

1 IN THE GRAND COURT OF THE CAYMAN ISLANDS  
2 HOLDEN AT GEORGE TOWN, GRAND CAYMAN

3 CAUSE NO. G 180 OF 2010

4 BETWEEN:

5 CHARLES BRENT YATES

6 PLAINTIFF

7 - AND -

8  
9 BRENDA KATHLEEN CHIN  
10 AS PERSONAL REPRESENTATIVE OF THE ESTATE  
11 OF YSATIS NATHINE CHIN, DECEASED

12 DEFENDANT

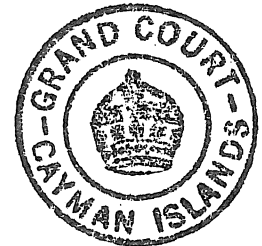
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14 Appearances: Mr. William Jones of Ogier for the Plaintiff  
15 Mr. Chris Levers of Stuarts Walker Hersant for the Defendant

16 Before: Hon. Justice Williams

17 Heard: 14<sup>th</sup> March 2012

18 Draft Circulated: 9<sup>th</sup> May 2012

19 Date of Judgment: 14<sup>th</sup> May 2012



20 JUDGMENT

21  
22 *Personal injury action — interim payment — Order 29, rule 11 — whether any*  
23 *requirement to show need by the Plaintiff — exercise of discretion — what factors*  
24 *should be considered in the exercise of such discretion.*

1 1. This is an action for damages for personal injuries arising out of a road accident  
2 which occurred at around 11.00 p.m. on 4<sup>th</sup> May 2007 on North West Point Road,  
3 West Bay, Grand Cayman. Ysatis Nathine Chin was the negligent driver of a Black  
4 Honda Accord which, whilst travelling on the wrong side of the road, collided with  
5 a Porsche Boxster which was being driven by the Plaintiff. Both drivers received  
6 serious injuries as a result of the collision. Sadly, Ms. Chin succumbed to her  
7 injuries. Ms. Brenda Kathleen Chin is the Court appointed Personal Representative  
8 of the Estate of the deceased.

9  
10 2. I am dealing with an application for an interim payment in the amount of  
11 CI\$700,000.00. The Plaintiff also seeks an order for his costs on the indemnity  
12 basis. The Defendant disputes the extent of the general damages sought and the  
13 considerable majority of the special damages. The Defendant opposes the  
14 application contending that the Plaintiff's request for an interim payment of  
15 CI\$700,000 is excessive and disproportionate and that it exceeds more than the  
16 total damages that are likely to be awarded should there be a trial in this matter. It is  
17 rightly submitted that if an interim order is made, it should not exceed a reasonable  
18 proportion of the damages that are likely to be recovered by the Plaintiff.

19  
20 **BACKGROUND**

21 3. The Writ of Summons with Generally Indorsed Statement of Claim herein was  
22 issued on 29<sup>th</sup> April 2010. The Plaintiff's full Statement of Claim was filed on 7<sup>th</sup>  
23 September 2010. The Defendant's Defence was filed on 19<sup>th</sup> October 2010.

1 Judgment was entered, by consent, against the Defendant for damages to be  
2 assessed. The Judgment was dated 6<sup>th</sup> July 2011.

3  
4 4. On 31<sup>st</sup> October 2011 the Plaintiff, whose date of birth is 7<sup>th</sup> January 1966, made an  
5 application by Summons for interim payment. The Summons asks for an amount of  
6 CI\$700,000.00 by way of interim payment.

7  
8 5. As a result of the accident, the subject matter of the claim herein, the Plaintiff  
9 suffered a fracture of the medial malleolus of the left ankle. In addition he suffered  
10 fractures of the neck of the right talus and the neck of second metatarsal on the right  
11 foot as well as multiple chest abrasions and contusions. He later suffered  
12 post-traumatic osteoarthritis of the right tibial talar joint. The Defendant does not  
13 dispute that the Plaintiff suffered a severe injury to his right ankle. He was admitted  
14 to George Town Hospital as an emergency and surgery was performed for insertion  
15 of pins into both of his ankles. The Plaintiff contends that he was totally  
16 incapacitated and needed help and care from his parents until his left ankle healed  
17 and was able to bear weight in or around June 2007. The Plaintiff contends that he  
18 is unable to bear full weight on his right ankle, and he experiences pain whenever  
19 he is on his feet.

