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IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION



No. IHQ19/0093

Neutral Citation Number: [2019] EWHC 1297 (QB)

Royal Courts of Justice

Thursday, 7 March 2019

Before:

MR JUSTICE MARTIN SPENCER

B E T W E E N :

FARRINGTON

Claimant

- and -

MENZIES-HAINES

Respondent

MR. N. HILLIER (instructed by Anthony Gold) appeared on behalf of the Claimant.

MS. R. JONES QC (instructed by Keoghs) appeared on behalf of the Respondent.

J U D G M E N T

MR. JUSTICE MARTIN SPENCER:

- 1 This is an application for a further interim payment by the claimant arising out of a road traffic accident on 8 January 2016 when the claimant's motorcycle was in collision with a motorcar being driven by the defendant out of a junction and across the claimant's path.
- 2 Primary liability has been admitted but there remains an issue in relation to contributory negligence in that it is the defendant's case that the claimant was travelling too fast and, in particular, at a speed of approximately fifty-three miles per hour in a zone governed by a forty mile per hour speed limit and, therefore, he bears some part of the blame for this accident.
- 3 Judgment has been entered on behalf of the claimant on the basis of admission of primary liability and admission that some significant injury has been incurred by the claimant, but at the trial, which is scheduled to take place in a window between May and July 2020, not only will the issue of contributory negligence fall to be decided but also issues of causation in the sense that there is a dispute as to precisely what damage and injuries attributable to the accident have resulted.
- 4 What is not in dispute is that in the accident the claimant sustained a mild to moderate brain injury: so much is accepted by, for example, the defendant's neurologist, and that injury appeared in the initial imaging, and I refer to Dr. Cockerell's report where he concedes the brain injury. However, subsequent imaging has shown that there has been significant recovery of the claimant's brain, such that it is now the defendant's position that insofar as the claimant has continuing problems, these are not the result of direct organic brain injury. Indeed, it appears to be the claimant's case that the ongoing problems are principally attributable to psychiatric and psychological problems rather than direct organic brain injury.
- 5 In the initial stages, the defendant's insurers were content to fund rehabilitation, but in early 2018, their approach to the issue of rehabilitation changed and in correspondence with the defendant's solicitors, it was made clear that the defendants were no longer comfortable that the approach to rehabilitation pursuant to the rehabilitation code was appropriate.
- 6 In a letter of 19 February 2018, the solicitors wrote:

"The provision of case management and rehabilitation has been entered into, in good faith, by our insurer client and we must express that they are very close to pulling funding under the rehabilitation code. We are struggling to see how the MDT [Multidisciplinary team] meeting on 5 March can be as effective as it should be without Dr. Shotbolt [or another neuropsychiatrist taking the lead] being present. There needs to be some proper direction from somewhere to manage the effectiveness of his regime. In our view, the meeting on 5 March needs to be postponed and be rearranged for a suitable time when Dr. Shotbolt is present. Perhaps the newly instructed case manager will be able to address this as an urgent issue and actually look at developing a rehabilitation regime that is going to offer the support workers guidance on how to help Jose as best they can and provide smart goals for Jose to aim for and achieve."

7 In a further letter of 16 March 2018, the solicitors for the defendant wrote:

"Faith has been lost in the case management regime to date and LV are not prepared to issue an interim payment in the sum of £100,000 and no further voluntary interim payments will be made. We understand you will, no doubt, take steps to issue proceedings and make an application for an interim. We are instructed to accept service. As for funding, LV are prepared to continue funding for matters for the time being under the rehab code as agreed previously, but you may take the view that it will be easier to cut ties in that regard and for further future case management and rehab to be controlled unilaterally by yourselves. We also accept that we will not be invited to attend MDT meetings in future with this approach."

