

**BARBADOS**

**[Unreported]**

**IN THE SUPREME COURT OF JUDICATURE  
HIGH COURT  
CIVIL DIVISION**

**No. 98 of 2009**

**BETWEEN:**

**DENNIS ALLEYNE**

**CLAIMANT**

**AND**

**EMBRY NURSE**

**DEFENDANT**

**Before the Honourable Madam Justice Margaret A. Reifer, Judge of the High Court**

**Date of Hearing: 2017 October 10<sup>th</sup>**

**Date of Decision: 2018 March 29<sup>th</sup>**

**Appearances:**

**Mrs. Beverley Nicholls Attorney-at-Law for the Claimant.**

**Ms. Tamara M. Simmons in association with Ms. Destinie Simmons Attorneys-at-Law for the Defendant.**

## **DECISION**

### **Introduction**

- [1] Substantial objection has been raised to this Claimant's application for an Interim Payment in this personal injury action. Submissions on both sides were fierce and heated.
- [2] It has occasioned much examination of the criteria for the determination of firstly, whether an order for payment, and secondly, if so, the quantum of such payment.
- [3] But more importantly and in the final analysis, the question arises: where the legal and procedural requirements have been met, what matters should guide the Court's exercise of its discretion to order an interim payment.
- [4] Part of the problem in this matter appears to be that the Claimant's injury was initially characterized as a moderate injury assessed as attracting total damages of less than \$50,000.00 (the claim as filed in 2009 estimated the claim at \$25,000), whereas the current assessment/claim is presently in excess of \$200,000.00.

### **History and Background**

- [5] The Claimant filed his application for an interim payment in February of 2016, in respect of his injuries, loss and damage sustained in a motor vehicular

accident which occurred on the 10<sup>th</sup> February 2005. It was filed together with a Certificate of Urgency.

[6] The substantive action was filed January 2009 by Writ of Summons under the **Rules of the Supreme Court 1982**. The Claimant was one of two Claimants (Plaintiffs) initially, but it appears that the original First Plaintiff settled his claim and discontinued his action in 2015.

[7] The application above-mentioned sought payment to the Claimant in the sum of \$75,000, as an interim payment. It was pleaded and not disputed, (as there has been acceptance of liability by the insurers of the Defendant), that should this action proceed to trial that the Claimant would obtain judgment for damages against the Defendant. (The parties were not in agreement as to what is meant by “substantial damages” in the **CPR**.)

[8] Also pleaded and not disputed, is the fact that the Defendant, through his insurers Consumers’ Guarantee Insurance Limited, is an entity whose means and resources are such as to enable it to pay the damages sought in this action.

### **The Affidavit in Support of February 4<sup>th</sup> 2016**

[9] This Affidavit exhibited three medical reports as follows: Dr. Charles Brown dated April 8<sup>th</sup>, 2008 and October 21<sup>st</sup>, 2012 respectively, Mr. Winston Seale dated October 29<sup>th</sup>, 2013.

[10] At paragraph 9 the Claimant signaled that he had been advised that his claim for damages should be under the following heads: General Damages for Pain and Suffering and Loss of Amenities; Loss of Do-it-Yourself Functions and Gardening Assistance; Actual loss of earnings; Past Domestic Assistance; Future Medical Care; Future Domestic Assistance; Devalued Position on the Labour Market; Future Loss of Earnings and Special Damages.

[11] This paragraph also indicates that the Claimant has been advised in detail what amount should, and can be, claimed by him under each of these heads as follows:

General Damages	\$ 105,000.00
Loss of Do It Yourself Functions	\$ 1,500.00
Past Domestic Care	\$ 2,520.00
Gardening Assistance	\$ 9,900.00
Future Medical Care	\$ 12,000.00
Future Domestic Assistance	\$ 31,200.00
Future Loss of Earnings	To be assessed
Devalued Position on the Labour Market	\$ 42,000.00
Special Damages	\$ 3,308.09
<b>Total</b>	<b>\$ 207,428.09</b>

[12] Of significance is paragraph 10 of this Affidavit, which is the only reason advanced for the payment of this interim payment. It states as follows:

“10. That I need an interim payment of \$75,000 to cover my bills, cost of living and my continued medical costs, chiropractor and medical costs.”

