Case No: E90MA187

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MANCHESTER DISTRICT REGISTRY

Sitting at the Manchester Civil Justice Centre

Date: 3 April 2019

Before:

HIS HONOUR JUDGE BIRD
Sitting as a Judge of this Court

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Between:

LARA MORETTA KNIGHT **(a protected party by her litigation friend Mrs Patricia Maiklem)**	**Claimant**
- and -	
ANTHONY WHITE	**Defendant**

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Mr Michael Jones (instructed by **Serious Law LLP**) for the Claimant
Mr James Rowley QC (instructed by **DWF LLP**) for the Defendant

Hearing dates: 7 March 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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His Honour Judge Bird:

1. This is an application for an interim payment in a serious personal injury claim. Liability has been admitted and judgment entered for damages to be assessed. It is likely, when the matter comes on for trial, that the trial judge will make a periodical payments order ("PPO").

2. I have read the following evidence. Two statements from Mr Crabtree, the Claimant's solicitor in support of the application and a statement from Mr Slater, the Defendant's solicitor.

Background

3. The Claimant suffered a very severe traumatic brain injury (see the report of Dr Clarence Liu of 8 August 2016) as the result of a road traffic accident on 14 July 2013 when she was the pillion passenger on a motor cycle driven by the Defendant. She resides at Theoc House in Tewksbury. Up to October 2018 she received neuro physiotherapy twice weekly, occupational therapy and neuropsychology as needed, speech and language therapy weekly, has input from a dietician. There has been a recommendation (see the case management report at page 19) for neuropsychiatry input. She has a son, Mitchell. He is now 10 years old.

Procedural Background

4. The parties are agreed that the claim, issued on 13 December 2018, has a value of around £10,000,000. Disclosure is to take place in April 2019 with evidence of fact to follow by the end of May. Permission has been given for each party to rely on the expert report of a neurologist, a neuropsychologist, a neuropsychiatrist and a general physician. In addition, the Claimant has permission to rely on the report of an ophthalmologist. A further case management conference will take place in January 2020 and a costs management hearing will take place at the end of May 2019. Interim payments of £1,377,106 have been made on a voluntary basis.

The Claimant's present position

5. The case management report provided by The Rehabilitation Partnership, dated 1 October 2018 makes it clear that the Claimant is at her best in the company of her family. It is clear from the report that preliminary work has been undertaken to explore the possibility of a move into the community. Further liaison with potential providers of community care and assistance with property search is recommended in 2019. A move into the community is described as "widely supported by her therapists and current members of her care team". Dr Liu expresses the view (paragraph 4.2.3(c)(vi) of his report at page 212 of the hearing bundle) that discharge from Theoc House for home care is a "long term goal to work towards".

6. The Rehabilitation Partnership report estimates the cost of case management, support and rehabilitation and accommodation at around £197,000 for 2019 (£20,470 in respect of case management, £15,000 in respect of nanny and support costs and £27,500 in respect of support and rehabilitation and £134,000 in respect of the costs of Theoc House).

The Law

7. The power to order an interim payment is set out at CPR 25.7. It is common ground that I have the power to make an order. The parties disagree about the amount of an interim payment but agree that my discretion should be exercised in line with the guidance set out by the Court of Appeal in *Eeles v Cobham Hire Services Limited* [2009] EWCA Civ 204. Further guidance on the proper exercise of the discretion can be found in *Smith v Bailey* [2014] EWHC 2569 (QB) and in *Sedge v Prime* [2012] EWHC 3460 (QB).

8. Whilst the principles derive from *Eeles* I gratefully adopt the summary set out at paragraph 19 of *Smith*. References in the extract to paragraph numbers are to paragraphs in *Eeles*.

> (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 (para 30).

(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 (paras 37, 43).

(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 (para 43).

(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") (para 31).

(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 (para 32).

(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" (paras 4, 39).

(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 (para 36, 43), leaving out of account heads of future loss which the trial judge might wish to deal with by a PPO. These are, strictly speaking (para 43):

(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 (para 44). 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 (para 4). 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 (para 38, 45).