8 Finally, in relation to the correspondence, on 17 May 2018 the defendant's solicitors wrote, "LV have instructed us to confirm they no longer wish to proceed to fund case management and rehabilitation under the rehab code." In that letter, the defendant's solicitors were critical of the support worker provision that had been provided, the lack of structure or goals in relation to the rehabilitation, the general poverty of the regime and management for the claimant and the fact that the support workers were turning a blind eye to the claimant's consumption of cannabis. The solicitors indicated that all funding from then on would be under the control of the deputy. They stated:

"In addition, the defendant will wish to raise arguments regarding the standard of care, case management and support offered to Jose in line with the decision in *Loughlin v Singh & Ors* [2013] EWHC 1641 (QB). Elements of the past provision to date, particularly the support worker provision will be subject to such arguments."

9 Thus it was, that from early 2018 the defendant flagged up their severe reservations at the rehabilitation and care regime which had been put in place and was then being implemented. Until September 2018, interim payments had been made in the sum of £140,025 but given the refusal of the defendant to make any further interim payments voluntarily, an application was made on 18 September 2018 to this court for a further interim payment, and £120,000 was ordered by Nicklin J. The sum sought was £250,000.

10 I have not seen a transcript of the decision of Nicklin J, but I understand that the award was made on a relatively rough and ready basis, principally because the claimant at that stage was running out of funds. There certainly does not appear to have been a reasoned analysis of the calculation in accordance with *Eeles v Cobham* [2010] 1 WLR 409, whereby a trial date is identified and a calculation of the likely award of general damages, past loss and capitalised future loss, such as accommodation, was made so that the court could aware a reasonable proportion thereof.

11 I do understand that it was either assumed or accepted by Nicklin J that the figure for general damages would be in the region of £100,000 and I assume that he built on that figure in reaching the interim payment which he did.

12 In any event, the parties accept that nothing decided by Nicklin J binds me today and I should approach the matter afresh, not least because the evidence which has been adduced before me is significantly different to that which was before the court on the previous occasion.

13 Before considering the detail of the application, I remind myself of the principles to be applied which were usefully summarised by Popplewell J in *Smith v Bailey* [2014] EWHC 2569 (QB) at para.19 where he said:

"It is convenient to set out the principles which I take to be established by *Eeles* and the previous authorities which it sought to summarise:

- (1) CPR r.25.7(4) places a cap on the maximum amount which it is open to the Court to order by way of interim payment, being no more than a reasonable proportion of the likely amount of the final judgment.
- (2) In determining the likely amount of the final judgment, the Court should make its assessment on a conservative basis; having done so, the reasonable proportion awarded may be a high proportion of that figure.
- (3) This reflects the objective of an award of an interim payment, which is to ensure that the claimant is not kept out of money to which he is entitled, whilst avoiding any risk of an overpayment.
- (4) The likely amount of a final judgment is that which will be awarded as a capital sum, not the capitalised value of a periodical payment order ("PPO").
- (5) The Court must be careful not to fetter the discretion of the trial judge to deal with future losses by way of periodical payments rather than a capital award.
- (6) The Court must also be careful not to establish a *status quo* in the claimant's way of life which might have the effect of inhibiting the trial judge's freedom of decision, a danger described in *Campbell v Mylchreest* as creating "an unlevel playing field".
- (7) Accordingly, the first stage is to make the assessment in relation to heads of loss which the trial judge is bound to award as a capital sum, leaving out of account heads of future loss which the trial judge might wish to deal with by a periodical payment order. These are, strictly speaking:
 - (a) general damages for pain, suffering and loss of amenity;
 - (b) past losses (taken at the predicted date of the trial rather than the interim payment hearing);
 - (c) interest on these sums.
- (8) For this part of the process the Court need not normally have regard to what the claimant intends to do with the money. If he is of full age and capacity, he may spend it as he will; if not, expenditure will be controlled by the Court of Protection. Nevertheless, if the use to which the interim payment is to be put would or might have the effect of inhibiting the trial judge's freedom of decision by creating an unlevel playing field, that remains a relevant consideration. It is not, however, a conclusive consideration: it is a factor in the discretion, and may be outweighed by the consideration that the Claimant is free to spend his damages awarded at trial as he wishes, and the amount here being considered is simply payment at the earliest reasonable opportunity of damages to which the Claimant is entitled: *Campbell v Mylchreest* [1999] PIQR Q17.
- (9) The Court may in addition include elements of future loss in its assessment of the likely amount of the final judgment if but only if –
 - (a) it has a high degree of confidence that the trial judge will award them by way of a capital sum, and
 - (b) there is a real need for the interim payment requested in advance of trial.
- (10) Accommodation costs are usually to be included within the assessment at stage one because it is "very common indeed" for accommodation costs to be awarded as a lump sum, even including those elements which relate to future running costs."

