

BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

No. 206 of 2014

BETWEEN

PAULETTE ATKINS

CLAIMANT

AND

ROGER BRATHWAITE

DEFENDANT

Before The Hon. Mr. Justice William Chandler, Judge of the High Court

Appearances:

Ms. Phedessa Walker, Attorney-at-Law for the Claimant

Mr. Leslie F. Haynes Q.C. in association with Mr. Leslie Roberts, Attorneys-at-Law for the Defendant

Decided on written submissions filed on behalf of the Claimant on 13 October 2014 and 21 April 2015 and written submissions filed on behalf of the Defendant on 06 March 2015

Date of Decision: 2016 July 13th

DECISION

The Application:

[1] The Claimant, by her application filed 30 May 2014, seeks *inter alia* an order that the Defendant pay the sum of \$150, 912.44 or such other sum as

the Court shall think just by way of an interim payment on account of the damages in respect of the Claimant's claim and that the costs of this application be costs in the cause.

The Grounds of the Application

[2] The grounds of the application are:

- a. The Defendant has admitted liability;
- b. If the action proceeds to trial the Claimant will recover substantial damages against the Defendant;
- c. The Defendant is insured in respect of the Claimant's claim and the insurer is well able to honour its financial obligations to the Claimant.

The Affidavit in Support

[3] The Claimant's affidavit in support of the application contains documentary evidence such as correspondence between the Claimant and United Insurance Company Limited (United), consultation with a Dr. Mukund Gundanna (Dr. Gundanna), receipts for medical treatment and medication as well as a schedule of expenses including those relating to the proposed overseas surgery.

[4] The Claimant deposed also that she required the payment to meet the expenses of recommended surgeries, medical treatment and daily living expenses since she had been reduced to half salary since 2013.

Background to the Application

[5] The brief facts are that on 18 September 2011 the Claimant sustained personal injuries as a result of a motor vehicle collision (the accident) caused by the Defendant's negligent driving. Sometime in 1997 the Claimant had also sustained personal injury, loss and damage in 1997 as a result whereof she filed a High Court action intituled CV 2025 of 1999 Paulette Atkins v Restonic Limited and Jonathan Sealy (the 1997 accident).

The Claim Form

[6] On 12 February 2014 the Claimant filed a claim form and statement of claim for personal injuries, loss and damage arising out of the accident. The Defendant filed an Acknowledgment of Service (Form 3) on 27 February 2014.

The Defence

[7] The defence filed 20 November 2014 admitted that the Defendant was the driver of the vehicle on the day in question. It made no admission with respect to the alleged negligence of the Defendant or the loss and damage occasioned by the Claimant. The Defendant denied that the significant

sacroiliac dysfunction, lumbar disc disease with primarily back pain and left trochanteric bursitis suffered by the Claimant were caused by the accident. The Defendant contended that the Claimant was involved in the 1997 accident and as a result whereof the Claimant suffered soft tissue injury to the neck and back with myofascial pain in the upper back, ever since that accident pain in the lower back has been constant. The Defendant alleged that these constituted underlying conditions.

- [8] It is further alleged that these previous underlying conditions and not the effects of the accident are and were at all relevant times the cause or contributed to the symptoms alleged to have occurred as a result on the 2011 accident. The Defendant relied upon the reports of Dr. Michael Wharton dated 18 January 2013 and Dr. Arthur Edghill dated 28 December 2011 and 25 May 2012.

The Correspondence

- [9] The Defendant was at all material times insured under a policy of insurance issued by United, which made several interim payments to the Claimant with respect to her medical expenses arising out of the accident. By letter dated 16 January 2014 (Ref: AA111930), United, through its servant or agent Ms. Tricia Hoyte of the Claims Department, advised the Claimant's Counsel Ms. Phedessa Walker:

“... that based on the details subsequently provided ... we are in a position to reimburse your client expenses totaling \$11,001.83.

As you are aware, Dr. Mukund Gundanna, in his note 23rd September, 2013 which we recently received, advised that your client had understood and agreed to the sacroiliac joint arthrodesis, which he was recommending... He suggested that the procedure be performed on the right side first “followed a couple of weeks later by the left side.”

Enclosed for your records are copies of Medical Reports dated 1st January, 2014 and 9th January, 2014 which were authored by Dr. Moseley and Dr. John Gill, respectively. **You will note that both Medical Practitioners have agreed that surgical intervention, namely the sacroiliac joint arthrodesis should be performed, in an attempt to alleviate your client’s pain.** You will note also that Dr. Gill has concurred with Dr. Gundanna’s recommendation for the procedure to be staged, that is for the procedure to be performed on one side first with the other side being worked on after a number of weeks.

