosurgery.

A review of X-rays taken prior to this admission did not reveal any spinal abnormalities. The CAT scan on this admission showed findings consistent with discitis possibly leading to osteomyelitis. He had no evidence of spinal cord compression either clinically or on CAT scan.

Long term intravenous antibiotics, serial ESR's and X-rays monitoring for any development of kyphosis were instituted.

He developed one episode of line sepsis needing drainage.

On 13/11/2012, he was again referred for percutaneous drainage of a right-

sided empyema, right hepatic abscess and placement of a PICC line.

He had a repeat CAT scan on 23/11 which showed no deterioration in the changes in his vertebral body.

He was fitted with a back brace to help with pain relief & to provide some support for his vertebral column.

He was discharged on the 20th December with arrangements for completion of his six week course of intravenous antibiotics and with a plan to repeat his back X-rays & CAT scan and to be seen in Nero-surgery, General Surgery, Cardiothoracic and Rehabilitation Clinics".

ADDENDUM - 29th April 26, 2013

Following his release from the Queen Elizabeth Hospital on 20th December, Mr. Bourne was seen in the relevant outpatient clinics. He was given a six month appointment to Cardiovascular Clinic. He was reviewed thrice in Neurosurgery clinic where the evidence was that his spinal osteomyelitis seemed to have been cured and that further follow-up would be on as the need arose.

I saw him at my private office 14th March when he complained that he was still having pain in his right side and back. He was taking Tramadoll 100mgs three to four (3 - 4) times daily and Paracetamol with only partial resolution of the pain.

He mentioned that the pain in his back radiated down his left side and was made worse by any sudden or jerking movements, by sneezing or coughing. He needed to wear the backbrace constantly as not having it on led to the feeling of imminent collapse of the back.

Examination at the time - he looked well, was wearing the backbrace[sic]. Even with the brace in position he had a marked gibbus in the mid-dorsal region with point tenderness at the point of angulation there was also swelling with marked swelling on the lateral aspect of the collapsed vertebra. There was also reduced air entry in the right lung base.

A diagnosis of possible incomplete resolution of his lumbar osteomyelitis was entertained.

On this basis an MRI scan and blood test (ESR) was requested.

When he was reviewed with these on 11th April 26, 2013 even though his ESR was not elevated, he was still having significant pain and had substituted Ibuprofen for Paracetamol.

The MRI had shown destructive bone changes in TB with some changes affecting T7 and T8 with bulging of the intervertebral disc into the central spinal canal.

There was the incidental finding of cystic lesions in the kidneys and evidence of healed right-sided rib fractures.

He has referred back to Mr. John Gill for definitive management of spinal/vertebral disease.

SUMMARY:

[18] Mr. Bourne has had significant injuries to ribs, liver, lung and vertebral bodies which have led to significant and continuing morbidity. His continuing problems will relate to his pain management and to the management of the consequences of vertebral injuries.

[19] Dr. Blades' report is contained in an email dated 20th June 2013 to the Claimant and is now reproduced:

> "I reviewed your MRI and you have developed a severe deformity of the midthoracic spine called a kyphotic deformity likely due to the infection that probably began at the disc space then spread to the vertebral bone. The deformity is causing some compression of the sac that contains the spinal cord. Over time this deformity could certainly worsen which could lead to continued pain and possibly spinal cord compromise resulting in neurological decline. Additionally, should the deformity worsen to a significant degree, there could be compromise to lung function.

Correction of the deformity through surgery would require opening the left side of the chest removing the compromised, infected bone and reconstructing the spine using a carbon fiber device to restore height to the spine and a titanium device (screws and rods) to stabilize the spine. Following surgery you would have to be transferred to an intensive care unit for monitoring as you will have a drainage tube in the chest cavity for a period of at least 2 days. Thereafter your program of rehabilitation would begin.

There are risks of this procedure to include: bleeding, further infection, failure of the stabilization of the spine with the need to correct, spinal cord injury with secondary weakness (your spinal cord function would be monitored by a special device during the surgical procedure) and lung injury. The risks arc low but not zero.