### **The Affidavit in Response**

[13] An Affidavit in Response was deposed to by counsel for the insurer, and filed February 20<sup>th</sup> 2017. The gravamen of this Affidavit was that the “Claimant is unlikely to receive damages in the amount deposed to in the Claimant’s affidavit filed herein on the 4<sup>th</sup> February 2016.” (see paragraph [9]). Significantly, this affidavit exhibited the legal opinion of attorney-at-law Liesel Weekes on the issue of quantum, in response to the Claimant’s assessment of damages.

[14] Paragraph 15 is instructive:

“15. I am further advised by counsel and verily believe that the amount requested in paragraph 10 of the Claimant’s affidavit in support filed herein on the 4<sup>th</sup> day of February 2016 is in excess of the entire award he is likely to recover on the evidence herein and is certainly in excess of a reasonable proportion of damages which he would be awarded. I am advised by counsel and verily believe that an order granting an interim payment in that sum would be in breach of the Court’s duty under **Part 17.6 (4)** of the **CPR**.”

[15] The Defendant’s opinion on damages places the value of the claim at under \$50,000.00.

## **The Supplemental Affidavit in Support**

[16] On March 20<sup>th</sup> 2017, (and later September 2017) the Claimant filed a Supplemental Affidavit in Support which exhibited a new Medical Report authored by Dr. Charles Browne and dated March 17<sup>th</sup> 2017. This Medical Report is used by counsel for the Claimant as authority for the following heads of damage: Loss of Do It Yourself Functions, Gardening Assistance, Past Domestic Assistance and Devalued Position on the Labour Market. It reiterates the Claimant's application for the sum of \$75,000 "to cover his bills, cost of living, medical costs and legal costs".

[17] The affidavit of September 20<sup>th</sup>, 2017 in addition to exhibiting the 2017 Medical Report of Dr. Brown also exhibited receipts dated 2016 and 2017 from an unauthenticated resource (Pain & Stress Removal Centre) for myoskeletal alignments/medical services.

## **The Submissions**

[18] In submissions filed February 10<sup>th</sup>, March 20<sup>th</sup> and September 29<sup>th</sup> 2017 respectively, the Claimant grounded his application in **Rules 17.5** and **17.6(1)(2)** and **(3)** of **the Supreme Court (Civil Procedure) Rules 2008 (CPR)**. Counsel submitted that it is the duty of the Court and attorneys at law to further the Overriding Objective. She relied on the Barbadian case of

**Electric Sales and Services Ltd v Hoyte CA 8 of 2011 par.[36]** in support of this submission.

[19] Having submitted that damages to be awarded the Claimant would be substantial, counsel submitted further that guidance as to what is meant by “substantial damage” in **Part 17.6(3)** can be found in the judgment of **Chandler J in Atkins v Brathwaite 2016 (Unreported)** and **Hughes v Bascombe** (below).

[20] She submitted that the Claimant having satisfied all the criteria, namely, that the Defendant must be insured or have the means and resources to make the interim payment, then that payment should be made. Counsel referenced the case of **Hughes v Bascombe et al 2003 Antigua and Barbuda** in support of this submission.

[21] On the issue of what constitutes a reasonable proportion of the likely amount of the final judgment, counsel submitted that such awards usually range between 25 and 75 % and that in the last few years the courts were awarding between 50 and 75%, of the conservative value of the claim: see **Smith v Glennon 1994** and **Electric Sales & Services Ltd v Hoyte BB 2012 CA 1, Civil Appeal 8 of 2011.**

[22] Counsel characterized the Claimant as suffering from chronic pain syndrome, and expressed the view that based on the *Judicial Studies Board Guidelines*

for the Assessment of General Damages in Personal Injury cases, the Claimant's injuries fall at the top end of moderate, and that the \$106,000.00 claimed in general damages is justified.

[23] In opposition to the claim, the Defendant argues that the amount being sought is more than a reasonable portion of the likely amount of the final judgment. The parties are evidently at odds over the import and meaning of the content of the medical reports which speak to the nature and extent of the injury mentioned, particularly the most recent (2017) report of Dr. Brown. In their submission, the report raises more queries than it settles, for instance there is mention of physiotherapy for which there is no report, and a previous accident which had "just about settled". It is the submission of the Defendant that it is the Claimant who diagnoses himself as suffering from 'chronic pain syndrome' and not the medical report.