At this stage, we have communicated our agreement to this procedure ... We noted that an estimate totaling USD 32, 632.86 “for one level” was prepared by Dr. Dee Gundanna. We have also noted that this is (sic) amount is not representative of the total funds which would have to be expended in pursuit of this option and we are therefore asking that you liaise with your client to obtain a full costing to include air and ground transportation and other related costs.” (emphasis mine)

[10] On 24th January 2014 (Ref: AA111930) United wrote Ms. Walker a letter, which stated:

“Subsequent to our letter dated 16th January, 2014, we have received some information, on the basis of which, we have decided to cancel our instructions relative to the proposed sacroiliac joint arthrodesis, at this stage. We will however proceed with issuing our cheque, in reimbursement of your client’s recently incurred expenses, as detailed by you in your letter dated 3rd December, 2013.

We confirm that we will be reverting to you with our final decision on the proposed procedure.” (emphasis mine)

The Insurers’ change in position triggered the Claimant’s filing of the application for interim payment on 30 May 2014 with supporting affidavit.

The Defendant's Application for Specific Disclosure

[11] On 20 June 2014 the Defendant filed an application for specific disclosure in response to the application for interim payment. The orders sought on the application are as follows:

- 1) The Claimant disclose to the Defendant within 7 days of this Order a list of documents which the Claimant has or has had control of specifically:
 - a) A list of documents which the Claimant has or has had control of specifically all medical reports obtained with respect to High Court Suit No. 2025/1999 between Paulette Atkins v Restonic Caribbean Limited & Jonathan Sealy; and
 - b) All claims for sickness benefit, disablement benefit or other disability grants submitted by the Claimant to the Director of National Insurance/the National Insurance Scheme since 1997.
- 2) The costs of and occasioned by this application be the Defendant's in any event.
- 3) Such further and other relief as this Honourable Court deems fit.

[12] **The grounds of the application are:**

1. The Claimant claims in the present matter that she sustained personal

injury, loss and damage as a result of a motor vehicle accident) (MVA) on September 18, 2011.

2. In her particulars of injury, the Claimant appended reports of Dr. Wharton of the FMH Emergency Medical Clinic, Ms. King, physiotherapist, Dr. Edghill, Dr. Moseley and Dr. Gundanna.
3. It can be gleaned from these appended reports that the Claimant:
 - a) Had been attending Dr. Moseley, Psychiatrist, for chronic pain syndrome following a MVA in 1997;
 - b) Had been assessed by Dr. Wharton as having sustained muscular spasm of the neck and back, right bicep tendinitis, left sacro-iliac dysfunction, left trochanteric bursitis, who concluded that her initial symptoms were consistent with the mechanism of the accident and represents an exacerbation of a pre-existing condition although it is extremely difficult to quantify the extent to which this accident contributed to the picture of chronic pain.
 - c) Has experienced severe low back pain, pain in the left lower limb, posterior neck pain and right shoulder pain. Dr. Edghill concluded that she gave a history of previous back injury with recurring bouts of low back pain, was involved in a MVA on September 18, 2011 and sustained neck, back and right shoulder

injuries leading to pain in the injured area. He formed the opinion that as a result of her 2011 accident, she (1) aggravated an old back injury and (2) suffered right-sided soft tissue neck injury.

d) Had been seeing Dr. Waterman since 2012 for chronic pain issues that had plagued her from the 1997 accident and pain symptoms became even more intolerable after her MVA on 18 September 2011. His differential diagnosis was possible pain generators from her sacroiliac joint, facet joint pathology and left trochanteric bursitis. He also assessed severe chronic pain.

e) Was assessed by Dr. Gundanna as having lumbar degenerative disc disease with primarily back pain as the issue with some significant sacroiliac pain and right leg radiculopathy.

4. The Claimant also has a suit pending with respect to an accident in 1997: *CV 2025 of 1999 Between Paulette Atkins, claimant and Restonic Caribbean Ltd., first defendant and Jonathon Sealy, second defendant*. In that claim, she alleges that she was involved in a MVA on December 3, 1997 as a result of which she sustained personal injury, loss and damage, namely:

- a) Soft tissue injury to neck and upper back;
- b) Myofascial pain on the upper back;
- c) Injury to the left shoulder;

d) Chronic pain.

5. There is an apparent overlap between the injuries and continuing symptoms alleged to have been sustained in the matter under consideration and the 1997 incident.
6. In order to consider any awards of damages for pain, suffering and loss of amenities as well as the period of compensation for other heads of general and special damages it is relevant for the Court to consider whether the claimant:
 - a) had no previous condition;
 - b) had previous conditions that were symptomatic; or
 - c) had previous conditions that were previously asymptomatic;
 - d) had a previous [sic] condition that was exacerbated by the present accident; and if so;
 - e) what period the symptoms were brought forward/accelerated by.
7. It is a general rule of liability that a tortfeasor should not be held responsible for any damage that he had not caused by his actions.
8. The Defendant has already advanced 8 interim payments and made reimbursements to the Claimant in the sum of \$139,789.21.
9. The Claimant's medical history dating back to the 1997 accident is therefore relevant to the divisibility of any damages allegedly caused by this accident.

