

**COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
COMMON LAW AND EQUITY DIVISION**

2016/CLE/gen/01424

BETWEEN

YVONNE RAHMING

Plaintiff

AND

(1) SUPER VALUE FOOD STORES LIMITED

First Defendant

AND

(2) FRANCISCO FRANCOIS

Second Defendant

Before: The Honourable Madam Justice Indra H. Charles

Appearances: Mr. Rhyan A.A. Elliott of Gail Lockhart-Charles & Co. for the Plaintiff
Mr. Kahlil Parker and Ms. Roberta Quant of Cedric L. Parker & Co. for the Defendants

Hearing Date: 27 March 2017

Practice and Procedure – Negligence – Personal injuries - Interim payment - Whether court entitled to have regard to how payment proposed to be spent - Whether payment to be ordered - Contributory negligence – Evidential burden

The Plaintiff brought this action against the Defendants claiming general and special damages for negligence. She alleged that she was struck from behind at the back of her right heel by a manual forklift which was being operated by the Second Defendant, an employee, servant or agent of the First Defendant whilst browsing grocery items and produce for purchase at the First Defendant's supermarket. The Defendants alleged that the accident was caused wholly or in part by the Plaintiff's own negligence in that she walked into the forklift and, among other things, she failed to keep a proper lookout.

The Plaintiff applied for interim payment on a multiplicity of grounds including (i) that, in the event that the action proceeded to trial on the issue of liability, she will likely obtain judgment against the Defendants without any or any substantial reduction of the damages for fault on her part; (ii) the First Defendant's means and resources are such that it is able to make the interim payment sought and (iii) the Plaintiff is currently experiencing extreme financial and emotional hardships as a result of the injuries.

The Defendants argued that in order for the Plaintiff to obtain an interim payment under Order 29 Rule 10, the Plaintiff must demonstrate a real need for the interim payment and she has failed to meet that threshold requirement.

HELD, making an award for interim payment of \$10,000;

1. On an application for interim payment under Order 29 Rule 10, the Plaintiff is not required to demonstrate a particular need beyond the general need to be paid her damages as soon as is reasonably possible and the Court should not, when considering whether to order such a payment, investigate how the money is to be used. *Stringman (A Minor) v Mcardle* [1994] 1 WLR 1653 and *Cobham Hire Services Ltd v Eeles (by his mother and litigation friend Eeles)* [2009] EWCA 204 applied.
2. On an application for interim payment, there is an evidential burden on the defendant to put before the Court material raising the issue of contributory negligence. In this case, the Defendants have not discharged that burden as the affidavit of Kimberley Hope cannot be relied upon as it contains inadmissible evidence: *Smith v Bailey* (2014) EWCA 2569 (Q.B.) relied upon.
3. In determining the amount of interim payment, the Court must assess the likely amount of final judgment leaving out of account the heads of future loss. In other words, the assessment should comprise only of special damages to date and damages for pain, suffering and loss of amenity, with interest on both.

RULING

CHARLES J:

Introduction

[1] By Summons filed on 16 November 2016, the Plaintiff (“Mrs. Rahming”) seeks an order for an interim payment pursuant to Order 29, Rule 10 of the Rules of the Supreme Court, 1978 (“RSC”).

[2] The Defendants opposed the application on the ground that Mrs. Rahming has not shown a real need for the interim payment. They say that the application ought to be dismissed since it failed to meet that criterion.

Brief facts

[3] Mrs. Rahming claimed against the Defendants general and special damages for negligence as a result of an accident that took place on 15 March 2016 at Super Value Food Store situate at East Street and Robinson Road in New Providence.

Mrs. Rahming said that she was struck from behind at the back of her right heel by a manual forklift which was, at the time, being operated by the Second Defendant (“Mr. Francois”), an employee, servant or agent of the First Defendant (“Super Value”). She alleged that the accident occurred whilst she was browsing grocery items and produce for purchase as a patron at Super Value. She next alleged that, as a result of the accident, she suffered soft tissue injuries and rupture to her Achilles Tendon.

[4] In its Defence, filed on 28 November, 2016, Super Value alleged that the accident was caused wholly or in part by Mrs. Rahming's own negligence in that she walked into the forklift; failed to be aware of her surroundings, failed to move out of the way of the forklift, failed to observe the presence of the forklift and failed to keep any or any proper lookout.