Following surgery you will be required to wear a brace (easily adjustable and not too overbearing) for approximately (3 weeks). The brace is really a reminder regarding maintaining appropriate posture and position.

… I highly recommend you have an updated MRI of the thoracic spine without and with Gadolinium. Additionally, please have all of the blood work performed since this will determine if you still have an underlying infection as the MRI and bone scan would suggest.”

The case for the Defendant

[20] The Defendant filed an affidavit of **Irvin Anthony Springer** Claims Manager of BICL (the Company) in response to the affidavits of the Claimant and Mr. Audain. He deposed, inter alia, that:

4. The Company had accepted liability on behalf of the Defendant for the negligence of the Defendant in the motor vehicular accident which is the subject matter of this action and had not accepted liability for the extent of damages claimed by the Claimant.
5. To date, the Company has paid all special damages which the Claimant had requested the Company to pay amounting to $13,116.76.
6. ...
7. ...
8. …
9. …
10. Further, the medical report and Addendum referred to in paragraph 7 hereof disclosed that a mid-dorsal gibbus manifested in March 2013, some eight months after the accident.
11. …
12. I received a letter dated July 5, 2013 from the Claimant's attorney-at-law wherein the Claimant's attorney-at-law states at paragraph 4, page 1 the following:

    "You will also be aware that on his most recent confinement at the Queen Elizabeth Hospital my *client contracted* a *'Klebsiella' bacterial infection.*"
13. At paragraph 2 of the said letter, the Claimant's attorney-at-law also quotes the view of Dr. Deborah Blades, who is said to be a spinal neurosurgeon who operates at The Spine and Orthopedic Institute of St. Vincent Charity Hospital, Cleveland, Ohio in the United States of America as follows:

    "She has detected "a *severe deformity of the mid-thoracic spine called* a *kyphotic deformity likely due to the infection that probably began at the*

disc space then spread to the vertebral bone."

[21] He deposed that the Claimant stated that he contracted an infection from which he now suffers at the Queen Elizabeth Hospital and it was unclear from the medical evidence provided by the Claimant whether the infection which led to the kyphotic deformity was contracted at the Queen Elizabeth Hospital and, if so, when it was contracted. lf the infection was contracted at the Queen Elizabeth Hospital, then he was advised that there may be some third party liability for some of the damages claimed by the Claimant, and that the damages arising out of the motor vehicular accident which accrue to the Defendant may exclude, or may attract contribution.

[22] With reference to the availability of medical care in Barbados, he said that he was aware that the Company's attorneys-at-law had written to Dr. John Gill, [sic] (properly designated Mr. John Gill) Neurosurgeon on the 19th December, 2013, enquiring as to:

I. Whether Dr. Gill agreed with the course of treatment suggested by Dr. Blades,
II. Whether there were facilities in Barbados where this type of treatment could be carried out,
III. Whether there were medical personnel with the appropriate skill set(s) in Barbados to carry out this type of treatment,
IV. What would be the cost of carrying out the appropriate treatment in Barbados, and
V. Whether there were any alternative course(s) of treatment which Dr. Gill would recommend.

[23] He was advised by the Company's attorneys-at-law, that Dr. Gill was out of office until 6th January 2014 and that the Claimant was scheduled to be examined by Dr. Gill on 9th January 2014.

The Claimant's Submissions

[24] Mr. Audain submitted that the Court was entitled to find on the affidavit evidence that the

Claimant, if successful at trial, would be entitled to substantial damages on a balance of probabilities. (**GKN Group v Revenue and Customs Commissioners [2012] 3 All E R 111**). All the other conditions required by the **Supreme Court of Judicature (Civil Procedure Rules) 2009 (CPR)** had been satisfied. He also submitted that the Claimant's injuries to his chest and lung were so severe that he would be entitled to an award of BDS $280,000.00 using the Judicial College Guidelines for the Assessment of Personal Injuries 12th Edn September 2013 (Judicial College Guidelines).