10. The justice of the case will be served, avoiding any overlap or double-recovery as the case may be.

The Affidavit in Support of the Application for Specific Disclosure

[13] An affidavit, deposed to by John Chandler (Mr. Chandler), Assistant Claims Manager of United was filed in Support of the application. Mr. Chandler deposed that United had made several interim payments and indicated United's unwillingness to provide further monetary assistance until it receives the Claimant's pre-accident medical history (and pre-existing medical condition), which he argued will undoubtedly affect the amount of damages. He further deposed as follows:

“1. I ... am authorized to make this Affidavit on the Defendant's behalf which I do in opposition to the Claimant's application for an interim payment. I also make this affidavit in support of the Defendant's application for specific disclosure of the Claimant's pre-accident medical history.

2. On or about January 14, 2014, United agreed to the Claimant undergoing the proposed medical treatment in Texas, however also required a full costing of the proposed procedure in order to give the matter its full consideration.

3. To date, United has reimbursed the Claimant for expenses amounting to \$50,613.23. When this sum is combined with the costs we have paid for fees relating to her medical management, surgery, and physiotherapy sessions, our total expenditure in respect of the Claimant is \$139,789.21. Since the occurrence of the accident in September, 2011, United has demonstrated its willingness to settle this matter amicably and has satisfied all eight (8) previous requests for interim payments to the Claimant.

4. Subsequently, United discovered that the Claimant had not been forthright in her disclosure of her previous medical history. On January 24, 2014 about a week since its last letter, United informed the Claimant's attorney that it would cancel its instructions regarding the proposed procedure but would reimburse recently incurred expenses forwarded to its attention under cover of her attorney's letter of December 3, 2013.

...

10. There is an overlap between the injuries alleged to have been sustained in each accident.

11. I consider the Claimant's pre-accident history to be relevant to this matter as a finding as to the operative cause of her symptoms will affect damages...

12. The Claimant's existing claim against Restonic and Sealy itself reveals that she had sustained some injury that is relevant to the present proceedings. It is entirely possible that the Claimant's injuries from this action are divisible from her previous injuries and the Defendant should not be held responsible for any damage that he had not cause by his actions.

13. On that basis, the Claimant should make full disclosure of her pre-accident history." (emphasis mine)

...

The Claimant's Affidavit in Reply

[14] The Claimant filed an affidavit in reply to the application for interim payment/in support of the application for specific disclosure on 18 July 2014. It was the Claimant's evidence that she was truthful with respect to her previous medical history to ensure the smooth medical management of her claim. She referred to her assessed disability arising from the 1997 accident. Relevant portions of the Claimant's affidavit are reproduced below. She deposed:

“6...On 27th October 2011 at the Defendant’s request I consented to undergo an Independent Medical Examination with Dr. Arthur Edghill. I was examined by him on 27th October 2011 and I disclosed to Dr. Edghill that I had a motor vehicular accident in 1997 and more specifically the injuries to my lower back which I suffered with recurring bouts of lower back pain. I gave the doctor a full history of my pre-existing medical state. ...

7. Further, at my second assessment with Dr. Edghill he authored a medical report dated 25th May 2012 and concluded that I had exacerbated an old back injury and suffered soft tissue injury to my neck. **Dr. Edghill made specific mention of the findings of the MRI examination and specifically noted that “the Radiologist makes no mention of the Sacroiliac Joints, these joints are not examined by an MRI or the lumbar Sacral Spine.”**

...

14.... there is no denying that I have a claim in the High Court CV 2025 of 1999 Paulette Atkins v Restonic Limited and Jonathan Sealy. **I will say that from the 1997 case while I had intermittent bouts of back pain the 1997 accident never**

required me to be off work continuously for (2) two years. Conversely, following the 2011 accident I now have constant back pain to my sacroiliac joints, am unable to work or have any social life at all. My pain from 1997 never necessitated back surgery by way of (3) three surgeries as is the consequence of the 2011 accident, (one for which surgery was completed).

...

15. It is now 17 years since the 1997 accident and 3 years since the 2011 accident. But a 14 year period between the two accidents. **There is no medical evidence that would show that I needed any surgical intervention to address the intermittent flare ups of my back pain for the 1997 accident. ... I was referred to Mr. John Gill, Neurosurgeon and in his assessment I was not indicated to be a candidate for back surgery. Exercise was instead recommended.**

...

16....**I was never informed that I had any sacroiliac joint dysfunction from the 1997 accident.** Unlike the injuries suffered in the 1997 accident which permitted me to return to work, the

severe pain and suffering from 2011 accident has prevented me from returning to work...” (**emphasis mine**)

The Submissions

[14] The Claimant submitted liability was not in dispute and that the Claimant had complied with CPR 17.5 et seq. If the matter proceeded to trial the Claimant would receive an award in damages greater than the interim payment claimed. No figure was set for general damages but counsel relied upon *Oak v Biddlecombe* [1998] *Kemp & Kemp Vol 4 para H1-011* where an award equivalent to Bds \$192,131.55 was given and *McKenzie v Clarke* [2002] *Kemp & Kemp Vol 4 para H1-012* where the equivalent of Bds \$176,127.91 was awarded.