20  
21 6. On 5<sup>th</sup> May 2007, the Plaintiff's left medial malleolus fracture and right talus neck  
22 fracture were surgically treated under general anesthesia. The Plaintiff's right  
23 second metatarsal was treated without surgery. On 7<sup>th</sup> May 2007, one of the screws

1 used in the right talus was changed under general anesthesia. Two weeks after  
2 surgery, the sutures were removed. The Plaintiff remained in hospital for some 15  
3 days, at which stage he was discharged with both legs and ankles in plaster.  
4

5 7. Following the Plaintiff's discharge from hospital he attended the hospital  
6 outpatient clinic on a regular basis. Eleven weeks after the collision, the Plaintiff's  
7 left medial malleolus fracture was confirmed to have healed, but his right talus  
8 fracture remained un-united a full year after the collision, when CT scans showed a  
9 partial union. On 19<sup>th</sup> January 2009 the Plaintiff was referred to Dr. Thomas P. San  
10 Giovanni, an ankle and foot specialist practicing in Miami, Florida, USA.  
11 Following his examination by Dr. San Giovanni on 23<sup>rd</sup> February 2009, he was  
12 advised that he had a complex condition and that fusion procedures for talar neck  
13 fractures were known to be fraught with complications and residual conditions of  
14 pain and, at times, deformity. Dr. San Giovanni recommended the non-operative  
15 treatment of anti-inflammatories or a trial of either an ankle foot orthosis or a  
16 patellar tendon bearing orthosis type brace. The Plaintiff had an MRI of his right  
17 ankle and, upon reviewing the results, Dr. San Giovanni, on 6<sup>th</sup> March 2009,  
18 recommended an ankle foot orthosis. Dr. San Giovanni further indicated that he  
19 believed that surgical treatment would be an alternate recommendation, but not  
20 until all conservative measures had been exhausted.  
21

22 8. On 13<sup>th</sup> April 2009 the Plaintiff attended Kendall Prosthetics and Orthotics Inc. in  
23 Miami to be fitted for a custom moulded ankle-foot orthosis. On 22<sup>nd</sup> April 2009

1 the Plaintiff collected the brace and also purchased special shoes from Bida Shoes  
2 and special socks and bandages from M. Quirantes Orthopedic Appliances.

3  
4 9. On 5<sup>th</sup> August 2009, the Plaintiff was seen by Mr. Tenson R. Edmonds, a  
5 Registered Physical Therapist, and Ms. Jacqui Smith of RVC Rehab Services at the  
6 Chrissie Tomlinson Memorial Hospital in Grand Cayman for a physiotherapy  
7 assessment and treatment. Mr. Edmonds reported that the Plaintiff's right ankle  
8 remained severely swollen, with moderate swelling on the left. Mr. Edmonds  
9 concluded that the Plaintiff had several deficits which required intensive  
10 physiotherapy management. Mr. Edmonds recommended that the Plaintiff should  
11 undergo a program of physiotherapy consisting of three sessions per week for six  
12 months, followed by one session per week for four months, and monthly check-ups  
13 thereafter until a plateau was reached.

14  
15 **THE PRESENT APPLICATION**

16 10. The Plaintiff has filed an affidavit verifying the amount of damages and the  
17 grounds of the application. The affidavit also exhibits documentary evidence in  
18 support of the application. The Plaintiff's case is that his prognosis is poor and that  
19 he has a permanent impairment as regards any activities which require him to walk  
20 more than a slow pace. He experiences pain when walking, if he remains standing  
21 for extended periods of time, and occasionally when at rest, or sitting or lying down.  
22 There is an outstanding issue about whether he will undergo surgical treatment,  
23 including excision of the avascular talus, the placement of a femoral head allograft,

1 a retrograde intramedullary rod infusion and a tibio-talocalcaneal fusion. However,  
2 he is delaying such surgery for as long as possible, because of the potential  
3 complications and residual conditions of pain and deformity.