[25] The Defendant's insurers had already paid several medical bills which were accrued as a direct result of injuries sustained in the accident. The Court should exercise its discretion to grant the Claimant the sum sought since the costs of the procedures though substantial would only cover the preliminary stages of recovery. The value of the claim might ultimately be more substantial than what had previously been proffered. It was clear that without surgical procedures a full recovery might not be possible. The conditions to be satisfied for the award of an interim payment were set out in **Part 17** of **CPR** and that the provisions of **Part 17.6** were exclusive since the word 'and' was not placed at the end of any of the sub-paragraphs. The applicant could therefore apply for an interim payment if he satisfied any of the requirements. Those requirements had been met in this case and the Court should only decline to make an order if there was some specific and sufficient reason not to do so.

The Defendant's Submissions

[26] The Defendant agreed that the relevant law was contained in **CPR Part 17.6** and conceded their admission of liability. Counsel submitted that the Court must not order an interim payment of more than a reasonable proportion of the likely amount of the final judgment and, further, that an assessment by the Court of the likely amount of the final judgment must be carried out on a conservative basis in order to risk an "overpayment". Relying upon **Electric Sales and Services Limited v. Kenrick Hoyte Civil Appeal No. 8 of 2011 (Barbados)** and **Eeles v Cobham Hire Services Limited [2010] 1 WLR 409.**

[27] Counsel took issue with Mr. Audain's characterisation of the injuries to the Claimant's

chest rib cage and lung as severe under Part 6 (A) of the Judicial College Guidelines and the range of awards which he said would be attracted by the injuries. She opined that the amounts appeared to have been converted to Barbados currency by using a conversion rate of greater than what obtained in December, 2013. The exchange rate for Sterling to Barbados dollars in December, 2013 was on average £1 = BDS$3.28. Counsel also opined that adding the upper limit of the award under 9a. above to the amount in 9b. would total $431,000.00 Barbados currency. However, to merely aggregate two amounts for individual injuries without considering them in a holistic manner is an incorrect approach to assessing damages. Any assessment of multiple injuries must take into account discounting for overlapping. She relied upon **Nigel Ward v Milton Lowe and Edward Roach Barbados Civil Appeal No. 17 of 2003**.

[28] She submitted also that the assessment of general damages may very well be impacted by further medical evidence being disclosed.

[29] It is the Defendant's submission that the general damages component of the Claimant's claim with relation to his back injury (subject to a finding that the compression fracture at T8 is due to the accident) may be more aptly categorised under the Judicial Studies Board Guidelines as 'moderate' rather than 'severe'. The moderate back injury attracts awards in the range of region of £17,080 to £23,730 (the upper limit of which converts to approximately $77,000.00 Barbados currency), which is about one- half of the amount suggested by Mr. Audain in his Affidavit. See extract from **Judicial Studies Board Guidelines, Kemp & Kemp, The Quantum of Damages, Volume 47**.

[30] The Defendant therefore submitted that, if the Court were to accept the Claimant's estimated damages of £48,250.00 to £74,000.00 (the upper limit of which converts to $242,000) for chest/lung injury and $77,000.00 for back injury and applied a discount of 25 to the total arising therefrom (that is, 25 x [$242,000 + $77,000]), the amount would be $239,250.00 at the upper end of the Judicial Studies Board Guidelines.

[31] It was submitted that the Court was obligated to assess damages conservatively, and that figure of $239,250.00 should be further discounted.

[32] On 29 January 2014, I made an Order by consent that the Defendant pay the Claimant the sum of $130,000.00 as an interim payment within seven days of the order to facilitate the

surgeries which the Claimant urgently needed for rehabilitation and thus only the sum of $70,000.00 remains in issue.

