**OUTER HOUSE, COURT OF SESSION**

**[2022] CSOH 65**

**A153/22**

OPINION OF LORD LAKE

In the cause

FRANCIS MURPHY

Pursuer

against

DUNBIA (UK), T/A HIGHLAND MEATS

Defender

**Pursuer: Fitzpatrick; Digby Brown LLP**
**Defender: Rolfe; Clyde & Co (Scotland) LLP**

9 September 2022

[1] This matter came before me on a motion by the pursuer for an award of interim damages in terms of Rule of Court 43.11. The pursuer sought payment of £30,000. There had previously been voluntary payments totalling £40,000 and an award of £10,000 interim damages on 7 April 2022.

[2] The principal issues at the hearing were whether when taken with the sums already paid the sum sought was more than a reasonable proportion of the damages that might be recovered by the pursuer and whether there had been a change of circumstances since the date of the previous award giving rise to an entitlement for the pursuer to make a further motion. I refused the motion on the basis that there had been no such change of

circumstances. I was asked to grant leave to reclaim and provide a written opinion. I granted leave to reclaim. The reasons for my decision are as follow.

**Reasonable proportion of the damages that might be recovered**

***Submissions for the pursuer***

[3] For the pursuer, Mr Fitzpatrick referred to the terms of a valuation for the pursuer that was intimated shortly before the hearing. It brought out the total value of the claim to £683,701.17. It valued solatium for the case as plead at £60,000 by reference to the Judicial College Guidelines, 15th Edition, 7(L)(iii) with an allowance for the psychological sequelae of the accident. Half of that sum was allocated to the past for the purposes of interest. Past loss of earnings was calculated as £37,421.57. For the future earnings loss claim, a multiplier was derived from the Ogden Tables of 34.98. The multiplicand was calculated as £16,640. It was contended that the deficits which Mr Murphy continues to suffer taken with his educational achievements meant that it was unlikely that he would work again and that only a small modification need be made to the multiplier to reflect the possibility. The future earnings claim was valued at £500,000. There was a claim for past services including interest in the sum of £7,029.60. By way of treatment costs, a sum of £9,400 was sought for costs incurred or known. Of this, £2,000 was in respect of ten sessions of CBT which I was informed had been recommended by Dr Wylie in a report dated 5 July 2022. Future medical expenses were quantified using a multiplier and multiplicand as £17,862.

[4] Mr Fitzpatrick referred me to the fact that there was a claim by the defenders against the health board and addressed me on what proportion of liability might be ascribed to them and whether this was relevant to the assessment under RCS 43.11. Unsurprisingly in view of the admission of liability by the defenders, the pursuer chose to make the claim

solely against them. As the pursuer does not direct a claim against the health board and the Rule refers simply to the damages that are likely to be recovered by the pursuer, issues of apportionment are not relevant to the question of interim damages. For the purposes of the Rule, the whole of the damages to which the pursuer would be found entitled are ones likely to be recovered from the defender.

[5] Mr Fitzpatrick recognised that a case of contributory negligence was plead but submitted that the duties claimed were such that the blameworthiness and causative potency of them was such that any deduction would not exceed 20%. Because liability is admitted, it is not necessary to apply the part of the Rule concerning whether there would be a "substantial finding of contributory negligence".

***Submissions for the defender***

[6] For the defenders, Mr Rolfe did not take issue with any of the detail of the valuation presented by Mr Fitzpatrick. He referred to the following three principal matters:

1. He said that senior and junior counsel principally instructed had valued the claim at approximately £134,000.
2. He referred to the fact that the effect of the benefit payments disclosed on the CRU Certificate was such that Mr Murphy received more each week than when he had been employed. However, as it is not necessary to show hardship to succeed in a motion for interim damages, I do not consider that this is relevant.
3. Mr Rolfe also referred to the sums brought out as re-payable in the CRU certificate and pointed out that if these were aggregated with the sum of £50,000 that had been paid to date, they came to in excess of £88,000. He

submitted that when allowance was made for the fact that a deduction would fall to be made from any award in respect of contributory negligence, the payments made to date meant that Mr Murphy had already received a reasonable proportion of the damages he might be expected to recover.

***Decision on the first issue***

[7] I was not provided with a copy of the defender's counsel's valuation or any details as to how it was determined and I do not feel able to place any reliance on it. In the absence of any detailed consideration by the defenders of what damages the pursuer is likely to be awarded, I consider it appropriate to rely on the pursuer's valuation. While I recognise that it is appropriate to take a "conservative and moderate approach" to this motion (*Nisbet* v *The Marley Roof Tile Co Ltd* 1988 SLT 608), I was nonetheless satisfied that the additional sum sought by the pursuer even when taken with the sums he has received from the defenders to date and the benefits he received, would not exceed a reasonable proportion of the damages he is likely to recover. The total sum paid would be £80,000 and the gross CRU liability is a little in excess of £38,000. A sum of 75% of the likely damages has been held not to exceed a reasonable proportion (*D's Parent and Guardian* v *Argyll and Clyde Acute Hospitals NHS Trust* 2003 SLT 511). On the basis of the information before me, the total sum of £118,000 will not exceed 75% of the likely damages.