[5] In his Defence, filed on 16 March, 2017, Mr. Francois alleged that the accident was caused wholly or in part by Mrs. Rahming's own negligence. He next alleged that Mrs. Rahming failed to heed his warning and walked back into the forklift (which he alleged was stationary), failed to be aware of her surroundings, failed to observe the presence of the forklift and failed to keep any or any proper lookout.

[6] Mrs. Rahming averred that, as a result of her injuries, she was unable to carry out many of her daily activities and had incurred numerous expenses, including significant maid and transportation expenses. Moreover, she was required to take out a consumer loan in the amount of \$3,000 at an interest rate of 8.75% to assist her in the payment of these expenses.

Applicable legal principles

[7] It is not disputed that the Court has jurisdiction to make an order for interim payment. The power to do so is to be found in section 22 (1) of the Supreme Court Act, Chapter 53 which provides:

“As regards proceedings pending in the Court, provision may be made by rules of court enabling the Court in such circumstances as may be

specified to make an order requiring a party to the proceedings to make an interim payment of such amount as may be specified in the order whether by payment into court or (if the order so provides) by payment to another party to the proceedings.”

- [8] The procedure upon an application for an interim payment is governed by O 29, r 9 to 17 of the RSC. O 29 r 9 defines "interim payment" as follows:

“Interim payment”, in relation to a defendant, means a payment on account of any damages in respect of personal injuries to the plaintiff or any other person or in respect of a person’s death which that defendant may be held liable to pay to or for the benefit of the plaintiff; any reference to the plaintiff or defendant includes a reference to any person who, for the purpose of the proceedings, acts as next friend to the plaintiff or guardian of the defendant. (Emphasis added)

- [9] An interim payment is a form of interim relief by which one party may be ordered to pay a sum of money to the other or into court during the pendency of the proceedings. It is not restricted to a payment on account of a plaintiff's special damages proved at the date of such an application. Indeed, an interim payment can and ought to be made to take account of a reasonable proportion of the general damages for pain, suffering and loss of amenity expected to be recovered by a plaintiff.

- [10] O 29, r 10 and 11 provide that an application for interim payment may be made at any time after the Writ has been served on the defendant and after the time limited for the defendant to enter an appearance has expired. The application must be made by Summons, stating the grounds on which it is made. The application must also be supported by an affidavit (i) verifying the special damages, if any, claimed by the plaintiff up to the date of the application; (ii) exhibiting the hospital and medical reports, if any, relied upon by the plaintiff and (iii) if the plaintiff's claim is made under the Fatal Accidents Act, contains the particulars stipulated in section 9 thereof (which is inapplicable in the present case).

- [11] Once the Court is satisfied that an application for an interim payment is brought in compliance with the procedural requirements prescribed by O 29, r 10 and 11,

the Court then considers whether it should go on to exercise its discretion to grant an interim payment.

[12] In determining whether to exercise its discretion to grant an interim payment, the Court must consider the provisions of O 29, r 12(c), which states as follows:

“If, on the hearing of an application under rule 10, the Court is satisfied —

(a)

(b)

(c) that, if the action proceeded to trial, the plaintiff would succeed in the action on the question of liability without any substantial reduction of the damages for fault on his part or on the part of any person in respect of whose injury or death the plaintiff's claim arises and would obtain judgment for damages against the respondent or, where there are two or more defendants, against any of them, the Court MAY, if it thinks fit and subject to paragraph (2), order the respondent to make an interim payment of such amount as it thinks just, not exceeding a reasonable proportion of the damages which in the opinion of the Court are likely to be recovered by the plaintiff.” [Emphasis added]

[13] The word “satisfied” in this context means that the Court, on the evidence currently before it, has formed the view that, on a balance of probabilities, the plaintiff will succeed at trial. The rule allows an order to be made against the particular defendant in relation to whom the Court is “satisfied”. It also applies both to claims in which there is one defendant and in which there is more than one defendant. The Court must not order interim payment of more than a reasonable proportion of the likely amount of the final judgment. The Court must take into account any contributory negligence.

[14] O 29 r 12(c) is discretionary. The Court “may” make an order. The Court can take into consideration the defendant’s means when deciding whether or not to exercise the discretion: **Jones v Tower Hamlets** (May 1996, unreported, CA and **British and Commonwealth Holdings Plc v Quadrex Holdings Inc** [1989] 3 All ER 492).