4  
5 11. The Plaintiff's case is that his employment history is in the quantity surveying field  
6 in which he has over 20 years of experience in performing property appraisals,  
7 building appraisals, building construction valuing, construction estimations, site  
8 inspections, bills of quantity, cost analysis, contracts and site meetings. Before the  
9 accident, the Plaintiff, who was 41 years old, had been employed from January  
10 2007 as the Manager of Building and Grounds at Boatswain's Beach. The Plaintiff  
11 gives his pre-accident basic salary as \$7,500.00 per month as well as a pension  
12 contribution of C\$450.00 per month, health insurance coverage, a company car  
13 and a company cellular phone.

14  
15 12. The Plaintiff claims that, following the accident, although he temporarily resumed  
16 that position about three months after the collision (albeit limited to a desk job role),  
17 he was unable to return to his full pre-accident duties. Since the collision, he  
18 contends that he has been unable to perform any of the heavy work or employment  
19 tasks which he was able to carry out prior to the accident, in regard to heavy  
20 construction, walking on uneven ground, ladder climbing, scaffold climbing,  
21 walking on sloping roofs, going in and out of holes, or heavy lifting. In fact, Dr.  
22 Pervez Ali has advised that the Plaintiff has sustained a career ending injury to his  
23 right foot, and that the impairment is permanent. As a consequence, on 1<sup>st</sup> January

1 2008, rather than being made redundant or being put in position paying less than  
2 CI\$5,000 per month, the Plaintiff accepted the role of Freedom of Information  
3 Manager at Boatswain's Beach on a reduced salary of CI\$5,224 per month. The  
4 Defendant contends that the Plaintiff has not filed any contemporaneous  
5 independent evidence to demonstrate that the change of his employment position  
6 was due to the injuries. The Plaintiff remained in post as the Freedom of  
7 Information Manager until he was made redundant on 12<sup>th</sup> May 2010. That  
8 redundancy was not due to his injuries but as a consequence of the restructuring of  
9 that business.

10  
11 13. Thereafter, between 26<sup>th</sup> June 2010 and 11<sup>th</sup> July 2011, the Plaintiff secured  
12 temporary employment with Charterland Ltd. ("Charterland"), a firm of Chartered  
13 Surveyors and Property Consultants. The Plaintiff claims that, as a consequence of  
14 his injuries, he was only engaged in a limited capacity with Charterland and that  
15 during his year with them he was only able to perform sixty-two appraisals for  
16 which he received a commission based salary totaling CI\$5,736 .67.

17  
18 14. On 1<sup>st</sup> April 2010 the Plaintiff, in a bid to supplement his income, purchased an ice  
19 cream retail unit at Boatswain's Beach called the 'Ice Hut Creamery'. The Plaintiff  
20 states that this turned out not to be profitable, leading to him temporarily  
21 suspending business in June 2011 due to a loss of approximately CI\$13,500.00. No  
22 accounts have been produced, so there is no documentary evidence verifying what,  
23 if any, remuneration has been paid to him by the business, the state of the business

1 at that time and/or at the current time. The Plaintiff's case is that he has been  
2 unemployed and out of work since 11<sup>th</sup> July 2011. Between July and August 2011  
3 the Plaintiff went to Peru to visit a friend and to see if he could acquire employment  
4 there. The Plaintiff contends that as a result of his injuries, he was unsuccessful in  
5 finding work in Peru. In October 2011 he re-opened the ice cream business to  
6 coincide with the high season. Due to a reorganization of the business he has  
7 increased the income and reduced the expenses of the business. It is not clear what  
8 net income he has each month, but it does not appear to be great. However, he  
9 states that he still owes his landlord CI\$6,300 in unpaid rent and that he still owes  
10 CI\$3,000 on the CI\$25,000 purchase price of the business. It is argued that he has a  
11 need to clear these liabilities as they are preventing him from drawing an income  
12 from his business and have resulted in him having "significant cash-flow  
13 difficulties." In the absence of verifying evidence, I am unable to fully determine  
14 the extent of any need, but there does appear to be at least a limited need for a  
15 payment at this time.