- 14 With those principles in mind, the further sum sought on account of damages today is £450,000 which, in addition to the £260,000 already received, would make a total interim payment of £710,025. If that sum is to be awarded, I need to be satisfied that within CPR 25.7(4) that is a reasonable proportion of the likely amount of the final judgment, not taking into account under *Eeles I* future heads of loss which may be amenable to periodical payment orders.
- 15 For the claimant, Mr. Hillier submits that I should assume that the figure of past loss and general damages will be approximately £900,000 on a conservative estimate and that therefore, a high proportion of that figure can be taken, namely ninety per cent, which would justify interim payments of £815,000. He therefore submits that the sum now sought is well within the principle of *Eeles I*.
- 16 A significant proportion of that sum consists of sum £26,000 per month in relation to the rehabilitation regime, which includes care and case management, and which is presently in place. He has, in fact, taken his calculations to the end of 2019 which is only a ten-month period so that the figure he puts forward in that respect is £260,000 being £26,000 for ten months. This he adds to the presently pleaded past losses calculated to February 2019 in the present draft schedule of loss, which is in the sum of £545,000. That sum is itself comprised of significant sums in relation to past rehabilitation costs and also deputyship fees which are to date in the region of £126,000.
- 17 Mr. Hillier acknowledges that the vast majority of these past costs are disputed, in that the defendant has only admitted the sum of £8,500 in relation to past losses, but he asks the court to accept that the basis of dispute is likely to be decided in the claimant's favour, namely that the need for the expenditure has arisen since the accident and as a result of the accident.
- 18 In particular, Mr. Hillier relies on the evidence of Dr. Toone, the neuropsychiatrist instructed on behalf of the claimant and his report of 6 February 2019, where Dr. Toone says at para.187:

"It is my view that it is behavioural as much as, if not more, than cognitive difficulties that present the greatest barrier to his recovery. It is likely that he has developed a dysexecutive syndrome secondary to frontal lobe damage, and it is this that is most likely to hinder his rehabilitation."

In relation to attribution, he says:

"It should be noted that in spite of a difficult childhood and adolescence, Mr. Farrington had, at the time of the material accident achieved a fairly stable lifestyle. He had acquired occupational training, regular full-time employment and a stable marital relationship. It seems very likely that but for the material accident, this lifestyle and working pattern would have continued."

- 19 As far as the prognosis is concerned, he says at para.193:

"This is difficult to determine at present. Much will depend upon how Mr. Farrington responds to rehabilitation. Cases of dysexecutive syndrome are notoriously difficult to rehabilitate. The combination of social and sexual disinhibition, aggression, poor impulse control and lack of insight makes it difficult

for such individuals to engage in treatment and renders them vulnerable to untoward incidents. It might be necessary to reassess him in six to nine months' time."