[15] There is no requirement that a Plaintiff seeking an order for an interim payment to show need or prejudice in order to found jurisdiction for a Court to grant an interim payment: see **Schott Kem Ltd v Bentley** [1991] 1 QB 61 and **Stringman**

v McArdle [1994] 1 WLR 1653. The case of **Cobham Hire Services Ltd v Eeles (by his mother and litigation friend Eeles)** [2009] EWCA 204, relied upon by the Defendants does not support their proposition that a plaintiff has to show a real need. At paragraph 4 of the judgment, Smith LJ said:

“Before making an order, the court would not necessarily need to enquire as to what the Claimant intended to do with the interim payment: Stringman v McArdle [1994] 1 WLR 1653. If of full age and capacity, the Claimant would be entitled to do with it what he wished...Nonetheless, Claimants often wished to explain why they wanted a particular sum at the time....”(Emphasis added).

[16] Learned Counsel Mr. Parker relied on paragraph 45 which is inapplicable. Paragraph 43 is apposite. Smith LJ stated:

“The judge’s first task is to assess 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 PPO. Strictly speaking, the assessment should comprise only special damages to date and damages for pain, suffering and loss of amenity, with interest on both....The assessment should be carried out on a conservative basis....the interim payment will be a reasonable proportion of that assessment. A reasonable proportion may well be a high proportion, provided that the assessment has been conservative. The objective is not to keep the Claimant out of his money but to avoid any risk of over-payment.”

[17] It is on these legal principles that I will deal with the application for interim payment.

Grounds for the application

[18] Mrs. Rahming's application for an interim payment is made on the following grounds:

- a) The Defendants have no defence to the Plaintiff's claim on the issue of liability;
- b) The Plaintiff has lost significant avenues of revenue as a result of her injuries and has been forced to take out a loan incurring interest in order to cover her medical expenses;

- c) That having regard to (1) the nature of the injuries involved; (2) the need for additional physical therapy and medical treatment; and (3) the Court calendar; the assessment of damages hearing is not likely to be heard and determined in the very near future;
- d) In the event this action proceeded to trial on the issue of liability, the Plaintiff will likely obtain Judgment against the Defendants without any or any substantial reduction of the damages for fault on her part;
- e) The Defendants' means and resources are such that they are able to make the Interim Payment sought by the Plaintiff and
- f) The Plaintiff is currently experiencing extreme financial and emotional hardships and difficulties as a result of her injuries.

Contributory negligence

[19] In the present case, the Defendants' respective defences seek to raise the issue of contributory negligence in circumstances where, it is undisputed that, Mrs. Rahming was struck from behind with the forklift being operated by Mr. Francois and Super Value is insured by NAGICO Insurances (Bahamas) Limited. It is also undisputed that Mr. Francois was, at all material times, an employee, servant or agent of Super Value and, as such, it is alleged that Super Value is vicariously liable for the negligence of Mr. Francois through his actions during the course of his employment.

[20] Learned Counsel Mr. Elliott submitted that the Defendants are entitled to raise contributory negligence in an effort to persuade the Court that, if the action proceeded to trial, the Plaintiff would **not** succeed in the action on the question of liability, without any substantial reduction of the damages for fault on her part, as is required under O 29, r 12.

[21] He next submitted that, it is however, just as plain that, the Defendants are constrained to place before the Court material in the form of admissible evidence

in order to raise contributory negligence to enable the Court to consider the same upon an application for an interim payment. In this regard, learned Counsel relied on **Smith v Bailey** [2014] EWHC 2569 (QB). Popplewell J held at para 8, as follows:

"The legal and evidential burden of proving contributory negligence at trial is on the defendant. On an interim payment application, there is an evidential burden on the defendant to put before the court material raising an issue of contributory negligence. The task of the court is to apply the relevant legal test to the evidence before it. There may be cases in which such material can not reasonably be expected to be available to a defendant at the time of the application, but this is not one of them."
[Emphasis added]

[22] I agree with Mr. Elliott that while the Defendants have sought to raise the issue of contributory negligence in their respective defences, they have failed to discharge the evidential burden since the affidavit of Ms. Kimberley Hope cannot be relied upon as it contains inadmissible evidence.

Special Damages

[23] Learned Counsel Mr. Elliott submitted that Mrs. Rahming's claim for special damages is set out on an item-by-item basis and is particularized at great length in the Statement of Claim endorsed in the Writ of Summons filed on 18 October 2016. Furthermore, Mrs. Rahming's claim for special damages is set out on an item-by-item basis particularized in great detail (at the request of the Defendants) in the Answer to Request for Further and Better Particulars of the Statement of Claim, filed on 14 February 2017.