- 16
- 17 15. The Plaintiff contends that he is no longer able to enjoy his pre-accident activities  
18 such as volleyball, tennis, cycling, boating and fishing. His case is that, as a  
19 consequence of the injuries, he has had to move in to his elderly parents' property  
20 and is reliant upon their assistance in the performance of day to day housekeeping  
21 chores. He states that he has been forced to hire someone to provide him assistance  
22 with the landscaping and the general building maintenance of his parents' house.  
23 This is problematic due to his contended limited income.

1

2 16. It is submitted by the Plaintiff, referring to the calculations in the detailed Draft  
3 Schedule of Damages exhibited to his first affidavit, that the level of damages  
4 which he is likely to receive is in the region of CI\$1.5 million. That total comprises  
5 a claim of CI\$286,283.10 in Special Damages and CI\$1,267,623.44 in General  
6 Damages. It is contended that fifty percent of the total damages, around  
7 CI\$700,000, is a reasonable proportion of the damages for payment at this stage.  
8 The most significant parts of the claim are under the head General Damages for the  
9 sum of CI\$1,128,492 for future loss of earnings from 1<sup>st</sup> September 2012 to the  
10 Plaintiff's anticipated retirement age of 65, followed by CI\$268,568.25 for loss of  
11 earnings between the date of the accident on 4<sup>th</sup> May 2007 and the anticipated trial  
12 date of 1<sup>st</sup> September 2012 under the head Special Damages. These two figures are  
13 the core dispute in the matter, both on issues of law and fact.

14

15 17. The Plaintiff contends that these are the appropriate figures despite the submissions  
16 of the Defendant. It is submitted that, even if the Court were to conclude at this  
17 hearing that it was inappropriate to find in favour of the Plaintiff as to certain heads  
18 of the claim and that these issues were best determined at the final hearing, the  
19 Court should at least consider ordering an interim payment having regard to the  
20 Defendant's submissions and facts the Plaintiff argues must be accepted by the  
21 Defendant. It is wrongly submitted that on the Defendant's own case the Plaintiff's  
22 claim is worth at least CI\$529,006.74 as the Defendant does not accept that there  
23 should be recovery for any future loss after the redundancy.

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18. The Plaintiff highlights that in paragraph 44 of the Defendant's written submissions the Defendant accepted that the Plaintiff suffered a loss of earnings of CI\$27,312.00 per year whilst he was employed as the freedom of information manager on his reduced salary of CI\$5,224.00 per month. It is submitted in light of that, that if the Plaintiff had not been made redundant, he would have continued to suffer that loss until retirement and therefore it should be accepted that CI\$27,312.00 is the absolute minimum multiplicand to be used in the calculations. There may be some force in this submission as, due to his injuries and the nature of his work experience, it may be unlikely that Mr. Yates will be able to now gain employment with an income equivalent to the CI\$7,500.00 per month plus benefits which he was earning at the time of the accident. There is an evident loss of earning capacity. However, for the Court to determine maximum recovery it will have to consider his income at the time of the accident, his prospects for the future and, particularly, evidence of the specific difficulties in seeking and retaining employment by reason of his disabilities. One would ordinarily expect this evidence to come from the Plaintiff as well as work colleagues, especially managers. In certain jurisdictions the Court might expect to hear from an employment consultant. This coupled with the absence of verifying evidence about his current level of income from his business means that, even if I am persuaded as to the strength of the Plaintiff's reduction in income capacity submissions, a determination about the level may only be made at the final hearing. Using the multiplier of 12.5388, which the Plaintiff contends is not disputed in the

1 Defendant's affidavit or written submissions, the Plaintiff submits that at a  
2 minimum the total future loss of earnings would amount to CI\$342,459.70. I am  
3 not in a position at this hearing to say whether or not that figure may be correct.  
4