[24] The Defendant therefore urges the Court to be conservative in its estimate, as there are complex issues to be determined and inadequate medical evidence. Counsel also stressed the risk that an interim payment may exceed the final payment (**Rule 17.6(5)**).

[25] It appears to this Court that the parties have each placed themselves at the farthest end of the spectrum in this process, at a point in which (after 13 years) it is reasonable to expect that they would be closer.

## Issues Arising

1. Whether the Claimant has satisfied the statutory and/or procedural requirements for an interim payment (whether the grounds for granting an interim payment have been satisfied);
2. Whether the Court should exercise its discretion to order such a payment; and,
3. If so, in what amount should the payment be granted.

## Discussion

### **The Statutory framework for this Procedure (situations in which an order for Interim Payment may be made)**

[26] There is no dispute that **Part 17**, governing interim remedies generally, specifically governs the grant/ordering of interim payments in personal injury matters. In so far as English authorities are heavily relied on by both parties, it is relevant to state here that **Part 25.7** of the **UK's CPR** is similar, but not always '*in pari materia*' with Barbados' **CPR**.

[27] The procedure to be followed is detailed in this Part (see **17.5 (1)** and onwards) which sets out when and how such an application can be made. For example, **17.2(1)** provides that an Order may be made at any time, "including (a) before a claim has been made; and (b) after judgment has been given."

[28] **Part 17.6** is particularly critical, as it sets out in detail the conditions to be satisfied and the matters to be taken into account before such an order is made.

The critical provisions relating to a personal injury claim such as this are as follows:

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

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

(b) ...

(c) ...

(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) ...

(f) ...

(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 an interim payment

(3) ...

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

[29] **Rule 17.6(5)** cannot be overlooked in this exercise as it provides that “The Court must take into account ... (a) contributory negligence, where applicable; and (b) any relevant set-off or counterclaim.”

[30] Both parties have made extensive submissions as to what is a ‘substantial’ amount of money in accordance with **Part 17.6 (1) (d)**, in view of the fact that the **CPR** does not define “substantial amount”. I shall not reproduce those submissions here.

[31] This Court is satisfied that the requirements of **Part 17.5(1), 17.6 (1) (a)** and **(d)** have been met.

[32] Before moving on to the issue of quantum, this Court will look at whether it should exercise its discretion to make an interim payment.

### **The Court’s Discretion**

[33] Counsel for the Defendant provided this extract from **O’Hare & Brown: Civil Litigation, 15<sup>th</sup> ed. at page 404** which is most apposite in speaking to this point. The learned authors state as follows:

“No claimant has a right to an interim payment. If he can establish one or more grounds the court will then exercise its discretion as to two questions (i) whether it would be appropriate in principle to make an order; and (ii) if so, the amount if any it is appropriate to award.

On question (i) the court may decide that it is not appropriate to order an interim payment if the application is made too close to trial, or for too small an amount of money for it to be worthwhile, or if, in some other way it would delay or prejudice the fair conduct of trial.”

[34] Also relevant (and cited by counsel for the Defendant), is the dicta of **Auld**

**LJ in Campbell v Mylchreest [1998] EWCA Civ 60** as follows:

“A judge, when considering an application for an interim payment, has discretion in the matter. This Court’s decision in *Stringman v McArdle* [1994] 1 WLR 1653 has not changed that, as lady Justice Butler-Sloss emphasised at p 1656D. It is true that, as a guide to the exercise of that discretion, it indicates that the court should normally order sought interim payments within the amount of the likely recoverable damages without investigation or consideration of the plaintiff’s intended use of the money.

However, there may be instances where there may be another matter, or other matters relevant to the exercise of the discretion. Mr. Mackay has helpfully suggested possible examples in other circumstances: first, that the payment is sought too close to the trial to justify ordering it; second, that the sought payment may be too small for it to be worthwhile as an exercise of the power; and third, where a plaintiff is not getting on with the claim and simply putting off the day of trial by repeated applications for interim payments.”

See also **British & Commonwealth Holdings plc v Quadrex Holdings Inc [1989] Q.B. 842**; and **Hoyte v Electric Sales & Services Ltd BB2011 HC16**.

