ROYAL COURT
(Samedi Division) 16.

24th January, 1996.

Before: The Deputy Bailiff and Jurats Myles and Vibert.

Between:	W.	Plaintiff
And:	A. Ltd *en désastre*	First Defendant
And:	S. Ltd	Second Defendant

(The names of the parties are withheld in order to comply with the provisions of Rule 7A/6 of the Royal Court Rules 1992, as amended).

Advocate S. Slater for the Plaintiff.
Advocate J. Martin for the Defendants.

JUDGMENT

THE DEPUTY BAILIFF: This is an interlocutory application by the plaintiff in a claim for personal injuries to have an interim payment made on account of damages.

The accident occurred on 6th October, 1991. The Order of Justice was signed on 4th July, 1994 and the case was called before Court on 15th July, 1994. It was adjourned *sine die* to allow negotiations to proceed, but on 30th June, 1995, it was placed on the pending list. An Answer was filed on 27th July, 1995.

On 16th November, 1995, leave was given by the Judicial Greffier to amend the Order of Justice. The original Order of Justice had actioned Eagle Star Insurance Company Limited as insurers of A. Ltd *en désastre*. The revised Order of Justice now actioned A. Ltd *en désastre*. On 22nd June, 1994 Eagle Star

notified the plaintiff's lawyers that Iron Trades Insurance group had agreed to take over the conduct of the claim.

On 5th June, 1992, each defendant was charged with an infraction of Article 21(1)(A) of the Health and Safety at Work (Jersey) Law, 1984. The judgment of the Court, although short, was forceful. The paddle mixer (used for mixing cement) had been supplied to the first defendant by the second defendant on hire. The machine (the Court held) was in a defective condition and there was a failure of supervision by the first defendant of its employees. The paddle mixer had been supplied by the second defendant to the first defendant without informing them that they were in possession of a vital service information bulletin marked "Priority A" for essential action.

The first defendant was fined £2,000 with £250 costs and the second defendant was fined £3,000 with £250 costs.

We do not need to go into the details of the case save to say that whilst the plaintiff was engaged in operating the paddle machinery at a building site, he caught his hand in the paddles of the mixer and suffered very serious injury to his right hand.

Prior to the accident, the plaintiff was a fit, healthy fully able man who has now virtually lost the use of his right hand. The medical report prepared for insurers by Mr. G.A. Carss, a consultant in accident and emergency at Queen Alexandra Hospital, gives a prognosis which says that *"it is most unlikely that he will ever work again".*

The plaintiff has sought assistance from the Welfare Office of the Parish of St. Helier, but was refused assistance on the grounds that he has not been permanently resident in the island for a period in excess of five years. He does, however, receive £44 per week from Social Security (who regard him as only semi-disabled as he has lost the use of only one hand). He borrowed £5,500 from the Midland Bank plc in July, 1995. He has paid no interest and it is assumed that the interest is compounding. He also borrowed £10,000 from relatives. He lives at present with his brother and his brother's girl-friend. All three of them have to share one room.

The insurers have consistently refused to make an interim payment and the Answer denies liability as alleged or at all and claim that the plaintiff contributed wholly by his negligence to the injury that he received. There is also a claim that any action by the plaintiff against the first defendant is prescribed in negligence.

Mr. Slater, on behalf of the plaintiff, makes an application by summons for an interim payment pursuant to Rule 7(a) of the Royal Court Rules 1993.

In this regard, he swore an affidavit in support on 11th July, 1995, and a further supplemental affidavit on 7th December, 1995.

In the supplemental affidavit, Mr. Slater enclosed as an exhibit a letter (on the face of it an open letter) from Iron Trades dated 20th September, 1995. That letter reads as follows:

> *"We thank you for your letter dated 10 August and we are in receipt of your faxes in connection with this matter.*
>
> *We do not believe that your client's claim has anywhere near the valuation suggested by you and would refer you back to our representatives discussion in your offices on the 12 July.*
>
> *We stand by the offer of £120,000 made on that day to you, it is repeated and we are prepared to pay that sum immediately in full and final settlement of your client's claim."*

Also included as an exhibit is an English Counsel's opinion obtained by the plaintiff. In that opinion Counsel argued firstly, that the plea of contributory negligence was likely to fail and secondly that damages were likely to be awarded (on the basis of full liability) as follows:

(i) for pain suffering and loss of amenity - £25,000

(ii) for psychiatric damage (assuming evidence can be adduced) - a further £5,000;

(iii) loss of earnings to date - £52,624 (main job) plus £22,800 (guitar playing);

(iv) loss of future earnings - £216,840 (main job) plus £6,000 (guitar playing)

Those damages total £328,264.

During the course of the hearing, Miss Martin said that she felt the Iron Trades letter was a letter without prejudice. We allowed Miss Martin an adjournment while she telephoned for instructions. When she returned to Court she told us that insurers now said that the matter was privileged and that she had overlooked the point since December. The point is unusual and we must consider it in the light of the application as it is made.

By the Royal Court (Amendment No. 2) Rules 1993, provision for interim payments was made.

