



[2020] JMSC Civ 53

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2011 HCV 04985

BETWEEN	DESMOND HEPBURN	CLAIMANT
AND	ATTORNEY GENERAL OF JAMAICA	DEFENDANT

IN CHAMBERS

Patrick Forrester along with Aisha Mulendwe and Karlene Afflick for the Claimant

Shaniel Hunter Holding for Deidre Pinnock Instructed by Director of State Proceedings for the Defendant

Heard: March 10, 2020 and April 2, 2020 (via teleconference)

Application for Interim Payment

T. HUTCHINSON, J (Ag.)

INTRODUCTION

[1] The Application before me was filed by the Claimant on the 12th of February 2019. It was supported by an Affidavit provided by the Claimant which was filed on the same date and the application outlines that two orders are sought, that is;

1. An order that the Defendant make interim payment of US \$2 million to assist and alleviate the suffering the Claimant continues to suffer experience;
2. That there be such further order and/or relief as may be just.

The grounds on which the orders are sought are as follows

1. Rule 17.6 of the CPR provides for interim payments where necessary.
2. The Defendant against whom the order is sought is(sic) resources are such as to enable an interim payment.
3. The Defendant against whom the order is sought indirectly admitted liability from the said accident.
4. If the claim went to trial, the Claimant would obtain judgment against the Defendant.

[2] In relation to grounds 3 and 4 on the day of the hearing of this application Judgment by Admission on the grounds of negligence was entered against the Defendant.

BACKGROUND

[3] The background to this application is that the Claimant who is a Jamaican national but resides in New York, USA was visiting Jamaica on the 25th of April 2008. On that particular day he was a passenger in a motor vehicle which was being driven by another along the roadway in the community of Settlement in St Catherine. The vehicle was in the process of exiting this community onto the Old Harbour Road way when its path was blocked by 3 SUV.

[4] The driver of the vehicle in which the Claimant was travelling came to a stop after which he sought to reverse and drive away. At the point when this manoeuvre was being attempted a Corporal Dwight Swaby alighted from one of the SUVs and shots were fired during which the Claimant was shot in the face. He was rushed to the Spanish Town Hospital where he was treated. The preliminary diagnosis of the attending Physician Dr. Hugh Bernard was that he had sustained a gunshot wound to the right eye with loss of vision in same. This was borne out in a medical report attached to his Particulars of Claim which was subsequently filed in this matter.

- [5] On the 10th of August 2011, a Claim Form and Particulars of Claim were filed in this matter seeking damages against the Attorney General of Jamaica for the actions of the police office in question. The Particulars of Claim had a number of documents attached to include medical reports and receipts one of which is the medical from Dr. Bernard which has been referred to above.
- [6] A number of requests for information were filed by the Defendant and on the 19th of June 2012 a Defence was filed in which it was indicated inter alia that the officer had been acting with reasonable and probable cause in discharging his firearm at the vehicle as same had been speeding towards him and he acted for his own safety.
- [7] On the 8th of March 2019 an amended Claim Form and Particulars of Claim was filed but this was later replaced by a Further Amended Claim Form and Particulars which was filed with the permission of the Court on the 18th of October 2019. On the 14th of November 2019 a Further Amended Defence was filed in which certain concessions were made at paragraphs 10 and 12 of that document which laid the foundation for Judgment to be entered by admission.

LAW

- [8] In the decision of Christopher Cunningham V Dubulin Ewan etal [2019] JMSC Civ 39 an interim Payment was defined by Rattray J as a payment made in advance on account of any damages that a Claimant may be awarded at the end of a trial. He noted that the purpose of such a payment is to prevent hardship and prejudice to the Claimant by ensuring that he/she is not kept out his/her money for any long period, particularly in respect of personal injury claims.
- [9] In the text A Practical Approach to Civil Procedure, 9th edition by Stuart Sime it was observed as follows:-

“Orders for interim payments] are likely to be made in claims where it appears that the claimant will achieve at least some success, and where it would be unjust to delay, until after the trial, payment of the money to which

the claimant appears to be entitled. The purpose behind this procedure is to alleviate the hardship that may otherwise be suffered by claimants who may have to wait substantial periods of time before they recover any damages in respect of wrongs they may have suffered."