### **The Purpose of the Procedure**

[35] The determination of this matter can be assisted by a cursory look at the purpose of this procedure. The purpose or objective is to ensure that a claimant, with a clear right to a money judgment, is not deprived for an unduly long time of what is due to him because the exact money due to him has not yet been quantified.

[36] In **Ricci Burns Ltd v Toole [1989] 3 All ER 478, Gibson L.J.** explained that “the underlying purpose...[is] the mitigation of hardship or prejudice to a plaintiff which may exist during the period from the commencement of the action until trial”. Equally important, interim awards remove the defendants’ incentive to drag out proceedings in order to force their needy claimants into unfavourable settlements.

[37] **Williams JA in Electric Sales and Services Limited v Hoyte (Unreported) Civil Appeal No. 8 of 2011** (decision delivered January 31<sup>st</sup> 2012) has this to say:

“The power of a single judge to order an interim payment on account of damages is an important weapon in the armoury of the court in granting interlocutory relief. This power is especially important and widely used in some jurisdictions in personal injury claims in order to ameliorate the suffering of claimants who have lost earnings, incurred expense and need funds to meet further expenses.”

[38] In **Shearson Lehman Brothers Inc v Maclaine, Watson and Co [1987] 2 All ER 181, Nicholls LJ** in the English Court of Appeal explained the purpose in the following way at page 190:

“The underlying purpose of the two (interim payment) rules is the same: to mitigate hardship or prejudice to a defendant which may exist during the period from the commencement of the action to the trial. Further the underlying task of the court under each rule is the same: ordering an interim payment of such amounts is just, having regard to all the circumstances.”

[39] It is noted however, that the Claimant is not obligated to show why the payment is needed or the use for which the money is sought.

[40] See also Commonwealth **Caribbean Civil Procedure, 3<sup>rd</sup> ed 2009** at page **166**.

**The Amount of the Interim Payment: A reasonable proportion of the likely amount of the final judgment.**

[41] **Rule 17.6 (4)** provides:

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

[42] This realistically involves a preliminary assessment of the substantive claim, namely, the amount likely to be awarded if the claimant were to succeed at trial. But courts are expected, in consideration of the danger of overpayment, to err on the side of caution by choosing an amount at the bottom of the range.

[43] Zuckerman on **Civil Procedure 3<sup>rd</sup> ed**, summarizes the considerations to be evaluated by the Court in this exercise in the following way:

“The reasonableness of the amount of the interim payment will depend on a variety of factors, including the claimant’s chances of establishing his entitlement to the amount claimed, the likelihood that the defendant will be unable to recover from the claimant any overpayment, and the hardship that the defendant is likely to suffer from having to make immediate payment or from being unable to recover overpayment. Accordingly, the claimant’s impecuniosity tends to both strengthen the case for an interim payment, due to the claimant’s need, and weaken it, due to the increased risk that the defendant will be unable to recover overpayment. Much must therefore depend on the court’s confidence that the claimant will be able to recover the amount claimed.”

[44] Neil Andrews, the author of **Modern Civil Process: Judicial and Alternative Forms of Dispute** noted at page 78 that for the purposes of

considering what is a reasonable proportion of the final award, the Court can take account of the following factors:

“... (1) the strength of the claimant’s claim; (2) whether the claim has been admitted; (3) whether the defendant has made a Part 36 payment into Court, and the amount of that payment; (4) the interval which is likely to elapse between the date of the award and the trial or final disposal of the case; (5) whether the defendant can afford to pay; (6) whether the claimant has a pressing need for the money; (7) the likelihood of the defendant’s defences of contributory negligence and set-off succeeding in fact at trial; (8) the likely amount of final judgment; (9) the reasons why the claimant believes that the general conditions for awarding an interim payment are satisfied in the present case; (10) details of special damages and past and future loss, in actions for personal injury; ...”

### **The Injury Sustained**

[45] This Claimant has been diagnosed with soft tissue injuries to the neck and back, moderate to severe in nature. There was some initial symptomology in the shoulders (trapezius muscles). His last medical report (dated March 17<sup>th</sup>, 2017) stated that his injuries “seemed to have improved as much as they are likely to”. This Report noted however that “there is no role for surgery but analgesics, muscle relaxants and physiotherapy will be helpful in alleviating the symptoms”. Twelve (12) years after the injury the Claimant still displays symptomology. It is noted that the Claimant was away from work for one (1) month post-injury, and has remained in the same employment.