5 19. It is forcefully submitted that the Defendant should accept that the Plaintiff will  
6 suffer a loss of earnings of at least CI\$27,312 per year until the notional trial date  
7 of 1<sup>st</sup> September 2012. It is contended that had the Plaintiff not been made  
8 redundant he would have suffered a total loss of earnings of **CI\$127,547.04** to the  
9 notional trial date.<sup>1</sup> Due to the loss of earning capacity, the Defendant's contention  
10 that the Plaintiff's redundancy and subsequent total loss of earnings fully  
11 extinguishes the earnings lost as a direct result of the accident is unattractive.  
12 Despite this, I am conscious of the position taken and the resultant issues in law  
13 raised by the Defendant which I should only properly determine after full argument  
14 at the assessment hearing, when exercising my discretion conservatively as to the  
15 appropriate level of the interim payment.  
16

17 20. The Plaintiff highlights that the Defendant in the written submissions states a belief  
18 that the Plaintiff is likely to receive CI\$40,000.00 plus interest of roughly  
19 CI\$1,500.00 in respect of his claim to damages for pain, suffering and loss of  
20 amenity; that the sum of CI\$4,500.00 is an appropriate award in respect of the  
21 claim for future care and treatment; that an award of CI\$8,000.00 is likely to be  
22 made in relation to past medical expenses; that the claim for past gratuitous care is

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<sup>1</sup> 1<sup>st</sup> January 2008 to 1<sup>st</sup> September 2012 is 1705 days or 4.76 years; CI\$27,312 multiplied by 4.67 is CI\$1027 547.04.

1 valued at CI\$2,500.00, and the interest on past losses is likely to be in the region of  
2 CI\$4,000.00. For Loss of Earnings to calculated to redundancy, the Defendant  
3 concedes, for the purpose of the interim application alone and without prejudice to  
4 the position he might take at the final hearing, that the maximum could only be  
5 CI\$68,677.73.<sup>2</sup> Therefore, the Defendant's position is that the total figure likely to  
6 be recovered is CI\$129,177.73.

7  
8 21. In opposing the application for interim payment, the Defendant's arguments can be  
9 summarised as follows — firstly, that the Plaintiff's request for an interim payment  
10 of CI\$700,000.00 is excessive and disproportionate in that it exceeds more than the  
11 total damages that are likely to be awarded at trial; secondly, that the General  
12 Damages sought and the considerable majority of the Special Damages are bona  
13 fide disputed. There is force in these submissions.

14  
15 22. The Defendant highlights that the majority of the damages claimed are calculated  
16 on the basis that the Plaintiff will never work again. It is clear that this is a  
17 substantial issue that will need to and may only be properly determined at the final  
18 hearing. It is clear, as is contended on the expert medical reports relied upon by the  
19 Defendant that, having regard to the fact that the Plaintiff has been able to be  
20 gainfully employed for different periods of time since the accident, he may be able

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<sup>2</sup> "1<sup>st</sup> January 2008 to 12 June 2010 is 893 days or 2.45 years. Loss of salary over that period is equal to (the difference in annual salary of CI\$27,312 x 2.45) + CI\$7,500 – CI\$5,736.67 (being the sum earned by the Plaintiff during his employment with Charterland)."

1 to find some suitable work in the future. Dr. Russell O'Connor stated at page 5 in  
2 his report:

3 *“Mr. Yates has worked in various full-time positions since August*  
4 *2007 and it is clear that he has been capable of working full-time in*  
5 *sedentary positions and part-time in more physical positions since*  
6 *then. In my opinion this will continue for the foreseeable future.*  
7 *Importantly, there is no evidence or suggestion of any cognitive*  
8 *impairment as a result of the accident and Mr. Yates remains fully*  
9 *capable of working in full time sedentary employment.”*

10  
11 23. At page 6 of his report the Doctor states:

12 *“It is my opinion (and this is confirmed by his actual work history)*  
13 *that he is capable of full-time sedentary work in a seated capacity.*  
14 *He is capable of only part-time work for activities that would require*  
15 *him to be on his feet for an extended time. Currently, he is working on*  
16 *his feet for part of the time and is generally working half days. He has*  
17 *already demonstrated his capabilities of doing such tasks up to the*  
18 *date of this assessment.*

19 *As set out above, it is my opinion that he is well capable of*  
20 *undertaking sedentary work in a full-time capacity for the*  
21 *foreseeable future. He has the capacity, with his employment*  
22 *experience and with his Cayman status, of applying for other work*  
23 *that is more sedentary. He has been capable of this essentially since*  
24 *August, 2007 to date, and will continue to be able to do so, in my*  
25 *opinion.”*