[8] As I have noted above, the presence of a claim by the defender against the third party for contribution is not material to this matter.

**Change in circumstances**

[9] The defenders' opposition to the motion was *inter alia* on the basis that:

> There has been no material change to the pursuer's circumstances since the courts [*sic*] interlocutor of 7 April 2022.

[10] Mr Rolfe referred me to Rule of Court 43.11(6) which is in the following terms:

> "Notwithstanding the grant or refusal of a motion for an interim payment, a subsequent motion may be made where there has been a change of circumstances."

He submitted that there had been no change of circumstances since the interlocutor of 7 April 2022 awarding interim damages of £10,000 and that, accordingly, the pursuer was not entitled to make this motion. He noted that nothing was said in the motion or had been said in the submissions for the pursuer as to what circumstances had changed.

[11] In his submissions in response, Mr Fitzpatrick replied to the following factors as changes of circumstance:

1. Since the earlier award of interim damages, Dr Wylie had recommended that Mr Murphy have sessions of CBT as treatment for the psychological consequences of the accident. It was recognised that the estimated cost of these was only £2,000 as against the interim damages of £30,000 now sought but it was submitted that once there was any change of circumstances, the door was unlocked and the matter could then be considered generally by the court.
2. The transfer of the cause from chapter 43 of the Rules of Court with the result that no proof was yet fixed. The delay in the date on which damages would be conclusively determined was said to be a change of circumstance.

[12] I was not referred to any authority as to what is meant by "change of circumstances" in RCS43.11(6). As hardship is not a requirement to entitlement to interim damages under

the Rule so it would not appear that this would be the focus for the circumstances that have changed.

[13] The Rule requires a change of circumstances before a second motion can be made both where the earlier motion was granted and when it was refused. It is apparent from this that the intention is to place a limit on the ability of a pursuer to make a further motion. If the earlier motion has been refused, a change of circumstances is necessary to avoid the second motion being, in effect, a rehearing of the first. That would not be competent. If the earlier motion has been refused, to be sufficient the change of circumstances would have to relate to something that bears on the issues that have to be decided such that a different outcome might be expected to result. It would therefore have to be material and directly relevant to the key factors that must be considered in such a motion. The same test of a "change of circumstances" applies in the situation such as the present where the further motion is made after an earlier one was granted. The adoption of the same test indicates that the intention is once again to require a change that is material and directly relevant to the key issues.

[14] In my view, the recommendation of Dr Wylie that the pursuer should have CBT costing £2,000 does not meet the test. While the pleadings do not refer to further CBT, they do refer to Mr Murphy having undertaken such therapy in the past and seek recovery of treatment costs. The issue of such costs is therefore something that was relevant to the earlier award. In addition, the power of the court in RCS43.11(3) is to award a "reasonable proportion" of the damages likely to be recovered. There is a deliberate lack of precision in that term. It means that the identification of a possible further head of claim of £2,000 in a claim of this size is something unlikely to affect the court's decision on the motion.

[15] The fact that the case has changed from being subject to chapter 43 to chapter 42A is not relevant. It was noted that this means that there is presently no diet of proof allocated. However, the Rule requires consideration of the quantum of damages that might be recovered following a proof and not when the proof will take place. The lack of a present proof diet might mean that it will be longer before the sums are paid to the pursuer, but it is common ground that hardship is not a factor to be considered in this motion.

[16] There being no change in circumstances in terms of the Rule, I refused the motion.

[17] There was a further issue that did not appear to be relied on directly by the parties but arose out of submissions. I note above the defender's submission that the CRU liability had to be taken into account in assessing whether the sums already paid amounted to a reasonable proportion of the sum the pursuer is likely to receive. In relation to this matter, in the course of submissions I was referred to paragraph 43.11(13) of the Annotated Rules of the Court of Session. This notes that in terms of the Social Security (Recovery of Benefits) Act 1997, a defender may deduct from compensation they pay to a pursuer certain sums representing recoverable benefits they are required to pay to the Secretary of State for Social Security. Section 15 of the 1997 Act requires that where a court orders a compensation payment it specifies how much of the payment is attributable to heads of compensation specified in column 1 of schedule 2 to the Act. This enables the party making payment to ascertain what parts (if any) of the recoverable benefits they must pay to the Secretary of State may be deducted from the compensation.

[18] No material was put before me that would have enabled me to ascribe any part of the interim damages sought to the heads specified in the schedule. The outcome of this would have a material effect on the sums actually received by the pursuer. For instance, if the payments were ascribed to loss of earnings, the deduction could be in excess of £23,000.

Accordingly, in the absence of material to justify ascription of the sums sought to the various heads of claim, I consider that I could not competently have granted the motion even if I had been of a different view as to whether there had been a change of circumstances.