### **The Authorities**

## **Eeles v Cobham Hire Services Ltd [2009] EWCA Civ 204**

[46] This case is often cited as setting out the matters that the court should take into account when determining the amount of an interim payment. They include:

- (a) An assessment of the likely amount of the final judgment, leaving out of account the heads of future loss which the trial judge might wish to deal with by a periodical payments order;
- (b) Assessment should comprise only special damages to date and damages for pain, suffering and loss of amenity, with interest on both;
- (c) As the practice of awarding accommodation costs (including future running costs) as a lump sum was sufficiently well established, it would usually be appropriate to include accommodation costs in the expected capital award;
- (d) The assessment should be carried out on a conservative basis;
- (e) Save in certain circumstances, the interim payment would be a reasonable proportion of that assessment. A reasonable proportion may well be a high proportion.

[47] **Schott Kem Ltd v Bentley and others [1991] 1 Q.B. 61**. This case suggests that the Court should consider an application for an interim payment in two stages. In the first instance, the likelihood of the Claimant obtaining substantial damages on a balance of probabilities; and secondly, whether in its discretion it should order an interim payment that does not exceed “a reasonable proportion” of the damages the Claimant is likely to receive. See also (the other leading United Kingdom authority on this point) **Shanning**

**International Ltd v George Wimpey International Ltd [1988] 3 All ER  
475.**

**Conclusion and Disposal**

[48] The Claimant has satisfied the necessary procedural requirements (**Part 17.5, 17.6(1)(a)** (admission of liability), **17.6(1)(d)** (judgment at trial) **17.6(2)** (the defendant insured) for the grant of an interim payment.

[49] This Court must now determine if these are circumstances in which it should exercise its discretion.

[50] This accident occurred thirteen (13) years ago and it is clear that the Defendant accepted liability without a fuss and that the parties embarked on negotiations towards the amicable settlement of the matter. This Court has been made aware that some advancements have been made to the Claimant since the filing of this application under a Certificate of Urgency.

[51] The Claimant's damages with the exception of loss of future earnings (which in any event may not be sustainable in light of the questions raised by the 2017 report, and in light of the fact that the Claimant has submitted a claim for Devalued Position on the Labour Market), have been assessed and submitted to the Defendant. They have however not reached a settlement, and it appears to this Court (having observed the interaction of the parties) that the best course for this matter is an assessment by the Court.

[52] Subsequent to the filing of this application for an interim payment, counsel for the Claimant obtained an addendum to the main reports, which may have raised more questions than it settled, for example, the reference to a possible pre-existing condition, the unexplained gaps in the medical evidence submitted by the Claimant, *inter alia*. As is his right, the Defendant is putting the Claimant to the proof of his claim.

[53] It appears to this Court in light of the challenges evident in the medical evidence, that there is a real risk that if an interim payment is made in this matter the Defendant may be exposed to the risk that the eventual claim will be less than the sum or sums paid out: see **Spillman v Bradfield Riding Centre [2007] E.W.H.C. 89** cited by Cornelius J in **Electrical Sales and Services Ltd v Kenrick Hoyte (supra)**. In other words, the current circumstances lend themselves to the studied consideration of the risk that this Court could contravene **Part 17.6 (4)** (that the interim payment reflect a reasonable proportion of the likely final judgment).

[54] In the final analysis, this Court is persuaded that the best course of action in this matter is to err on the side of caution and to order an early trial in accordance with its authority under **Part 17.8** of the **CPR** which provides as follows:-

“17.8 On hearing any application under this **Part**, the Court may exercise any of its case management powers under **Parts 26** and

**27** and may in particular give directions for an early trial of the claim, or any part of the claim”.

[55] In view of the above, this Court orders as follows:-

- (a) That this matter be set down for case management on the 4<sup>th</sup> day of April, 2018;
- (b) That this matter be given an early trial date within one (1) month of the above.

**MARGARET A. REIFER**  
Judge of the High Court