26  
27 24. Additionally, the Defendant rightly reiterates that the Plaintiff has not given details  
28 of any recent attempts to find employment or disclosed any financial  
29 documentation as to his present income, the current status of his business or clearly

1 setting out his current financial position. In light of the contested medical evidence,  
2 and to a degree the absence of this up-to-date information, I am unable at this stage  
3 to reach an informed conclusion about the degree of his employment prospects and  
4 gain a comprehensive picture as to his current income and financial affairs. This  
5 again is an issue that I may only be able to fully resolve in an informed manner at  
6 the final hearing. This coupled with the dispute about the post-redundancy loss of  
7 earnings adds to the need for a cautious approach when deciding what level of  
8 interim payment should be made.

9  
10 **THE LAW**

11 25. The requirements on interim payments are set out in Grand Court Rules, O.29 r.11.

12 Under O. 29 r.11 (1), for the application to succeed, the Plaintiff will have to show  
13 that:

- 14 a) liability has been admitted; or  
15 b) the plaintiff has already obtained interlocutory judgment (with damages  
16 to be assessed); or  
17 c) the plaintiff would recover substantial damages if the case went to trial.

18  
19 26. The Court may order an interim payment of such amount as it thinks fit, not  
20 exceeding a reasonable proportion of the damages which in the opinion of the Court  
21 are likely to be recovered by the Plaintiff after taking into account any relevant  
22 contributory negligence and any set off, cross claim or counterclaim on which the  
23 respondent may be entitled to rely.

24

1 27. It is clear that in the matter before me the requirement under O.29 r.11 (1) (b) has  
2 been met. In this case, interlocutory judgment (with damages to be assessed) has  
3 already been entered by consent. There is therefore no question of any contributory  
4 negligence nor any set-off or cross-claim.

5  
6 28. Grand Court Rules O.29, r.11 (2) does not apply in this case as the Defendant is  
7 insured by British Caymanian Insurance Company Limited with respect to the  
8 Plaintiff's claim.

9  
10 29. The footnote at 29/11/7 of the 1999 England and Wales White Book reads :

11 *“The former custom in personal injury actions for interim payments*  
12 *to be limited to sums for which the plaintiff can show a need, **Schott***  
13 ***Kem Ltd. v. Bentley** [1991] 1 QB 61 has been abrogated by*  
14 ***Stringman v. McArdle** [1994] 1 WLR 1653; the former case was a*  
15 *two judge decision of the Court of Appeal and the latter was a three*  
16 *judge decision.”*

17  
18 30. **Schott Kem Ltd v Bentley** was not a personal injuries case. However, **Neill L J**  
19 drew a distinction between personal injuries cases and other civil cases in respect of  
20 the practice relating to interim payment when giving the judgment of the court in  
21 that case. The relevant part of his judgment at page 74 is as follows:

22 *“As I understand the present practice, it is customary in personal*  
23 *injury actions for interim payments to be limited to sums for which*  
24 *the plaintiff can show a need. This is a sensible course because*  
25 *large interim payments in such cases may lead to difficulties if an*  
26 *order for repayment is subsequently made under Ord.29 r.17.*

1            *I am not satisfied, however, that there is any restriction implicit in*  
2            *the rules which prevents an interim payment order being made in*  
3            *the absence of evidence of need or prejudice. By the use of the*  
4            *words 'if it thinks fit' both rules 11 and 12 confer a discretion on the*  
5            *court whether to order an interim payment at all. Moreover the*  
6            *amount of the payment is expressed to be 'of such amount as [the*  
7            *court] thinks just,' with the additional limitation in the case of*  
8            *damages that the amount is not to exceed 'a reasonable proportion*  
9            *of the damages which in the opinion of the court are likely to be*  
10           *recovered by the plaintiff' after taking into account the matters*  
11           *specified. For my part I can see no basis for any further limitation*  
12           *on the jurisdiction of the court to order interim payment other than*  
13           *those set out in Order 29 itself."*  
14

15 31.    **Stuart-Smith LJ** stated at page 1657 in **Stringman v. McArdle**:

16            *"Once the threshold conditions in R.S.C. Ord.29 r.11(1),*  
17            *sub-paragraphs (a), (b) or (c) are satisfied, what the court has to do,*  
18            *if it thinks fit, is to make an interim payment of such amount as it*  
19            *thinks just not exceeding a reasonable proportion of the damages*  
20            *which in the opinion of the court are likely to be recovered by the*  
21            *plaintiff after taking into account contributory negligence and any*  
22            *set off or counterclaim. It should be noted that the plaintiff does not*  
23            *have to demonstrate any particular need over and above the general*  
24            *need that a plaintiff has to be paid his or her damages as soon as*  
25            *reasonably may be done. It will generally be appropriate and just to*  
26            *make an order where there will be some delay until the final*  
27            *disposal of the case. Therefore what the court is concerned with in*  
28            *fixing the quantum is that it does not exceed a reasonable*  
29            *proportion of the damages which in the opinion of the court are*  
30            *likely to be recovered...In the case of an adult of sound mind, the*

1 court making an order under R.S.C. Ord.29 r.11 is not concerned in  
2 any way with what the plaintiff does with his damages.”<sup>3</sup>  
3

4 32. There will be some personal injuries cases where a plaintiff can show, because of  
5 the injuries suffered or for some other reason, that he is suffering some hardship  
6 and there is a real need or requirement for an interim payment. Provided that the  
7 other threshold conditions of Order 29, rule 11 are met, there is nothing preventing  
8 a Court from taking that into account in making an order for interim payment. A  
9 plaintiff's need, requirement or hardship may be taken into consideration in an  
10 enabling way but not in a restrictive way in the exercise of the Court's discretion.  
11 However, as confirmed by **Schofield J** sitting in the Grand Court in **Baucom v**  
12 **Ebanks** 1994-95 CILR N—21<sup>4</sup> a plaintiff does not need to satisfy the court that the  
13 damages are likely to be substantial, nor of his need for an interim payment or that  
14 he will suffer prejudice if he does not receive one.

15  
16 33. Although there is nothing in the Rules which requires the Plaintiff to show need in  
17 order to ground jurisdiction, it does appear from his first affidavit that he has some  
18 need. Despite the lack of verifying documentary evidence it does appear that the  
19 Plaintiff has not had a steady reasonable income since May 2010.

20  
21 34. In the circumstances, it seems sensible and desirable to order an interim payment.  
22

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<sup>3</sup> My emphasis

<sup>4</sup> Applying *Schott Kem Ltd v Bentley*

1    **DECISION**

2    35.    Substantial disclosure of the Plaintiff’s case is required in an interim payment  
3           application. I accept the submission made by the Defendant that in seeking to  
4           determine the quantum I should not adopt at this stage an “overly detailed  
5           approach.” I accept the submission that an interim payment procedure, is more  
6           summary in nature, and therefore the Court ordinarily does not conduct the same  
7           detailed investigation into a Plaintiff’s claim as is required at the final hearing.

8           **Justice Robert Walker in Chiron Corporation and Others v. Murex**  
9           **Diagnostics Limited (No.13)** [1996] F.S.R. 578 at page 584 referred to the  
10          statement of **O’Connor LJ** made at page 77 in the English Court of Appeal case of  
11          **Newport (Essex) Engineering Co. Ltd. LPD v Press and Shear Machinery**  
12          [1981] 24 B.L.R 74 a case within rule 11 (1) (b) **O’Connor LJ** stated at page 77:

13                    *“I do not think it desirable that application for interim payments*  
14                    *should turn into long drawn out investigations into the very issues*  
15                    *which are performed the subject matter of a future hearing. The*  
16                    *wide discretion given to the court, coupled with a safety net for the*  
17                    *defendants in rule 17, show that these application should be decided*  
18                    *on a fairly broad approach, with a minimum of expense to the*  
19                    *parties.”*

20  
21    36.    The Defendant relies upon Neill LJ’s observations at page 73 in **Schott Kem Ltd v**  
22           **Bentley:**

23                    *“.... That interim payment procedures are not suitable whether*  
24                    *factual issues are complicated or where difficult points of law*  
25                    *arise.....”*