- [10] The claimants' application relies on Rule 17.6(1)(d) of the CPR which sets out the circumstances in which the court may an order for interim payment. It states:-

"The court may make an order for an interim payment only if:- except where paragraph (3) applies, it is satisfied that, if the claim went to trial, the claimant would obtain judgment against the defendant from whom an order for interim payment is sought for a substantial amount of money or for costs;"

- [11] This is subject to rule 17.6(2) which states:-

"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. The court may make an order for an interim payment only if it is satisfied that...if the claim went to trial the claimant would obtain judgment against the defendant from whom an order for interim payment is sought for a substantial amount of money or for costs"

- [12] In ***Phyllis Anderson v Windell Rankine*** (unreported), Supreme Court, Jamaica, ***Claim No. 2006 HCV 05105***, F. Williams J, as he then was, stated the principles in respect of an Interim Payment pursuant to Rule 17.6 (d) of the CPR as follows:

- "(i) For a claimant to successfully apply for an interim payment, he/she must satisfy a court that he/she will likely win the case against the defendant.*
- (ii) The standard by which that must be done is the civil standard (i.e. proof on a balance of probabilities), but such proof must be effected at the higher end of that scale.*
- (iii) It is expected that such applications will only succeed where the claimant has a very strong claim and where his/her action is likely to be easy to establish. Establishing a "mere" prima facie case will not be enough.*
- (iv) Where the competing contentions on the part of the claimant and the defendant are, on the pleadings, of equal weight, and nothing emerges at that stage to "tilt the balance", such an application will likely fail.*
- (v) Even where the claimant might be able to establish a ground for the making of an interim payment, the court still retains a discretion in*

deciding whether or not such a payment should be made (see Blackstone's Civil Practice, 2008 (page 456, para 36.14)."

- [13] Ordinarily for the Claimant to succeed on an Interim Payment Application, he must therefore satisfy the Court that if his claim went to trial, he would obtain judgment against the First Defendant. In the instant matter however Judgment by Admission on the grounds of negligence was entered against the Defendant by consent on the 10th of March 2020.
- [14] In ***Larson Higgins v MT Tajin [2014] JMSC Civ 83*** additional guidance was provided by Simmons J as to the Court's approach to an interim payment where she stated thus;
- [15] Awards of Interim payments have been described as being intended to "tide over plaintiffs who have lost earnings and incurred medical and other expenses while the slow process of litigation unwinds".(McGregor on Damages 16th ed para 1527)
- Having made this pronouncement, she went on to observe;
- [16] There is however no requirement for a claimant to prove need per ***Stringman v McCardle*** [1994] 1 W.L.R. 1653. It is a payment on account of the compensation the claimant is likely to be awarded by the court.

CLAIMANT'S SUBMISSIONS

- [17] In putting forward his submissions Mr. Forrester began by highlighting the personal circumstances of his client. He indicated that the Claimant has suffered hardship as he has been sent back to resume sessions with the psychiatrist which was an added expense. He also urged the Court to take into account the fact that the Claimant is from the United States which is a different economy and as such any award would have to bear this in mind.
- [18] Counsel also referred the Court to the local decision of ***Latoya Brown v AG [2015]*** in which the Claimant had lost sight in both eyes having been struck in the head

by a bullet and an award of \$45 million was awarded for general damages in May 2015.

- [19] Counsel also made reference to and relied on 3 authorities from the United States, specifically ***Fresco v E72nd St Condominium 2003 NY Slip 19821 delivered December 23, 2003*** in which an award for US\$2 million was awarded for past pain and suffering, US \$2 million for future pain and suffering for 38 years and US \$125,000 for future medical expenses was made.
- [20] It was observed by the Appellate Court that the award for future medical expenses should be reduced as agreed and it was also noted that the awards of past and future pain and suffering deviated materially from what is reasonable compensation under the circumstances. In that situation the Plaintiff was injured in the eye when a nail bounced upwards while he was hammering same.
- [21] The 2nd authority cited was ***Villaseca v City of New York 2008 NY Slip 01002 delivered February 5th, 2008*** in which the Plaintiff was awarded US\$2 million and \$6 million for past and future pain and suffering, \$2,300,000 for future lost earnings and \$100,000 for future medical expenses. In that situation school door was suddenly slammed against the side of the teacher's head(Plaintiff) which resulted in a detached retina of the right eye and eventual loss of vision in that eye. It was noted by the Appellate Court however that the damages were excessive and \$3 million stated for future pain and suffering, \$1,802,466 for lost earnings, \$21,000 for future medical expenses.
- [22] The final authority relied on was ***CSR America Inc etal v Robert Kukes etal*** a decision from the Supreme Court of Nevada. In that decision an award had been made for a global sum of \$3,700,600 which was distributed as follows, \$1,250,000 for past pain and suffering, \$98,000 for past medical expenses, \$33,600 past wage loss, \$125,000 future medical loss. In that situation, the Plaintiff was hit in the eye by a golf club and lost vision in same as a result. The award for past medical and lost wages was amended to reflect the documentary proof provided.