(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 (paras 36, 43).

<u>the First Stage: making an assessment in relation to the heads of loss which the trial judge is bound to award as a capital sum.</u>

9. The Claimant's schedule of loss values general damages and losses incurred up to its date at around £1.5M. Of that sum, £250,000 relates to general damages. For the purposes of this application the following specific claims are relevant:

    a. General damages. It is agreed I should take these at £250,000.
    b. Neuro rehabilitation fees. It is agreed I should take these at £837,104
    c. Case management costs. These are not agreed. In the schedule of loss they are claimed at £107,317. Mr Crabtree puts them at £127,453. The Defendant suggests £100,000 as a conservative estimate.
    d. The Claimant's loss of earnings. These are not agreed. They are put at £66,528 in the schedule of loss. Mr Crabtree's evidence is that the Claimant was not working at the time of the accident because of short term health problems and in particular a knee problem for which she was awaiting surgery. She had however worked for a cheque cashing company and had always worked full-time and was keen to provide for her

family. Mr Crabtree has suggested a 15% reduction in the scheduled claim and suggests £56,549. The Defendant suggests zero as a conservative estimate.

e. Gratuitous care. This is not agreed. There is no claim in the schedule of loss. Mr Crabtree suggests £50,000 as a conservative estimate based on care over more than 5 years. The Defendant suggests £25,000.

f. Deputy costs. These are not agreed. Mr Crabtree's evidence is that these have been assessed by the Court of Protection in the sum of £52,000. The Defendant suggests £25,000.

g. Nanny and support costs. These were pleaded in the schedule of loss at £13,526. Mr Crabtree now suggests £39,786 to cover the cost of paying for the provision of services over a 5.5 year period. The Defendant suggests the sum claimed in the schedule is a conservative estimate.

h. Therapies. These are not agreed but the difference between the parties is small. Mr Crabtree suggests £41,073. The Defendant suggests £39,324.

i. Aids and equipment. Again, these are not agreed but the difference between the parties is small. Mr Crabtree suggests £24,544. The Defendant suggests £21,933.

10. In order to assess the losses suffered under the same headings (other than general damages) between the date of the schedule and the date of the trial the first issue to determine is when the trial is likely to start. The Defendant asserts that with a case management conference in January 2020 it is realistic to expect a listing in the Autumn of 2020, around 20 months from the date of the hearing. The Claimant suggests that a more realistic date is mid-2021 or 27 months from the date of the hearing.

11. There was some discussion about how I should determine the question and in particular if I should take a conservative approach or put myself in the position of a hawkish judge listing the matter for the earliest possible trial date. In my judgment I should simply do the best I can to say when the trial is likely to take place. It is artificial to expect me to adopt an overly hawkish approach just as it is difficult to adopt a "conservative approach". The concept of a conservative approach is easiest to grasp when the court is being to assess what level of damages might be awarded in the future on the basis of evidence that is not yet fully formed and where there are well-argued competing positions advanced by each side. Applying a conservative approach to the question of when a trial is likely to take place is less easy. In my view, bearing in mind that experts in the fields of neuropsychology, neuropsychiatry and neurology are generally busy, this trial is likely to be fixed by reference to the availability also of counsel and that there is a prospect that further expert evidence will be ordered in January which will need to be prepared and the subject of a discussion between experts I have come to

the conclusion that as matters stand today it is far safer to proceed on the basis that the correct period between the date of the hearing and the trial is 27 months and not 20 months. I would be concerned if fixing the trial at the earlier date that the parties might find themselves under undue pressure to be ready for trial.

12. The next question is what is the monthly sum I should apply when arriving at a conservative view of the lump sum damages likely to be awarded over that period?

13. The Defendant suggests that the sum of £12,500 is an appropriate estimate. The Claimant suggests the correct figure is either £20,000 (broadly from Mr Crabtree's evidence) or £17,500 (a figure referred to in argument).