[15] Under loss of earnings she claimed \$5,322.60 for 27 months totaling \$143,710.20 to date of filing the submissions. Special damages of \$153,818.09 being the aggregate of \$147,578.68, \$3,239.41 for additional medical bills, \$12,000.00 accommodation for three months post-surgery and \$3,000.00 daily living expenses for three months. Disadvantage on the labour market and loss of congenial employment were left to be assessed.

Submissions on the Application for Specific Disclosure

[16] Counsel submitted that the Defendant had knowledge of the Claimant’s pre-existing medical history when she was assessed by a doctor of the

Defendants choice (Dr. Edghill) on two occasions as noted by the doctor in his report where he said “It is to be noted that she gives a history of previous back injury with recurring bouts of low back pain.”

[17] Counsel further submitted that:

- a. The Defendant had Dr. Edghill’s medical reports since 5 May 2012 before the Claimant underwent the first surgery.
- b. The Claimant underwent an MRI, which Dr. Edghill stated showed degenerative disease, which did not affect the nerves and was of no clinical significance.
- c. He suggested that X rays be conducted which he reviewed and agreed with the findings of Dr. Waterman and agreed that the Claimant should continue to follow Dr. Waterman’s recommendations.
- d. With reference to the allegation that there was overlap between the 1997 and 2011 injuries, counsel posed the question which doctor was in a position to give a definitive apportionment (counsel’s emphasis) as to what percentage should go to the 1997 accident and the 2011 accident?
- e. The Claimant had been forthright and had attended Dr. Edghill (who authored two reports) at the request of the Defendant. In one such report the Claimant gave a history of previous back pain with recurring bouts of lower back pain.

The Defendant's Submissions

[18] Mr. Haynes Q. C. submitted that the jurisdiction of the court was grounded in the CPR Part 17.6, which contained the conditions to be satisfied and the matters to be taken into account in making an interim award in respect of personal injury claims. He opined that the court had a discretion whether or not to make the award and that it was incumbent upon the Claimant procedurally to provide the necessary evidence. The Claimant had not stated the overall value of the claim and had not submitted a schedule of loss and expenses as required by Part 8 and the full picture of the Claimant's medical history was not before the court.

[19] He submitted that the Claim Form made no reference to any claim for what was being sought now to buttress a claim for loss of earnings, disadvantage on the labour market, loss of congenial employment and special damages which were not particularized except for one pay slip which was exhibited.

[20] He admitted that the precondition relative to insurance had been satisfied but that no quantum of damages had been submitted so that the court could conclude that a substantial award of damages may be awarded.

[21] The court must take into account any contributory negligence, relevant set off or counterclaim. He proffered that the first accident might be a concurrent cause of the Claimant's complaint and therefore a relevant

factor. He relied upon section 3(1) of the **Civil Liability (Contribution) Act Chapter 194B of the Laws of Barbados (the CLCA)**.

[22] There was, counsel further submitted, no evidence before the court as to what sum was likely to be awarded at trial and no evidence as to the reasonable proportion of damages after the set off and contributory negligence. He relied upon Kemp commentary 24-017 and 24-018, **Rowe v Dolman [2008] EWCA Civ 1040 (Rowe)** and **Tinsley v Sarkar [2004] EWCA Civ 1098 (Tinsley)**.

The Defendant's Submissions on Specific Disclosure

[23] Counsel referred to the CPR part 28.5 (1) et seq. and the criteria for disclosure orders under the CPR part 28.6 and submitted that the court must concern itself with whether the disclosure is directly relevant to the issues in dispute. The Claimant's past medical history related to causation and contributory negligence, which may affect the quantum of damages to be awarded.

[24] The claimant sustained damage, according to the claim form, to her "neck, back and hip", was diagnosed with (whiplash injury to my neck and back" and "pain syndrome). - paragraph 4 she has been assessed by Edghill in his first report of December 28, 2011 for "severe low back pain that varies in intensity. Pain radiates into the left hand and right lower limb. Posterior neck pain. Right

shoulder pain" (p.2) and that she in the current accident "sustained neck, back and right shoulder injuries leading to pain in the injured areas." (p.3). In his second report, p.3 he concludes that she "aggravated an old back injury" and "suffered right sided soft tissue neck injury".

[25] Counsel further submitted that it was interesting to note that to establish the alleged irrelevance of the 1997 accident to the present medical complaints, the claimant relies in her affidavit evidence on:

Reports of Mr. Seale, her orthopaedic surgeon, without appending his actual reports (presented as hearsay);

Affidavit of Cyrillene Thomas Mascoll in the concurrent proceedings against Restonic et al - Exhibit 6; and

Affidavit of Bernadette Donita Callender in the concurrent proceedings - Exhibit 7.