- [23] Counsel also referred to and relied on the contents of the Affidavit of the Claimant as well as the exhibits attached which set out his medical expenses, loss of earnings, future medical expenses among other items. It also outlined the view of the Claimant that US \$2 million would be required to put him in as good a condition as if damage had not occurred.
- [24] This figure was based on an expected award of general damages in the amount of US \$6.3 million given that the injury had resulted in 19% PPD and this amount would be required to cover pain and suffering and his continued healthcare and survival in the US. The sum of just over US\$1.3 million for loss of earnings, special damages of US\$46,696.15 and JA\$56,100 were also put forward in addition to other expenses for retraining to meet the job market and replacement of prosthesis. In respect of the sum for loss of wages, this was based on a loss of US\$78,000 for April 2008 to October 2010 at US\$720 per week post tax as an assistant electrician and US \$1,284,000 at US\$156,000 per year from October 2010 to February 2019 as a qualified electrician.
- [25] In his amplified submissions however Mr. Forrester indicated that the Claimant was prepared to accept an interim of US\$500,000 at the prevailing rate of exchange which he accepted was JA 126.69 to US\$1 on the day of the hearing, as they were not going to trial. He also indicated that the Claimant was prepared to take that sum to cover medical expenses and lost wages up to date of application.

DEFENDANT'S SUBMISSIONS

- [26] In written submissions which were provided to the Court, Ms. Pinnock indicated that the Defendant by its defence had admitted liability for damages for negligence and was prepared to enter judgment by admission. She also made reference to the provision of Rule 17.6(4).
- [27] Counsel also indicated that there was no dispute that the Claimant was entitled to Special Damages in the sum of JA \$75,078 and US \$39,273.48. In relation to

General Damages and the reference to the decision of CSR America ***Inc v Kukes etal***, Counsel submitted that the sum of US\$1,250,000 for general damages was to be shared between the two Plaintiffs. She also observed that as the case was decided outside of Jamaica it is not persuasive if there is a local case which had settled the point on this issue.

[28] In support of this position she made reference to the decision of ***Linden Palmer etal v Neville Walker etal*** where there being no precedents on blindness in Jamaica James J relied on the guidance of Wright J in ***Winston Barr v Bryad Engineering Company Ltd etal*** S.C.C.A. 45 AND 48/85 where he stated;

“But I think that where justice demands in this case, where the required guide cannot be found in awards of the same jurisdiction or in a locality then recourse should be made to such source as will aid the court in coming to a just and fair conclusion.”

[29] Ms Pinnock then referred the Court to 3 authorities the first being ***Roxanne Peart (bnf Venice Peart) [2017] JMSC Civ 60*** where the Claimant lost vision in the left eye as a result of being stabbed in the eye with a pencil. The award for pain and suffering was \$3,500,000 which Counsel submitted updated to \$3,887,588.80.

[30] The second authority is ***Bertrand Cagan v Edward Ramsay C191/96*** the Claimant was a passenger in a motor vehicle which plunged into a gully. He received head injuries including a fracture of the left orbit the award was \$800,000 which updated to \$4,097,709.83

[31] The third authority is ***Ruel Ellis v Tristan Wiggins 2007HCV04918*** the Claimant's was a passenger in a motor vehicle which was involved in a 3 car collision as a result of this he lost his right eye and had to get a prosthesis. He sustained injuries to his face, knee and leg. The award was \$3,500,000 which updated to \$5,533,876.63.