Resolution of the differences between the parties

14. I remind myself that I must adopt a conservative approach to the determination of the relevant questions.

15. Case management costs. The Rehabilitation Partnership report of 1 October 2018 refers to an annual case management cost of £20,470 in 2019. It would not be appropriate to use that amount as a definitive guide to the assessment of the damages likely to be awarded, for a number of reasons: first I have no clear idea of how the care regime has changed over the years since the accident and so cannot assume that the cost of care has been steady, and secondly costs are likely (at least by reason of inflation) to have risen over the last 5 years. Bearing that figure in mind it seems to me that the sum of £100,000 (around £18,000 per year) is an appropriate estimate of this head of loss on a conservative basis.

16. The Claimant's loss of earnings. I do not consider that it would be reasonable to proceed on the basis that the Claimant will be awarded nothing under this head. In my judgment the approach adopted by Mr Crabtree is broadly a conservative one. I would estimate this loss to be £55,000 (or £10,000 per year).

17. Gratuitous care. To a very large extent this head of loss relates to care given by family members over and above that provided by a nanny to Mitchell between the ages of 5 and 10. Adopting the approach I must, it seems to me that the Defendant's suggestion of £25,000 is too low. A child of 5 requires near constant supervision, will have restless nights from time to time and needs to be looked after before a nanny arrives, after the nanny leaves and on days

when the nanny does not work. Even allowing for some overnight nanny provision it seems to me that a conservative estimate of gratuitous care will lie between the competing figures. I would put it at £35,000 (around £6,000 per year).

18. Deputy costs. I am content to accept that these costs have been assessed by the Court of Protection in the sum of £52,000. The Court of Protection is charged with the task of ensuring that funds are used appropriately to meet the needs of protected parties. The assessment of costs in that sum seems to me therefore to represent the sum likely to be awarded.

19. Nanny and support costs. I have some sympathy with the Defendant's position that a conservative approach to this head of loss should not exceed the sum claimed in the schedule of loss. However, I should bear in mind that this head should be considered with the claim for gratuitous care. In assessing damages under that head, I have assumed that there was nanny care throughout. Taking a conservative estimate, I would put the loss at £35,000.

20. I will estimate therapies at the Defendant's figure of £39,324 and Aids and equipment at the Defendant's figure of £21,933.

Conclusion on the first stage

21. Dealing first with the past losses up to the date of the schedule, I have concluded that the appropriate sums to award are:

    a. General damages £250,000
    b. Residential care and rehabilitation £837,104
    c. Case management £100,000
    d. Past earnings £55,000
    e. Gratuitous care £35,000
    f. Deputy costs £52,000
    g. Nanny support £35,000
    h. Therapies £39,324
    i. Aids and equipment £21,933

22. This gives a total of £1,425,361.

23. As to the losses between the schedule and the date of trial (27 months) they will fall under the same heads as the claims above, save there will be no claim in respect of general damages. My estimate on a conservative basis of the capital damages which will be awarded over a 5.5 year period (ignoring general damages) is £1,175,361. That equates to £17,808.50 per month. I am prepared therefore to proceed on the basis that a conservative assessment of the post-schedule loss is £17,500 per month as suggested in argument by the Claimant. I accept that the route I have taken to that figure may be different to that taken by the Claimant, but I am comforted that the destination is broadly the same. In my view the Defendant's suggested figure of £12,500 per month is too low to be justified.

24. Over 27 months, the further period to trial amounts to £472,500.

25. My assessment of the likely relevant amount of the final judgment is therefore (472,500 + 1,425,361) £1,897,861.

Reasonable Proportion and previous interim payments

26. A reasonable proportion of that sum (given my conservative approach) is 90%. There is an argument that the Deputy costs, which have been assessed in part by the Court of Protection should not be subject to any reduction. In my view the safer (and overriding conservative approach) is to be make the reduction nonetheless.

27. A reasonable proportion of the likely amount of the final judgment is therefore £1,708,074 which I propose to round down to £1,708,000.

28. After account is taken of interim payments made in the sum of £1,377,106, the maximum interim payment I have the power to make is £330,968.90.