From the last of these, it is apparent that the defendant in that case threatened to make an application to strike out the claim against the claimant for want of prosecution and exhibits pre-trial review orders which in the context of the affidavit had not been complied with by the claimant. It is also clear that the complaint by the claimant of whiplash injury to her shoulder, radiating pain to her hand is not a new one. She had been previously assessed with bursitis after the first accident-

see BDC 6. BDC 9 reveals that the claimant was under care of not only Mr. Seale, but also a Spinal Surgery & Trauma specialist, Mr. A. Rao around June, 2009- prior to this accident.

The Claimant's Submissions in Response to the Defendant's Submissions

[26] Counsel submitted that the interim payment is an interlocutory remedy and ought not to preclude the application for an interim payment. She submitted that the issue of pre-existing injury could be disposed of at trial. If there is any reduction in damages it could be applied at trial. **Fryer v London Transport Executive, The Times December 4, 1982.**

The Issues

[27] The issues for the Court's determination are:

- i) Whether the Claimant has complied with the procedure under **CPR 17.5** to obtain an order for interim payment;
- ii) Whether the Claimant has satisfied the conditions found at **CPR 17.6** and therefore entitled to an order for interim payment by the Defendant; and
- iii) Whether the disclosure of the Claimant's medical history is a condition to be satisfied or a relevant consideration to be taken into account by the Court in determining if it should grant an order for interim payment.

The Law with Respect to Interim Payments

[15] **Part 17** of the **Supreme Court (Civil Procedure) Rules (CPR)** governs interim remedies. **Rule 17.1 (1) (h)** provides that the court may grant interim remedies including an order, referred to as an “order for interim payment”, under rule **17.5** for payment by a defendant on account of any damages, debt or other sum which the court may find the defendant liable to pay. Under rule **17.3**, an application for an interim remedy must be supported by evidence on affidavit, except in a case of extreme urgency where the interests of justice so demand.

[16] Rule **17.5** sets out the procedure for interim payments. The relevant portions are reproduced below. It reads:

“**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) ...

(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 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) ...”

[17] Rule **17.6** sets out the conditions to be satisfied in order for the court to make an order for an interim payment. **Rule 17.6** provides:

“(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) ...
 - 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) ...
- (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 insured in respect of the claim;**
- (3) ...
- (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**". (emphasis mine)

[18] In **Electric Sales and Services Limited v Hoyte Civil Appeal No. 8 of 2011 (decision of 31 January 2012)** an application heard under the Old Rules **Williams JA** pointed out that:

“The power of a 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 expenses and need funds to meet further expenses.”

[19] In the text, **Commonwealth Caribbean Civil Procedure**, 3rd ed., the authors state that:

“An interim payment is a payment in advance on account of any damages which a claimant may ultimately be awarded at the conclusion of the trial. The purpose of such a payment is to ensure that a claimant is not ‘kept out of his money’ for an unduly long period. Interim payments are particularly important in personal injuries and clinical negligence cases, since an injured person might be in urgent need of funds to lessen the burden imposed on relatives and others who may be caring for him, and to satisfy his regular financial commitments, such as mortgage or rent payments. In such circumstances, it would cause serious hardship if he were bound to wait until the conclusion of the trial, which might be many months away.”

[20] The case of **Hughes v Bascombe et al ANUHCV 116 of 2003 (decision of 30 October 2003)** is particularly instructive. **Hughes** concerned an

interlocutory application for an interim payment to be made to the claimant who claimed to have been injured (suffered a whip lash injury) in a traffic accident when her vehicle was involved in a collision with another, driven by the first defendant and owned by the Government of Antigua and Barbuda (the second defendant). The defendants denied that Ms. Hughes was entitled to an order for an interim payment.

[21] The facts were that the defendants were insured by State Insurance. After the accident, Ms. Hughes was directed by the defendants to make arrangements with the Claims Manager of State Insurance. She presented her claim to the insurance company. The Claims Manager authorized a doctor to conduct a medical examination and to forward the report and his bill to the insurance company. The insurance company did not inform Ms. Hughes that this intervention was without prejudice. In January of the following year, 2002, the doctor reported to the insurance company with his findings. He was again authorized to start therapy on Ms. Hughes and to send in his bill to State Insurance. In March, the doctor reported again to the insurance company recommending further orthopaedic attention. In April, the doctor reported again to the insurance company on her progress, and recommended an MRI scan and intermittent use of cervical traction.

- [22] By April, Ms. Hughes was pressing the insurance company for an interim payment to cover the costs of seeking overseas specialist treatment. In May, State Insurance made its first payment to Ms. Hughes of \$6,990.55 to cover her medical costs. Ms. Hughes received medical attention for a herniated disc, which was paid for by the funds advanced. Her pain from her injuries was not relieved and she pressed for more funds to cover her expenses. She was advised by the Claims Manager that she would be reimbursed when everything had been finalised.
- [23] On 18 July, State Insurance made another interim payment to her, this time of \$30,000.00. It classified this payment as “an interim payment.” At no time was either this payment or the earlier one expressed to be made without prejudice to the rights of the defendants to deny liability. She received further medical attention overseas, but did not receive full relief from her pain.
- [24] Between October and December 2002, her solicitor pressed State Insurance for a further interim payment, but none was forthcoming. By letter of 11 November, the defendants through their attorney confirmed that the defendants were committed to providing all interim urgent medical expenses prior to full settlement. However, the insurance company did not

advance any further monies. This state of affairs precipitated the suit and the application for an order for an interim payment was filed.