The Law

[33] The applicable law is found in **CPR Part 17.5** et seq which provide as follows:

> **"Interim payments – general procedure**
>
> **17.5** (1) The claimant may not apply for an order for an interim payment before the end of the period for entering an acknowledgment of service applicable to the defendant against whom the application is made.
>
> (2) The claimant may make more than one application for an order for an interim payment even though an earlier application has been refused.
>
> (3) Notice of an application for an order must be
>
> *(a)* served at least 14 days before the hearing of the application; and
>
> *(b)* supported by evidence on affidavit.
>
> (4) The affidavit must
>
> *(a)* state the claimant's assessment of the amount of damages or other monetary judgment that is likely to be awarded;
>
> *(b)* set out the grounds of the application;
>
> *(c)* annex or exhibit any documentary evidence relied on by the claimant in support of the application; and
>
> *(d)* where the claim is made under any relevant enactment in respect of injury resulting in death, contain full particulars of the
>
> (i) nature of the claim in respect of which the damages are sought to be recovered; and

(ii) person or persons for whom and on whose behalf the claim is brought.

(5) Where the respondent to an application for an interim payment wishes to rely on evidence or the claimant wishes to rely on evidence in reply, that party must

(a) file the evidence on affidavit; and

(b) serve copies on every other party to the application,

at least 7 days before the hearing of the application.

(6) This rule does not require written evidence

(a) to be filed if it has already been filed; or

(b) to be served on a party on whom it has already been served.

(7) The court may order an interim payment to be made in one sum or by instalments.

Interim payments – conditions to be satisfied and matters to be taken into account

17.6 (1) The court may make an order for an interim payment only if

(a) the defendant against whom the order is sought has admitted liability to pay damages or some other sum of money to the claimant;

(b) the claimant has obtained an order for an account to be taken as between himself and the defendant and judgment for any amount certified due on taking the account;

(c) the claimant has obtained judgment against that defendant for damages to be assessed or for a sum of money, including costs, to be assessed;

(d) except where sub-rule (3) applies, it is satisfied that if the claim went to trial, the claimant would obtain judgment against the defendant

from whom he is seeking an order for interim payment for a substantial amount of money or for costs; or

(e) the following conditions are satisfied

(i) the claimant is seeking an order for possession of land, whether or not any other order is also being sought; and

(ii) the court is satisfied that, if the case went to trial, the defendant would be held liable, even if the claim for possession should fail, to pay the claimant a sum of money for rent or for the defendant's use and occupation of the land while the claim for possession was pending.

(2) In addition, in a claim for personal injuries, the court may make an order for the interim payment of damages only if the defendant is

(a) insured in respect of the claim;

(b) a public authority; or

(c) a person whose means and resources are such as to enable that person to make the interim payment.

(3) In a claim for damages for personal injuries where there are two or more defendants, the court may make an order for the interim payment of damages against any defendant if

(a) it is satisfied that, if the claim went to trial, the claimant would obtain judgment for substantial damages against at least one of the defendants, even if the court has not yet determined which of them is liable; and

(b) sub-rule (2) is satisfied in relation to each defendant.

(4) The court must not order an interim payment of more than a reasonable proportion of the likely amount of the final judgment.

(5) The court must take into account

(a) contributory negligence, where applicable; and

(b) any relevant set-off or counterclaim.

Powers of court where it has made order for interim payment

17.7 (1) Where a defendant has been ordered to make an interim payment, or has in fact voluntarily made an interim payment, the court may make an order to adjust the interim payment.

(2) The court may in particular

(a) order all or part of the interim payment to be repaid;

(b) vary or discharge the order for interim payment; or

(c) order a defendant to reimburse, either in whole or in part, another defendant who has made an interim payment.

(3) The court may make an order under this rule

(a) without an application by a party, if it makes the order when it disposes of the application or any part of it; or

(b) on an application by a party made at any time".

The Issue

[34] There is one issue before me, namely, whether or not the court ought to exercise its discretion and grant the interim sum claimed. This issue has been broken down into the following sub issues, namely: (1) whether or not the sum claimed as an interim payment represents a reasonable proportion of the likely damages to be awarded on the final assessment of the damages payable?, (2) whether the infection to the Claimant's lungs were as a result of the accident or was contracted at the QEH? and (3) the issue raised by the Defendant about the availability of the proposed operation in Barbados and its effect on the sum to be awarded.

