

JERSEY / JUDGMENT

Singleton v G Thatcher Felt Roofing

[2002] JRC 105 (27 May 2002)

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judgment

the DEPUTY BAILIFF: 1. This is an application by the Plaintiff for an interim payment of damages in the sum of £5,000. The application is made pursuant to Rule 7A/2(1) of the Royal Court Rules 1993 which states as follows: "If, on the hearing of an application under Rule 7A/1 in an action for damages the Court is satisfied - (a) that the defendant against whom the order is sought (in this paragraph referred to as the "respondent") has admitted liability for the plaintiff's damages; or (b) that the plaintiff has obtained interlocutory judgment against the respondent for damages to be assessed; or (c) that if the action proceeded to trial, the plaintiff would obtain judgment for substantial 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) of this Rule, 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 after taking into account any relevant contributory negligence and any set-off cross-claim or counterclaim on which the respondent may be entitled to rely." 2. The background can be shortly stated. On the 28 th February, 2001, the plaintiff was injured whilst at work. A roll of ruberoid fell from a roof above and struck him. It transpired that the roll had been inadvertently kicked by an employee of the defendant company. 3. The plaintiff sustained injury to his neck and the accident also brought on a lower back problem. On the 14 th March, 2002, by consent, summary judgment was given in favour of the plaintiff with damages to be assessed, if not agreed. 4. The plaintiff has not worked since the accident; he therefore claims loss of wages as special damages. He also claims for various expenses to which he has been put. We have been provided with a schedule by the plaintiff prepared as at 27 th May, 2002. This suggests a claim for aggregate special damages of some £36,900, although at least two items in fact relate to future losses. Of the total sum of special damages, the loss in wages claimed up to the 27 th May is some £26,145. In addition, of course, the plaintiff also claims for general damages. 5. The defendant, through its insurers, has made a number of interim payments already, starting in August 2001, with the latest being in April 2002. These total £24,000. In addition the defendant has agreed to make a further payment of £3,000 in repayment of certain moneys loaned to the plaintiff by his employer. Thus total interim payments have been, or are about to be made, in the sum of £27,000. 6. The key issue which divides the plaintiff and the defendant arises out of whether he is

fit for any form of employment. A medical report from Professor Shearer dated 15 th March, 2002, expressed the opinion that from between 9 and 12 months after the accident the plaintiff has been fit for light semi-sedentary work, such as bench type work, or light work such as reception work, or light driving if it does not involve a lot of lifting and carrying. 7. The defendant submits that the plaintiff has therefore been under a duty to mitigate his loss by seeking employment which falls within this category from, at the latest, 1 st March, 2002. The defendant further submits that the plaintiff has failed to produce evidence that he has in fact tried to take all reasonable steps to find suitable employment. The defendant therefore does not accept that the plaintiff will necessarily recover any loss of wages after the 28 th February, 2002. 8. Taking into account one or two other items of the special damages listed by the plaintiff which are disputed by the defendant, Advocate Speck, on behalf of the defendant, says that the maximum claim for special damages does not exceed £23,000. On this basis the interim payments already made of £27,000 are more than adequate to cover the losses and outgoings incurred on the part of the plaintiff. 9. The plaintiff argues that he has tried to find suitable employment. He looks in the Jersey Evening Post every night, but his experience in the past has been solely within the building trade as a carpenter, and he cannot do any lifting or climbing. As a result the opportunities are limited. He has applied for jobs as a messenger with Norman Limited, as a temporary meter reader at the JEC and two other firms but in each case he has been unsuccessful. His understanding is that his injuries have contributed to this lack of success. 10. He is now attempting to qualify as a taxi driver. He has taken the necessary practical examinations and now has to pass the theoretical side. He has failed this once, but is having a second attempt tomorrow, and if successful he would hope to begin employment as a taxi driver as soon as possible. 11. As we have said, the defendant argues that the plaintiff has made insufficient efforts. For example the defendants have suggested two websites to him which assist people with disability to find employment, and they have also referred him to the Adult Careers Guidance Officer at the Employment Services Centre. We were informed that he has in fact been to see that person. 12. We have concluded that we do not have sufficient evidence to determine definitively whether the plaintiff has taken all reasonable steps to mitigate his loss by finding alternative employment. This would be a finding which would be decisive in the litigation, and it seems to us that much greater and more detailed evidence would be necessary for us to make such a finding, and not least, the opportunity for the defence to cross-examine the plaintiff. We therefore assume in favour of the defendant that special damages will not exceed £23,000. 13. As to general damages, the plaintiff alleges that, taking into account various headings such as pain and suffering, loss of amenity, loss of congenial employment, and handicap on the job market, general damages cannot be less than £15,000. It certainly is the case, from the medical reports, that the plaintiff has suffered a neck injury, there has been an aggravation of a pre-existing back condition, and he is suffering from depression. It is clear that the accident has had a dramatic impact on his life and on that of his family. 14. So, says the plaintiff, even on the defendant's version of events, the aggregate claim will not be less than £38,000 ie £23,000 plus £15,000. Whilst not conceding that the general damages would be in the region of £15,000, Advocate Speck did not seriously demur from this figure, and we certainly find it to be reasonable on the evidence available to us. 15. Advocate Martin, therefore, argues on behalf of the plaintiff that to order a further interim