[25] **Mitchell J** identified one of the issues as whether the claimant had satisfied the procedural requirements found in the rules of the court entitling her to be given an order for an interim order by one of the defendants.

[26] It was contended on behalf of the Crown that the conditions in Part 17 (equivalent to the Barbados CPR) had not been met in that neither had a judgment been entered against the defendants, nor had they admitted liability, nor was it likely that if the claim went to trial Ms. Hughes would obtain a judgment. Further, it was not likely that she would obtain judgment for a substantial sum and that the action having been brought over two years after the accident there was a real likelihood that the defendants would successfully defend the claim. Moreover, the defendants denied that they admitted liability to pay damages and argued that State Insurance was never authorized by them to admit liability on their behalf.

[27] The court found that the defendants had authorized Ms. Hughes to make a claim at their insurer. The insurer negotiated payment of some of her medical expenses over an extended period of time. Additionally, the insurer made interim payments to her on account of her medical expenses.

None of these was done subject to any suggestion that it was without admission of liability and was in all the circumstances an unqualified admission of liability.

[28] **Mitchell J** held that the claimant had satisfied Part 17.6 and was entitled to an order for interim payment. He stated:

“[16] She has supported her application by an affidavit exhibiting the documentary evidence relied on. There is no complaint that she has not adequately stated her assessment of the amount of damages that are likely to be awarded. I am satisfied that if this action proceeded to trial, Ms. Hughes would obtain judgment for a substantial sum. The defendants are deemed for the reasons given above to have admitted Ms. Hughes claim so that if the matter went to trial she would inevitably succeed. Finally, the defendants, or one of them at least, the Crown, is a person of means and resources that are such as to enable them to make the interim payment. It is proper in this case for the Court to make an order for an interim payment, subject only to the resolution of the second issue below in Ms. Hughes’ favour.”

I. DISCUSSION

Issue 1 – Has the Claimant complied with CPR 17.5?

[29] The Claimant’s application was made 30 May 2014 subsequent to the Defendant entering an acknowledgment of service on 27 February 2014 and before the Defence was filed.

[30] The Claimant in the present case has supported her application by evidence on affidavit setting out the grounds of the application, exhibiting documentary evidence including a schedule of expenses. However, the

court observes that the Claimant has not stated the likely amount a court might award as damages or other monetary judgment.

Issue 2 – Whether the Claimant has satisfied CPR 17.6 conditions

CPR 17.6 (1) (a) – Admission of liability

- [31] Has the Defendant admitted liability to pay damages or some other money to the Claimant?
- [32] The Defendant's Insurer has made several payments to the Claimant. United stated that it paid to the Claimant the sum of \$139,789.21. (See: paragraph 3 of the affidavit of John Chandler, letter dated 16 January 2014 from United's Claims Manager advising of its position to reimburse the Claimant's expenses totaling \$11,001.83, letter dated 24 January 2014 from the Claims Manager indicating that United will proceed to issue a cheque for the Claimant's recently incurred expenses).
- [33] No submission was made by the Defendant that the Insurer was not authorized to make payments to the Claimant.
- [34] Further, neither the Defendant nor Insurer made submissions denying liability. Stated differently, the Defendant and United do not deny that they have admitted liability to pay damages. In fact it is the Insurers' position that disclosure of the Claimant's medical history will affect the amount of

damages likely to be awarded as distinct from affecting the issue of liability save and except for the use of contribution.

[35] The facts unequivocally show that Defendant's insurer paid most of the Claimant's medical expenses since the accident. According to Mr. Chandler's affidavit, United has paid \$139,789.21 for the Claimant's medical expenses including medical management, surgery and physiotherapy sessions. None of these payments were made subject to any suggestion that it was without admission of liability. Certainly this amounts to an unqualified admission of liability.

[36] Moreover, at page 3 of the Submissions in support of the application for disclosure filed 6 March 2015, Mr. Haynes QC affirms that the Claimant has satisfied the preconditions of liability and insurance.

[37] It is my opinion that this condition under CPR **17.6 (1) (a)** has been satisfied.

CPR 17.6 (1) (d) – the Claimant would obtain judgment at trial

[38] While it is noted that the Claimant has not submitted a quantum of damages, it must be pointed out that the amount sought for the interim payment as particularized in her Schedule of expenses relates only to special damages, in particular for the surgery she alleges that she so urgently/desperately needs in order to ameliorate the pain she continues to

endure. At this time, the Claimant has not sought damages under any other head of award (e.g. future care, loss of earnings, do-it-yourself) nor has she claimed general damages.