[24] Mr. Elliott submitted that Mrs. Rahming has reasonably verified her claim for special damages up to the date of the application (16 November 2016), in accordance with the provisions of O 29, r 11(1)(a) by demonstrating that her claim for special damages is true, accurate and justified in the evidence throughout her affidavit (*YR paragraphs 21 - 24 and pages 70 - 84*) and in the documentary evidence exchanged with the Defendants throughout the extensive course of correspondence and negotiations during these proceedings (which said

documents are in the possession of the Defendants and their Counsel).

[25] Mr. Elliott next submitted that any claim that Mrs. Rahming has not done so is disingenuous. On the other hand, learned Counsel Mr. Parker submitted that even though Mrs. Rahming submitted receipts for special damages, the Defendants requested Further and Better Particulars in order to assess the legitimacy and reasonableness of the purported claims which she has failed to do.

[26] Be that as it may, on the date of this hearing, a bundle of documents was presented to Mr. Parker and the Court and so learned Counsel was able to challenge the documents for legitimacy and/or unreasonableness which he forcibly did.

Amount of Interim payment

[27] The Court must be satisfied that Mrs. Rahming would succeed in the action on the question of liability **without any substantial reduction of the damages for fault on her part**. The Court must also be satisfied that Mrs. Rahming would obtain judgment for a substantial amount at trial. The term “substantial” means different amounts in different situations and the real need of Mrs. Rahming may be taken into consideration in this context.

[28] In determining an amount of interim payment, the Court must firstly assess the likely amount of final judgment leaving out of account the heads of future loss. In other words, the assessment should comprise only of special damages to date and damages for pain, suffering and loss of amenity, with interest on both.

[29] Mrs. Rahming alleged that she suffered orthopedic and soft tissue injuries and rupture to her Achilles Tendon (“the injury”). Using **The Judicial College Guidelines, 13th Edition**, I am of the view that the appropriate guideline for the assessment of damages in respect of Mrs. Rahming's pain, suffering and loss of amenity is the category listed at Chapter 7, Orthopedic Injuries, Paragraph (O) -

Achilles Tendon under the heading (c) – Moderate which reads as follows:
"Cases involving partial rupture or significant injury to the tendon."

- [30] On the medical evidence before the Court, it appears that Mrs. Rahming suffered a partial rupture of the Achilles Tendon. Awards for such injuries range between £10,530 and £17,600 (\$13,303.60 to \$22,235.84 using a multiplier of 1.26, which was the daily conversion rate from Pounds Sterling to Bahamian Dollars on 25 January, 2017).
- [31] Mrs. Rahming's claim for special damages amounts to \$8,841.55. Learned Counsel for the Defendants, Mr. Parker trenchantly challenged all of the invoices: see paragraphs 12 to 16 of his written submissions. If I understood Mr. Parker correctly, he opined that special damages should only be approximately \$5,000 considering that the Court finds the consumer loan in the amount of \$3,000 to be reasonable.
- [32] It goes without saying that, as a result of the accident, Mrs. Rahming would have suffered pain. At paragraph 12 of her affidavit, she alleged that, in the hopes of alleviating the pain and expediting her return to work, she began physiotherapy classes, as prescribed by Dr. Bowe.
- [33] Mrs. Rahming has also exhibited the hospital and medical reports relied upon in support of the application, in accordance with the provisions of Order 29, Rule 11(1)(b). Learned Counsel Mr. Elliott submitted that the total expected award of damages which is likely to be awarded at trial will range between \$22,145 and \$31,077.39. He argued that, in the circumstances, Mrs. Rahming should receive 50% of the total damages as an interim payment representing special damages, pain, suffering and loss of amenities. She seeks an award between \$11,072.50 to \$15,538.70 (representing a reduction of 50% of the range of damages likely to be awarded) or such other amount, as the Court sees fit.

Resources of First Defendant

[34] O 29 r 12 (2)(c) refers expressly to a consideration of the resources of the defendant in the context of person injury claims. Learned Counsel Mr. Elliott submitted that the Court ought to consider the fact that the Defendants are insured and, therefore, there can be no valid argument that any irremediable harm would be caused to them.

Conclusion

[35] In the exercise of my discretionary power, I will make an award of \$10,000 to Mrs. Rahming as an interim payment. This amount is to be paid by 17 November 2017. Mrs. Rahming will also have the costs associated with this application to be taxed if not agreed.

Dated 10th day of November A.D., 2017

**Indra H. Charles
JUSTICE**