payment of £5,000 at this stage would result in aggregate interim payments of £32,000. This relates to the minimum claim, as she puts it, of £38,000, and she argues therefore that this is a reasonable proportion. She, of course, claims that the final damages will in fact be much greater.

16. There is very little authority on what is to be considered a reasonable proportion of the damages likely to be recovered, which is the phrase referred to in the Rules. We were referred to the English case of *Fryer-v-London Transport Executive* (30 th November, 1982), which is summarised in *Kemp and Kemp* R.51 June 1994. In that case the defendant assessed the claim as being worth some £64,000 and the Court of Appeal upheld an order by the judge below for interim payments which aggregated £50,000. We were also referred to an extract from *Kemp and Kemp*, paragraph 12-006, which quoted an extract from *Stringman's case* [1994] 1WLR 653, where the English Court of Appeal made it clear that the plaintiff's need for an interim payment was not a requirement. The relevant extract reads as follows: "The error into which the judge fell in this case was, in my opinion, when he concerned himself with what was to be done with the damages in the hands of the plaintiff or those responsible for her care. Once the threshold conditions in Ord. 29, r. 11(I) (a), (b) or (c) are satisfied, what the court has to do, if it thinks fit, is to make an interim payment of such amount as it thinks fit, not exceeding a reasonable proportion of the damages which in the opinion of the court are likely to be recovered by the plaintiff after taking into account contributory negligence and any set-off or counterclaim. It should be noted that the plaintiff does not have to demonstrate any particular need over and above the general need that a plaintiff has to be paid his or her damages as soon as reasonably may be done. It will generally be appropriate and just to make an order where there will be some delay until the final disposal of the case. 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." 17. We are satisfied that the interests of justice in this case require an interim payment of £5,000. The fact is that the plaintiff has had no earnings since the accident; in particular, although Professor Shearer has expressed the opinion that he is able to undertake certain limited types of work as from 1 st March, 2002, he has not in fact been employed during that time. There is therefore a cash flow deficit despite the interim payments and in our judgment it is reasonable that an interim payment should be made. We have concluded that to make a payment of £5,000, (thereby bringing the interim payments to an aggregate of £32,000), does not exceed a reasonable proportion of the amount which the plaintiff is likely eventually to recover.

18. We must emphasise that we would be unlikely to be able to make any further interim payment without determining the issue whether of the plaintiff has mitigated his loss by making all reasonable efforts to find employment. Professor Shearer has said that the condition of the plaintiff should have finalised by February, 2003, at which time he will be able to prepare a final report listing the plaintiff's continuing disability. It follows that the case cannot be resolved before then. There will, therefore, be further delay in bringing this matter to a conclusion whether by negotiation or by decision of the Court. If the plaintiff is unable to find work in the interim or if he can find work but there is a continuing loss in wages as compared with his previous earnings, we can well understand that he may wish to bring an application for further interim payments. We make it clear that the plaintiff will have to come up, at that stage, with detailed and convincing evidence, supported independently wherever possible, of all the efforts

he has made to find employment, and why it has not been possible, or why, if it has been possible, there is still a continuing loss. Subject to that observation we make the order for an interim payment of £5,000. Authority. W-v-A (24 th January, 1996) Jersey Unreported. Kemp & Kemp: R.51: June 1994: pp.12105: Fryer-v-London Transport Executive (30 th November, 1982). Kemp & Kemp: para. 12-001 to 12-015: Interim Awards. Stringman

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