[39] The Defendant's insurer is mindful of the Claimant's medical condition as can be seen in the letter of 16 January 2014 where it relied on the assessment of the medical practitioners that "*surgical intervention should be performed in an attempt to alleviate your client's pain*". Therefore, there is no evidence amongst the doctors practicing in Barbados that the procedure for which the order for interim payment is sought is not a necessary course of treatment.

[40] The nature of the Claimant's injuries has precluded her from returning to work and presently the pain is of such degree that it is only managed until such time of surgical intervention.

[41] Further, there is no evidence or submission that she was negligent in sustaining her injuries. The Defendant is therefore fully liable or responsible for the Claimant's injuries.

[42] In all the circumstances, it appears that if the Claimant's claim went to trial she would obtain judgment against the Defendant for a substantial amount

of money. I am of the view that that this condition under **CPR 17.6 (1) (d)** has been satisfied.

CPR 17.6 (2) – Is the Defendant insured or a person of means and resources?

[43] Under rule 17.6(2), 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 or (c) a person whose means and resources are such as to enable that person to make the interim payment.

[44] In the present case, the facts clearly show that the Defendant is insured by United in respect of the claim. Further, no evidence has been adduced to show that his means and resources would enable him to make an interim payment.

CPR 17.6 (4) – the interim payment to reflect a reasonable proportion of the likely final judgment

[45] The law of tort provides that an award of damages ought to restore/place the person to the position he/she was in before he/she was affected by the tortfeasor's action (restitutio in integrum).

[46] The court must not order an interim payment of more than a reasonable proportion of the *likely amount* of the final judgment. As stated above, at this stage the total value of the claim has not been quantified. Mr. Haynes

Q.C. submitted that the Claimant had not complied with the CPR Part 17.5 since her counsel had not stated her assessment of the amount of damages or other monetary judgment that is likely to be awarded. The Claimant's Attorney-at-Law submitted cases on quantum giving a local equivalent on the sums awarded. Under other heads, she indicated that those heads were to be assessed in circumstances where the loss appeared to be ongoing. I am of the view that the Claimant complied with the general procedure for interim payments under the **CPR rule 17.5**.

[47] The interim relief sought represents the amount required to have the sacroiliac joints surgery (which the Claimant had previously agreed to), which has been quantified, and a figure given for attendant expenses. It is a species of special damages distinct from a situation where the claim is for a portion of the likely general damages which the Court might likely award and is recoverable in any event. The reasonableness of, and the necessity for, that specific outlay have not been challenged by the Defendant.

[48] I, therefore, reject Mr. Haynes Q.C.'s submissions on this point.

CPR 17.6 (5) – Contributory Negligence, Set-off/Counterclaim

The submissions with respect to these issues have already been outlined in this decision.

The Law

[49] **The CPR 17.6 (5)** provides that:

- (5) The court must take into account
 - (a) contributory negligence, where applicable; and
 - (b) any relevant set-off or counterclaim.

The CLCA provides as follows:

“Section 3. (1) Subject to this section, any person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage, whether jointly with him or otherwise.

(2) A person is entitled to recover contribution by virtue of subsection (1) notwithstanding that he has ceased to be liable in respect of the damage in question since the time when the damage occurred, if he was so liable immediately before he made or was ordered or agreed to make the payment in respect of which the contribution is sought.

(3) A person is liable to **make contribution** by virtue of subsection (1) notwithstanding that he has ceased to be liable in respect of the damage in question since the time when the damage occurred, unless he ceased to be liable by virtue of the expiry of a period of limitation or prescription which extinguished the right on which the claim against him in respect of the damage was based.

(4) A person who has made or agreed to make any payment in *bona fide* settlement or compromise of any claim made against him in respect of any damage, including a payment into court which has been accepted, is entitled to recover contribution under this section without regard to whether or not he himself is or ever was ever liable in respect of the damage provided however that he would have been liable assuming that the factual basis of the claim against him could be established.

(5) ...

(6) ...

4. (1) Subject to subsection: (3), in any proceedings for contribution under section 3; **the amount of contribution recoverable from any person shall be such as may be found by a court of competent jurisdiction to**

be just and equitable having regard to the extent of that person's responsibility for the damage in question". (emphasis added)

Issue 3 –Disclosure of the Claimant's Medical History

[50] The Defendant's application for specific disclosure is related to his submission relative to contributory negligence. He has also pleaded contributory negligence in his defence notwithstanding the interim payments, which have already been made. It appears that liability is not in dispute save and except to the extent of the contributory negligence claim.

[51] The Court's interpretation of Mr. Haynes Q.C.'s submission is that there is a challenge to or a query arising as to whether the Claimant's injuries or the full extent of those injuries arose from this accident or the previous or index accident as Counsel characterized it. The case with respect to the 1997 accident has not been completed. It seems to me that the argument for the Defendant is that, depending on the medical evidence, the Court may be asked to apportion liability between the tortfeasor in the 1997 case and the tortfeasor in the instant case. Such apportionment is based upon the issue of causation. This is relevant when regard is paid to the language of Section 4 of the **CLCA** above quoted. In other words, the issue is whether the 1997 accident is the operative cause or an operative cause of the Claimant's injuries and continuing loss and damage.