- 20 Thus, says, Mr. Hillier, the evidence of Dr. Toone establishes the necessary causal connection between the claimant's current condition and inability to function, and the index accident. He refers to the predominant features of the claimant's post-accident presentation having been his personality change, exhibited in poor temper control, intolerance, disinhibited behaviour, tangential speech, rigid thinking, all features which are commonly observed in cases of traumatic brain injury.
- 21 For the defendant, Ms. Rhiannon Jones, QC, submits that there are significant problems with the evidence of Dr. Toone, such that the court should not assume that his attribution will be accepted. In particular, she criticises the fact that nowhere in his report does Dr. Toone refer to the claimant's excessive consumption of cannabis and the potential role which that plays in the claimant's presenting condition. She submits that this is significant when Dr. Toone's report is compared and contrasted to that of Dr. Robin Jacobson to which I will refer in due course.
- 22 In addition, it seems to me that there are some further problems arising from Dr. Toone's report. Principally, that at present, he speaks with a lone voice in suggesting that the claimant's problems are all attributable to dysexecutive function.
- 23 The claimant has produced a number of reports from Dr. Nicholas Leng, a neuropsychologist who first reported in September 2016 and whose second report is dated 30 November 2018. Dr. Leng did not have Dr. Toone's report available when he reported in 2018, and it remains to be seen whether Dr. Toone's causation pathway is one which Dr. Leng supports.
- 24 It is however noticeable that Dr. Leng has not himself reached a similar conclusion to that reached by Dr. Toone in his reports so far. This is surprising if Dr. Toone's analysis is correct, given that the diagnosis of dysexecutive function and the consequences of that in terms of behaviour are more matters for neuropsychology than neuropsychiatry.
- 25 Dr. Jacobson's report is a long one, but Ms. Jones has referred me to p.10 of that report where Dr. Jacobson discusses two hypotheses in relation to attribution, *vis-à-vis* the index event. Hypothesis 1 assumes four matters: -
1. That the claimant is an accurate historian and is as disabled as is reported.
 2. That there have been no major life events other than marital breakdown since the index event.
 3. That there was no onset or escalation in 2017 of heavy cannabis use following a period of abstinence since the age of twenty-four, twenty-five. That is several years before the index accident.
 4. There is continuity of cognitive and behavioural problems from the index event through the eighteen months of work to the late deterioration.
- 26 With these assumptions, he acknowledges that the index event probably caused the diagnosis which he has listed and probably contributed to the marital breakdown.
- 27 The second hypothesis assumes that those assumptions are incorrect and that there was, in fact, a severe life event in 2017, for example, the loss of considerable funds in Ecuador and the onset or escalation of cannabis use. In this second hypothesis, the index event probably

caused cognitive and behavioural problems which had largely recovered during the period of work, the late deterioration on that hypothesis is probably due to a life event and cannabis use and would probably have happened in any event. He acknowledges that in this scenario, it is difficult to explain the late deterioration and apparent need for twenty-four-hour care in terms of the direct consequences of the index event. Considering which of those hypothesis is more likely he says:

"Given the claimant's unreliability, the possibility of conscious exaggeration, the lack of clarity about certain key facts and the late onset of deterioration, I am unable to confirm hypothesis one and on present evidence, support hypothesis two."

- 28 On that basis, Ms. Jones submits that there is a significant chance that at the trial of this matter the court, accepting Dr. Jacobson's evidence in preference to Dr. Toone's, will conclude that there is no causal connection between the vast majority of the damages claimed by the claimant in the schedule of loss, including the past losses, and that the claim will, effectively, fail in terms of causation. If that argument is correct, then it is self-evident that the claimant has received more by way of interim payments than he is entitled to already.
- 29 Ms. Jones' submissions do not end there though. She also submits that the court cannot assume, as submitted by Mr. Hillier, that the past losses pleaded in February 2019 in the sum of £545,000 or anything like that sum will be established, whether on a conservative basis or on any basis. She submits that the loss of earnings claimed in the sum of £66,000 will be entirely disputed on the basis that the claimant told Mr. Nixon that he had purchased a caravan before the accident in order to quit his job and go travelling, so that there is a real issue over whether he would have continued to work in any event. More importantly, it will be the defendant's contention that he has been fit for work since February 2016 in any event.
- 30 She makes submissions in relation to the reason for the claimant stopping work being unclear on the basis that the claimant has given various accounts for stopping work but none of them attribute that to his psychological problems arising from the accident. The sum also includes some £31,000 for gratuitous care which, again, she indicates will be strongly contested. Conceding only a figure of just under £2,500.
- 31 The largest component is for professional care in the sum of just under £174,000. She points out that the professional care claimed commenced in January 2018, two years after the accident, but no professional care had been required in the previous two years and the opposition to the sum was flagged up in the correspondence to which I have already referred. Equally, the case management costs of just under £63,000 will be challenged on the basis that they are disputed on causation grounds and the quantum is manifestly excessive. She challenges the vast majority of the other claims as well but, in particular, the figure of £152,000 claimed for Court of Protection fees.
- 32 She submits that the basis for Dr. Toone asserting that the claimant lacked capacity was the loss of monies invested in a waterpark in Ecuador, indicating a lack of reasonable control over his impulsive spending which she said, if true, would support Dr. Jacobson's attribution of the deterioration in late 2017 to a life event.
- 33 However, evidence has been adduced on behalf of the claimant which suggests that the loss of money to Ecuador was, in fact ,only £2,000 and occurred before the index accident and she submits if that is true, then there is a basis to challenge Dr. Toone's opinion that the