29. The sum claimed by way of an interim payment of £250,000 is considerably less than the maximum.

Exercising the Discretion

30. Given that the sum asked for is a sum I have the power to order, I should consider if the circumstances are such that I should make the order sought.

31. Mr Rowley QC submitted that the evidence in support of the application reveals a clear intention to trial independent living. He said that if such a trial takes place and that some of the £250,000 is used to fund it, that money will be lost to the Claimant and the trial judge's powers to deal with damages as he or she thinks fit will be fettered. He submitted that there was at least a very real risk that the interim payment might be wasted on an experiment that would turn out to be "a dreadful mistake". He therefore submitted that it would be inappropriate to order an interim payment of anything approaching £250,000.

32. I do not accept Mr Rowley's argument. First, the evidence in my view does not support it. In my view the evidence shows that there is a real and proper desire to explore and consider a move into the community and no more. Such a move would potentially benefit the Claimant and is supported as a goal by Dr Liu and by the care teams referred to in the rehabilitation report, so that exploration of it cannot (of itself) be objectionable. There is no suggestion that there is an immediate plan to do anything other than explore options. Exploration seems to me to be sensible. It is a first step to a different care regime. If there is no exploration of the idea then the long-term goal described by Dr Liu will remain as a goal and will never be realised. Secondly, the Claimant has the benefit of help and support not only from experienced serious injury solicitors, but from others including a care manager who might all be expected to voice objections to a direction in her care which was a "dreadful mistake". The position of the Claimant's advisers is made clear in Mr Jones' skeleton argument at paragraph 10(ii):

> *"The Claimant's advisers will carefully examine her long-term accommodation options as the evidence develops. The options will necessarily include a return to the community. There is no intention for the Claimant to move from Theoc House in the short to medium term and no intention for her to move at all, until all options have been carefully considered, which would not be until at least Autumn 2019. At the stage - whatever accommodation option applies – the Claimant will need to come back to court to seek a further payment"*

33. I was referred to *Sedge v Prime* [2012] EWHC 3460 (QB), a case in which an interim payment was sought specifically to fund a trial of independent living. The defendant raised the "level playing field" argument in this way (see paragraph 35): if the interim payment was made and a period of independent living began, by the time the case came to trial the period of independent living would be so established that the trial judge would (in practical terms) be

bound to continue with it.

34. In that case the Deputy Judge ordered an interim payment because he was not persuaded that it would be "plainly wrong" to do so and was persuaded that such a payment would not result in any unfair prejudice.

35. I do not derive any real assistance from ***Sedge*** because there is here no immediate plan to trial independent living. If and when a further interim payment is sought to fund independent living (if the preliminary investigations that are likely to be undertaken in the near future show this as a viable possibility), it may be that the court will need to consider the level playing field.

Conclusion

36. I have come to the conclusion that it would be appropriate to order that an interim payment in the sum of £250,000 should be made.

37. Given the conclusion I have reached I need not go on to consider stage 2 of ***Eeles*** and consider whether it is safe to take into account other sums which are likely to be capitalised.

Final comments

38. In reaching the conclusion I have reached I have followed the guidance set out in ***Eeles***. Whilst it is incumbent on the Claimant to put evidence of loss before the court, in my view that evidence must be considered in context. It must be remembered that in the present case that final expert reports have not been exchanged, witness evidence for the trial has not been exchanged and there has been no disclosure. The procedural point the proceedings have reached must be borne in mind. It would not always be appropriate to expect the Claimant when pursuing (for example) a claim for loss of past earnings, to produce every wage slip, degree certificate or tax return. The claim may be strengthened by that evidence, but its absence is unlikely to lead to a nil assessment. It must be borne in mind that the court's task is to "assess the likely amount" of the final judgment. That exercise falls short of making a finding, supported by the sort of evidence one would see at trial, about losses.

39. I have also borne in mind, as Mr Rowley QC pointed out, that evidence that a sum has been spent (for example in respect of care costs or nanny costs) is not always the same as evidence that that sum is the correct measure of damages.