[32] It was submitted by Ms Pinnock that in light of these authorities and the fact that his injuries were not as serious as these persons it is more likely than not that the award of the Court for general damages would be \$5 million.

- [33]** In relation to the Claimant's assertion of loss of income the Defendant submits that the Claimant would only be entitled to an award for his loss of income for 17 weeks in the period between the 28th of April 2008 and the 29th of August 2008 when he was out of work as a result of surgery to the eye. This amount was stated to be US\$12,200 to which the Jamaica income tax rate was applied to reduce the sum to US\$9,165. No offer was made for the period thereafter on the basis that the Claimant had a duty to mitigate his loss and could have sought alternative employment in another field.
- [34]** For future medical care in the absence of all medical reports and experts the proposed figure is US\$14,400. It was submitted by the Defendant that the award that the Claimant would likely receive would amount to JA\$5,075,078 and US\$62,838.48 which equates to JA\$8,532,208.81 the global sum being \$13,607,208.81. Counsel also submitted that bearing in mind that the Claimant resides outside of the jurisdiction and if an overpayment is made recovery will be challenging the interim award should be no more than JA\$5 million.

ANALYSIS AND DISCUSSION

- [35]** It is settled law that in order to receive an interim payment, the claimant must prove, on a balance of probabilities, that he would obtain judgment for a substantial amount of money or for costs. In this regard Rule 17.5(5) of the CPR stipulates that the affidavit in support of the application must, among other things, state the claimant's assessment of the amount of damages or other monetary judgment that is likely to be awarded.
- [36]** The claimant's affidavit sworn to on February 12, 2019 indicates at paragraph 19 that damages will likely be assessed for more than US six million, three hundred thousand dollars (US \$6,300,000).
- [37]** At paragraph 13 of his affidavit the Claimant set out medical expenses incurred that he would wish to have taken care of immediately in the sum of US \$5,471 and JA\$43,600, receipts have been exhibited in to order to substantiate that sum. He

also outlined a payment made to his caregiver in the sum of US\$2100 and a letter from her in receipt of this payment has been attached and I am satisfied that these sums were spent by the claimant.

- [38]** At paragraph 28 he makes reference to the sessions with Dr. Noah a clinical psychologist and produced invoices which show that between 2013 and 2014 his sessions incurred a cost of US\$9,000, in 2015 \$US\$8,600 and in 2016 US\$9,200. The report from the doctor also outlines that he had been diagnosed as suffering from PTSD which was associated with the trauma suffered in April 2008. I have reviewed the documents and I am satisfied on a balance of probabilities that this sum was incurred in association with the treatment being provided for PTSD.
- [39]** In paragraphs 7 and 8 of said affidavit the Claimant's earnings are outlined and he has exhibited a letter from his previous employers Doumas Electric Inc indicating that he had worked with them and had earned US\$720 per week. It also outlines that he was unable to work from the 28th of April 2008 to the 29th of August 2008 and had to be let go on the 27th of March 2009 as he was no longer able to perform his duties satisfactorily due to his injury. In relation to the salary that he would have earned from October 2010 when he would have come out of apprenticeship he has not provided any documentation at this stage.
- [40]** The medical report from Dr. Noah, the clinical psychologist which has been attached at DH10 outlined that the Claimant had had returned to his old job but had been unable to perform and as a result personal and professional networks were used to find alternative employment most of which had been part time and temporary. It is clear from this report as well as his affidavit that the Claimant had in fact sought to mitigate his losses by seeking after employment but those that were obtained were not of a permanent nature.
- [41]** The Claim for lost wages is divided into 2 portions the first spans the period up to September 2010 and the second from October 2010 onwards. In light of the fact that he had been employed by Doumas Electrical from July 2006 and had only

been let go in March 2009 because he was no longer able to perform his job, I am satisfied on a balance of probabilities that his employment would likely have continued certainly until the end of his apprenticeship in September 2010 and his earning would have been in the range of US \$78,000 and an award would likely have been made for this sum and not only for the 17 weeks during which he would have been recuperating.