claimant lacked capacity being based upon a false premise and, in those circumstances, the Court of Protection fees should not have been incurred.

- 34 In any event, and in addition, she submits that the level of Court of Protection fees is, again, manifestly excessive and she contrasts the £150,000-odd claimed with the level of deputyship costs incurred in the first year set out at p.289 of facts and figures, 2018/19 edition, which gives a total of some £32,570 for the first year.
- 35 Mr. Hillier responds by pointing out that this was an exceptionally difficult case for the Deputy given the psychological problems which had been demonstrated by the claimant which had manifested themselves, amongst other things, in his antagonism to successive case managers and the need for the Deputy, therefore, to adopt a much more hands-on approach than would normally be the case.
- 36 In my judgment, the answer to this application lies in the principle set out in *Eeles v Cobham* and reiterated by Popplewell J in *Smith v Bailey*, namely that the objective of an award of interim payment is to ensure that the claimant is not kept out of his money to which he is entitled, whilst avoiding, "any risk of an overpayment".
- 37 Thus, where there are genuine and substantive challenges to causation, in my judgment the court cannot award damages by assuming, whether on the balance of probabilities or otherwise, that the causation issues will be decided in favour of the claimant. This is not least because otherwise interim payment applications would run the risk of turning into mini trials of causation at an early stage and without the court hearing the necessary evidence it would need to hear in order to decide such issues.
- 38 The approach to interim payments is informed by Part 25.7 of the Civil Procedure Rules which under sub-para.1 confines the circumstances in which an order for interim payment can be made to where either the defendant has admitted liability to pay damages or some other sum of money, or the claimant has obtained judgment against that defendant for damages to be assessed, or the court is satisfied that if the claim went to trial, the claimant would obtain judgment for a substantial amount of money.
- 39 The implication of this, is that the assumption where an interim payment is sought is that liability having been admitted or judgment having been entered, issues of causation are, by and large, resolved and all that remains is the quantification of the loss. However, it is sometimes the case that because some damage has been admitted and primary liability is admitted as here, the claimant is able to enter judgment but leaving over to the assessment of damages, significant areas of dispute in relation to causation. Which is the situation in this case.
- 40 In my judgment, Part 25.7 is not intended to cover situations where significant issues of causation remain at large. The court cannot assume, for example under 25.7(1)(c) that the claimant will obtain judgment for a substantial amount of money if, because causation is disputed, the defendant is contending that the amount which will be recovered is not substantial at all, as here.
- 41 There is and remains such a significant gap between what the claimant is seeking and what the defendant is conceding that were I to accede to this application, there would be a real risk of an overpayment. Even that states the position too highly in favour of the claimant, because it is not just a real risk that needs to be avoided, but within the authority of *Eeles v Cobham* any risk which needs to be avoided.

42 In those circumstances, I regret that I must conclude that the application for a further interim payment has not been made out and it is therefore dismissed.

CERTIFICATE

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This transcript has been approved by the Judge