On the hearing of an application under Rule 7A/1 in an action for damages if the Court is satisfied (a) that the defendant against whom the order is sought has admitted liability for the plaintiff's damage or (c) (we omit (b)) that if the action proceeded to trial the plaintiff would obtain judgment for substantial damages or where there are two or more defendants against any one of them, the Court may, if it thinks fit, order the defendant to make an interim payment of such amount as it thinks just. There are then set out various protections.

In relation to the defendants an "interim payment" means a payment on account of any damages which the defendants may be held liable to pay to or for the benefit of the plaintiff. The essential features are that it is a payment on account of the damages for which the defendants may be held liable.

Clearly, the burden on the plaintiff to satisfy us is particularly high.

The Rule is meant to provide for persons to make interim payments where insured in respect of the plaintiff's claim. Rule 7A/2(2) makes that very clear. It is also clear that until the matter comes to trial, when the parties will have to give evidence as best they can, the conduct of the negotiations for the defendants is entirely in the hands of Iron Trades.

Mr. Slater referred us to the case of Fryer -v- London Transport Executive which is reported in The Times, December 4th 1982 and which is noted in Kemp & Kemp on Damages at paragraphs 12-014 and 12-222. This is a judgment of the English Court of Appeal.

In that Case the plaintiff was making application for an interim award of £50,000 and adduced evidence of the facts that the defendants had made a voluntary payment into Court. Waller L.J. said this:-

> *"Mr. Carling, on behalf of the defendants (who are the appellants before us) submits that the affidavits put in by the plaintiff, which included a statement both of the voluntary payment of £15,805.50 and of the money paid into Court, namely £48,194.50 by the rules are not allowed to be before the learned judge when considering a matter of this kind.*
>
> *Ord. 22 r. 7 reads so far as is relevant: '[...] the fact that money has been paid into court under the foregoing provisions of this Order, shall not be pleaded and no communication of that fact shall be made to the court at the trial or hearing of the action or counter-claim or of any question or issue as to the debt or damages until all*

questions of liability and of the amount of debt or damages have been decided'.

Ord. 29, r. 15 reads: 'The fact that an order has been made under rules 11 or 12 shall not be pleaded and, unless the defendant consents, or the court so directs, no communication of that fact or of the fact that an interim payment has been made, whether voluntarily or pursuant to an order shall be made to the court at the trial, or hearing, of any of any question or issue as to liability or damages until all questions of liability and amount have been determined.'

Mr. Carling submits that this disclosure comes within that rule, and that the hearing before Sir Douglas Frank was a hearing of a 'question or issue as to damages'. Accordingly, in respect of the payment into Court and of the interim payment, there was a breach of that rule, and the matter should not have been before the learned judge.

In my opinion, dealing with the rules themselves, the matter before Sir Douglas Frank did not raise a question or issue as to damages in the way in which both rules require.

The matter, which he had to consider, was whether (as a matter of discretion, there being an admission of liability)

an order should be made for an interim payment, and the object of the rule providing for interim payments, particularly in personal injury cases, is to relieve the injured party from the worst effect of delay in the hearing of the claim and from the results of the accident which have caused those injuries and the subsequent disabilities which arise.

In my judgment, in deciding whether or not an interim payment should be made, and in deciding how great that interim payment should be, it is not an issue as to damages. It is a question of what, in the interlocutory proceedings before the learned judge, should be done to meet the justice of the case.

I would be of the opinion that the information is not prohibited information before the learned judge in such circumstances. Therefore that ground for making this application for leave to appeal would fail."

At one point Miss Martin argued that the suggested offer of £120,000 was a form of "nuisance value". We find that concept difficult to accept because of the value of the offered sum. We

must consider therefore whether we have the right to take cognisance of the letter.

We remain convinced that we do have that right. When we look at the letter of 20th September, there is an indication of an admission of liability. That is as clear to us as is a payment into Court. The fact that a payment into Court has been made does not in any way deter the defendant in the action from fighting tooth and nail to prove that he is not liable. The letter from Iron Trades does not in any way inhibit Iron Trades (if the sum offered is not accepted) from allowing this case to go to trial and to run its full course if that is what is felt necessary.

In any event, we have studied for information the statements made (including an allegation that the accident report book has been destroyed deliberately). These are statements included in an agreed bundle. We have not of course, in reading them, taken a view as to their probative value.

During the luncheon adjournment Counsel were able to agree a consent order on the quantum. We are very grateful to them for this.

It has been agreed that £35,000 should be paid as an interim payment. In that regard we order (this was not consented) that payment shall be made within seven days of the date of the hearing, to Bailhache Labesse who have given an undertaking in regard to the bank loan. The interim award shall be drawn primarily against special damages and will only go against general damages when the sum of special damages is exceeded.

Costs are agreed to be in the cause.

Authorities

Kemp & Kemp: Vol 1, Chapter 12: paras 12-001 - 12-024.

Fryer -v- London Transport Executive (4th December, 1982) "The Times".

Royal Court (Amendment No. 2) Rules 1993.

A.G. -v- Mark Amy Limited & SGB (Channel Islands) Limited (5th June, 1992) Jersey Unreported.