- [42] Where loss of earnings from October 2010 to the date of this affidavit and future loss of earnings would be concerned, insufficient information has been provided at this stage and I am unable to make a determination as to the award that would be likely be made in respect of same.
- [43] Where general damages for pain and suffering and loss of amenities is concerned Mr. Forrester has relied on the American authorities which have already been referred to above as well as the Latoya Brown decision. In respect of the American authorities, I agree with and adopt the dicta of Wright J in ***Winston Barr v Bryad Engineering*** which was also cited with approval by James J in ***Linden Palmer v Neville Walker et al.*** In light of this given that there are already local decisions on this area, I will be considering these cases in coming to a conclusion on the amount to be awarded by way of interim payment.
- [44] In examining the decision of Latoya Brown, Mr. Forrester highlighted the fact that the injury was similar and sustained in similar circumstances. In addition to losing her vision, that claimant also suffered what appeared to be PTSD which has been asserted in the instant claim. In that authority the Learned Judge reviewed the decision of ***Owen Small v United Estates Ltd*** a decision delivered March 1998 in which the Claimant lost sight in both eyes having been burnt by chemicals. The award for pain and suffering and loss of amenities was \$7,000,000 which updated in May 2015 (CPI 221.5) to \$33,394,357.10. Reference was also made **to Linden Palmer v Neville Walker et al** where the 59-year-old Deputy Commissioner lost sight in both eyes as a result of a motor vehicle accident. The judgment was

delivered March 1997 and an award of \$8,000,000 was made for general damages which updated in May 2015 to \$41,428,005.62.

- [45] In coming to his decision in ***Latoya Brown v The Attorney General***, the Learned Judge took into consideration the age of the Claimant and the fact that she was now left in complete darkness and as a result of her youth would suffer the 'blight occasioned by her disability' for longer than the Claimant in Linden Palmer. In the instant matter, I note that this Claimant is older and has not suffered a complete loss of vision.
- [46] In respect of the decision of ***Cagan v Ramsay*** which has been referred to by Counsel for the Defendant, that situation was markedly different as even though the Claimant reported having dark vision at times he did not suffer a complete loss of sight in either eyes. The doctor's finding was impairment of visual acuity. When the CPI for February 2020 of 269.5 was applied this sum indexed upward to \$4,154,142.58.
- [47] In relation to Peart v Thomas, the Claimant sustained the loss of vision in one eye and also suffered PTSD. The Court having considered her injury, her age and PTSD made an award of \$3.5 million and \$500,000 for the PTSD. Applying the CPI for February 2020 this award for general damages indexes upward to \$3,941,704 and that for PTSD indexes upward to \$563,100.71.
- [48] In ***Ruel Ellis v Tristan Wiggins etal*** the award in December 2010 for very similar injuries was \$3.5 million. Applying the CPI for February 2020 this figure indexes upward to \$5,610,909.
- [49] I have also considered the decision of ***Audley Gilbert v AG [2017] JMSC Civ 165*** a judgment delivered in November 2017 where an award of \$5 million was made for general damages in circumstances where an inmate had suffered a complete loss of vision in one eye after being hit in same by a correctional officer. This amount would index upward to \$5,448,847.

CONCLUSION

[50] Based on the foregoing, I have concluded that the claimant would obtain judgment for a substantial sum. I note however that Rule 17.6 (4) of the CPR states: "The court must not order an interim payment of more than a reasonable proportion of the likely amount of final judgment." This rule requires the court to adopt a cautious approach in order to avoid overpaying a claimant. This was recognised in **Schott Kern Ltd v Bentley and Others** [1991] 1 QB 61, 74B by Neill LJ. The principle was summarized by Smith L J in **Stringman v McArdle** as follows: -

"Therefore what the court is concerned with in fixing the quantum is that it does not exceed a reasonable proportion of the damages which in the opinion of the court are likely to be recovered"

[51] Based on the foregoing, I am of the view that an interim payment in the sum of eight million five hundred thousand dollars is appropriate.

[52] In the circumstances it is ordered that: -

1. An interim payment in the sum of \$8 million five hundred thousand be made to the claimant;
2. The said sum is to be paid to an account the details of which are to provide by the Claimant's Attorney to Counsel at the Director of State Proceedings.
3. The hearing for the Assessment of Damages is scheduled for the 15th of July 2021 for 1 day at 10am.
4. Case Management Conference is scheduled for the 3rd of November 2020 at 12 noon for 1 hour.
5. Claimant's Attorney to prepare, file and serve order herein.