[52] I am of the view and hold that the fact that interim payments were made before is no bar to the Defendant raising this issue now. It may be inconvenient for the Claimant, however, the resolution of this issue has serious financial implications for the Defendant who will be called upon to pay the damages ultimately.

[53] The purpose of an order for interim payment is to ameliorate the suffering of a claimant until final determination of the matter. In this case the Claimant, has lost earnings and incurred medical expenses as a result of the motor vehicle collision caused by the Defendant's negligent driving. One important principle that must be borne in mind is the thin skull rule which provides that a tortfeasor must take his victim as he finds him. **Smith v Leech Brain [1962] 2 Q. B. 405**. Dr. Wharton concluded that her initial symptoms were consistent with the mechanism of the accident and represents an exacerbation of a pre-existing condition although he felt that it is extremely difficult to quantify the extent to which this accident contributed to the picture of chronic pain.

Conclusions

[54] The application for specific disclosure cannot be described as frivolous nor a mere attempt to delay the Claimant from obtaining the relief sought. It goes to the root of whether the medical intervention, which has been

suggested has been contributed to, by the tortfeasor in the 1997 case and whether the medical expenses are to be paid by the Defendant in the instant case or shared by the Defendant in the 1997 case.

[55] In my view, the disclosure of the Claimant's medical history is a matter to be taken into account by the Court in determining if it should grant an order for the interim payment. It falls squarely within the provision that the court must not order an interim payment of more than a reasonable proportion of the likely amount of the final judgment.

[56] I am also of the view and hold that the Claimant's medical history is also relevant to the issue of whether there is likely to be double recovery or overlap of damages.

[57] With reference to the allegation that there was overlap between the 1997 and 2011 injuries, counsel for the Claimant did not specifically deny that there was a possibility of overlap but posed the question which doctor was in a position to give a definitive apportionment as to what percentage should go to the 1997 accident and the 2011 accident?

[58] The answer to this question is not for the doctors but for the Court after hearing the testimony of the medical practitioners who attended the Claimant. (See section 4 of the **CLCA** above quoted).

- [59] It is my opinion that the Claimant has satisfied the conditions under **CPR 17.6 (1) (a) and (d)**.
- [60] I am of the view that an order for the interim payment to cover the Claimant's medical expenses, particularly the expenses connected to the sacroiliac joint arthrodesis surgery is not more than a reasonable proportion of the likely final judgment since it is separate and distinct from the general damages claimed.
- [61] I am of the further opinion that **Section 3** of the **CLCA** gives a right to the Defendant to recover contribution from the Defendants in the previous case if they so desire. The right to recover contribution from the Claimant could only exist if there was a pleading that she contributed to the accident and by extension to the injuries she suffered. This is a separate and distinct consideration from the issue of double recovery or overlap.
- [62] It is my opinion that the disclosure of the Claimant's medical history (sought by the Defendant) is a matter, which ought to be taken into account by the Court in determining if it should grant the order for interim payment sought. There is, however, medical evidence that the accident in the instant case caused or contributed to the Claimant's injuries for which the surgery is required.

[63] It has not been alleged that the Claimant is seeking to recover the cost of the surgery from the defendants in the previous case as well as the instant case. There is no issue of overlap or double recovery in relation to the expenses of the surgery. The right of the Defendant to pursue contribution from the Defendants in the previous case is available to the Defendant to pursue if he so desires. In these circumstances, the request for specific discovery ought not to defeat the application for the interim payment.

[64] I am also of the opinion that the Court should grant the Claimant the relief she seeks by making an order for an interim payment.

Disposal:

[65] In the circumstances, the Court orders:

1. That the application for the interim payment is granted and that the Defendant do pay the Claimant the sum of \$150, 912.44 on or before the 15th day of August 2016.
2. That the Claimant disclose to the Defendant within 21 days of this Order:
 - a) a list of documents which the Claimant has or has had control of specifically all medical reports obtained with respect to High Court Suit No. 2025/1999 between Paulette Atkins v Restonic Caribbean Limited & Jonathan Sealy;

- b) all claims for sickness benefit, disablement benefit or other disability grants submitted by the Claimant to the Director of National Insurance/the National Insurance Scheme since 1997;
- c) all medical records/records of all medical practitioners and physiotherapists and alternative health practitioners seen by the Claimant since 1997 and which documents, claim and/or records are not already in the possession of the Defendant.

By Consent

It is ordered that the Defendant provide to the Claimant a list of the documents which he has in his possession on or before 20th day of July 2016.

It is further ordered that:

3. The Claimant shall have the costs of her application to be assessed if not agreed.
4. The costs of the Defendant's application shall be the costs in the cause.
5. The Defendant has permission to appeal this decision.

William J. Chandler

High Court Judge