Discussion

Sub Issue No.1

[35] Counsel have agreed that the law as set out above is the applicable law. There is likewise no dispute that the Claimant has satisfied the conditions for an award of an interim payment. I have reviewed the entirety of the medical reports rather than focus only on those portions referred to by both counsel in their presentations before the Court. I am of the opinion that the injuries are to be characterised as severe. The medical report of Dr. Selma Jackman details a history of pain consequent upon serious injury to his ribs and lung. It is obvious from her report that, in spite of some amelioration of his condition consequent upon her medical intervention, he continued to suffer pain and he was referred to Mr. John Gill for definitive management of spinal/vertebral decease.

[36] Of importance as well is the report of Dr. Blades who opined that the Claimant developed a severe deformity of the midthoracic spine called a kyphotic deformity likely due to the infection "…that probably began at the disc space then spread to the vertebral bone." She opined further that this deformity could worsen leading to continued pain and possibly spinal cord compromise resulting in neurological decline." Should the deformity worsen to a significant degree, she opined that there could be compromise to lung function.

[37] In respect of the likely quantum of damages, having reviewed the guidelines and case law, I am of the opinion that the likely damages will be great and outweigh the cost of the proposed operation. In any event, one cannot be constrained by the limitation that the cost of the operation must be less than the possible damages. It may well be that in a particular instance, the cost of an operation may outweigh the final damages to be awarded.

[38] The cost of this operation falls into the category of special damages as distinct from general damages. I am of the opinion that the operation is necessary and that, it has resulted as consequence of the accident. There is no suggestion that the cost is unreasonable. This finding is for the purposes of the application for an interim payment and is based on the evidence before me. It is no bar to the Defendant instituting proceedings against any third party that he may consider to be responsible for the infection.

Sub Issue 2

[39] The defendant has argued that the infection may have been caused at the QEH and it was unclear whether the infection which led to the kyphotic deformity was contracted at the QEH and, if so, when it was contracted. Thus, the possibility was that there could be some third party liability.

[40] This conclusion was reached from a reading of the Claimant's affidavit (paragraph 7) and the letter from the Claimant's counsel (dated 5 July 2013) quoted previously in this decision. I have thoroughly reviewed the medical reports and I have been unable to find any medical opinion to support the assertion in the Audain letter or in Mr. Springer's affidavit that the infection was contracted at the QEH. Whether or not it was so contracted, is a question of fact for the court to decide based upon the medical evidence and the cross examination of the doctors not the opinion of counsel.

[41] There is no claim in the pleadings of the Defendant for indemnity or contribution by the QEH or any third party. The resolution of the matter depends on the pleaded case.

[42] Whether or not a third party is liable is for the Defendant to plead and prove on a balance of probabilities. That has not been done here. The burden is on the Defendant to prove that the infection has been caused by a third party on a balance of probabilities, this has not been proved to the requisite standard. Consequently, I hold that the cost of the operation must be paid by the Defendant.

Sub Issue 3

[43] With reference to the availability of the medial procedure in Barbados, Mr. Springer deposed that he had written Mr. Gill on 19 December, 2013 and was still awaiting a response to his enquiry. To date no response has been filed in Court. The Claimant cannot be made to wait indefinitely for his response and risk the decline in his health alluded to by Dr. Blades. The burden of proof that the surgical procedure is available in Barbados is on the defendant who so alleges. He has failed to prove this, accordingly, I hold that the cost of the procedure outside of Barbados is reasonably required.

Disposal

[44] It is hereby ordered:

(1) That the Defendant to pay the Claimant the further sum of Barbados $70,000.00 in respect of his surgeries and rehabilitation on or before the 30th day of March, 2015.

(2) The Claimant to have his costs of the application to be assessed if not agreed.

William J. Chandler
Judge of the High Court