26

1 37. When Mr. Justice Robert Walker in Chiron Corporation considered this  
2 passage from Schott Kem he added:

3 *“...I do not read Neill LJ’s general observation as excluding an*  
4 *application for an interim payment in relation to part (I might say,*  
5 *an irreducible minimum part) of a claim which may be capable of*  
6 *being established without venturing far into disputed areas of fact*  
7 *or law, provided that the irreducible minimum part is substantial*  
8 *enough to justify the trouble and expense of an interlocutory*  
9 *application.”*

10  
11 38. In Ultraframe (UK) Ltd v Eurocell Building Plastics Ltd [2005] EWHC 211 (1  
12 Ch) Justice Pumfrey rightly cautioned himself at paragraph 3 when saying:

13 *“..... As a helpful reminder that what may, at an early stage in an*  
14 *enquiry as to damages, appear clear and well supported may, on a*  
15 *proper analysis, be tentative and liable to criticism and substantial*  
16 *adjustment -something which am obliged to bear in mind when*  
17 *considering this application.”*

18  
19 39. When adopting the guidance as to the exercise of the court's discretion given by  
20 Justice Robert Walker in Chiron Corporation, Justice Pumfrey added:

21 *“While a broad brush approach to detail may be appropriate to an*  
22 *inquiry as to damages.*  
23 *...At this stage it is also necessary to take a conservative view,*  
24 *however broad the brush employed is....”*

25

1 40. I am mindful that I ought not risk over paying the Plaintiff. What I have to consider  
2 for present purposes is “the damages which in the opinion of the Court are likely to  
3 be recovered by the plaintiff”.

4  
5 41. In Chin–Welds v Welds [2006] CILR Note 31, **Harrison Ag J**, sitting in the  
6 Grand Court, found that under Grand Court Rules, O.29 r.11(1) an interim payment  
7 of a reasonable proportion of the total damages likely to be recovered can be  
8 ordered. He concluded that general and special damages for personal injury may be  
9 considered in deciding what is a reasonable proportion. The Learned Judge,  
10 applying Baucom v Ebanks, stated that it is unjust not to at least order the interim  
11 payment of undisputed special damages. However, the amount to be paid is at the  
12 Court's discretion.

13  
14 42. From all the facts, the submissions and the evidence before me at this stage,  
15 importantly including the contents of the medical reports which are now apparent,  
16 I should think that a very conservative estimate of the total damages which the  
17 Plaintiff is likely to recover would not be less than CI\$130,000.00, perhaps even  
18 much more depending on the evidence to be adduced at the assessment hearing and  
19 which I do not have the benefit of at present and my then being in a position to  
20 make a final determination on future loss of earnings legal arguments. In arriving  
21 at this cautious figure, I have taken into account the fact that the final hearing will  
22 likely be heard in September/October 2012, only four to five months away.

23

1 43. Accordingly for the above reasons and having regard to the helpful guidance given  
2 as to the approach to such application set out in the above case law. I, in the  
3 exercise of my discretion, make an order for interim payment for the amount of  
4 CI\$85,000.00. This figure ensures that there is a sufficient margin to guard against  
5 any overpayment, even on the Defendant's case conceded for this hearing.  
6

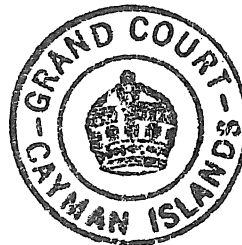
7 **ORDER**

8 44. Accordingly, I shall order that the Defendant pay to the Plaintiff by way of interim  
9 payment the sum of \$85,000.00, such sum to be paid to the Plaintiff's attorneys  
10 within 21 days from this order. The parties have leave to apply concerning the  
11 means of payment and the payment date.  
12

13 **COSTS**

14 45. I will hear the parties as to costs if required at a later stage. However, I note that  
15 although the amount awarded is considerably less than that sought by the Plaintiff,  
16 it is similarly considerably greater than the amount suggested by the Defendant.  
17

18  
19 **Dated this 14<sup>th</sup> day of May 2012.**



20  
21  
22 **Williams J.**  
23 **Judge of the Grand Court**  
24