

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** *Dartt v. Decoste*,  
2018 NSSC 24

**Date:** 2018-02-07

**Docket:** *Pictou*, No. 448704

**Registry:** Pictou

**Between:**

Tracy Lynn Dartt and Lilla Katherine Bennett

*Plaintiffs*

v.

Diana Susan Decoste

*Defendant*

DECISION

**Judge:**

The Honourable Justice N. M. (Nick)  
Scaravelli

**Heard:**

January 18<sup>th</sup>, 2018, Nova Scotia

**Decision Date:**

February 7<sup>th</sup>, 2018

**Counsel:**

Melanie Young for the Plaintiffs

Christine Nault for the Defendant

[1] Lilla Katherine Bennett, one of the plaintiffs in this proceeding has filed a motion pursuant to Civil Procedure Rule 70.08 seeking an order for an interim payment of damages.

**Interim payment**

**70.08 (1)** A party who claims damages may make a motion for an interim payment when the other party admits liability or the party who makes the motion is entitled to have the damages assessed in accordance with Rule 8 - Default Judgment, or in accordance with an order made under Rule 13 - Summary Judgment.

(2) The order for an interim payment must grant judgment in the interim amount with the balance to be assessed.

(3) The order for an interim payment must provide for a reasonable contribution towards damages that the person making the claim is likely to recover, less any deduction to which the other party is likely to be entitled.

(4) The party who makes a motion for an interim payment must file the party's undertaking to repay the difference if the interim payment is greater than the amount allowed on assessment.

**BACKGROUND**

[2] On September 3<sup>rd</sup>, 2015, Ms. Bennett was involved in a motor vehicle accident on Provost Street, New Glasgow, Nova Scotia. Ms. Bennett was the front seat passenger in the vehicle operated by the plaintiff Tracy Lynn Dartt. Their vehicle was rear ended by a vehicle operated by the defendant Diana Susan Decoste. The defendant has admitted liability for the collision. The remaining

issues of causation and quantum of damages is scheduled for trial before a Judge alone in November, 2018.

[3] In support of the motion the plaintiff has filed the following documents:

- a. Affidavit of Lilla Bennett;
- b. Supplemental affidavit of Lilla Bennett;
- c. Medical report of Dr. Lee, family physician;
- d. Medical report prepared by Dr. Thomas Loane, specialist in physical medicine;
- e. Chronic pain and interdisciplinary assessment.

[4] The plaintiff, at trial is claiming under the following heads of damages:

- a. General damages in excess of “the cap”;
- b. Past loss of income;
- c. Past loss of earning capacity;
- d. Loss for housekeeping and valuable services.

[5] The plaintiff seeks an interim contribution to her damages in the amount of \$70,000 or such amount as the court deems reasonable.

[6] The plaintiff claims she has suffered neck and lower back injuries from the collision resulting in a diagnosis of chronic pain condition that has not improved since the collision and that her prognosis for recovery is poor. The injuries and chronic pain have limited her ability to sit, stand and walk. The injuries have impacted her ability to perform activities of her daily living and as well as her ability to work.

[7] The defendant opposes the motion and has filed the following:

- a. Affidavit of Tanya Godin; claims adjuster with the motor vehicle liability insurer for the defendant;
- b. Affidavit and medical report of Dr. Edwin Koshi, specialist in physical medicine;
- c. Video surveillance;
- d. Discovery transcripts.

[8] The defendant submits there are profound issues of causation, mitigation and credibility that should be left to the trial judge.

#### INTERIM PAYMENT

[9] Interim motions are summary in nature. The court does not conduct a detailed investigation into the merits of the case. The court should only use its discretion to order a contribution to damages in cases where evidence material to the issues is uncontradicted. Where there is material evidence before the motions judge that appears contradictory including evidence that raises live issues of causation and credibility, the motions court should decline to exercise its jurisdiction. Weighing and balancing of evidence in these instances should be left to the trial judge.

[10] Both counsel have referred to general principles governing interim payments as set out in *Fournier v. Green*, 2005 NSSC 253:

**17** The general principles involving interim payments where summary judgment has been allowed was discussed in *Bogaczewicz v. Faulkner*, [1997] N.S.J. No. 237. See also *Mahoney v. Almeco Leasing Limited* [1999] N.S.J. No. 390 and *MacDonald v. MacPherson* [1999] N.S.J. No. 283 affirmed on Appeal [1999] N.S.J. No. 445. The case law may be summarized as follows:

1. It is not the function of the Court in determining the matter of an interim payment to make findings of credibility or even to dwell on them. This might ultimately be for a Trial Judge at an assessment of damages.
2. An Order of an interim payment is not mandatory. It is a discretionary Order of the Chambers Judge.
3. The Court must exercise caution in assessing likely recovery of a plaintiff in the early stages of litigation particularly where there is a lack of medical opinion in the discovery of experts where necessary.
4. An application under Rule 33.01(A) is not to be a trial or mini-trial where an estimate of the plaintiff's ultimate recovery can be difficult and may amount to nothing more than a haphazard guess. In such cases the Court should refrain from making an order of interim payment.
5. In cases where there is considerable uncertainty existing as to what is likely to be recovered by the Plaintiff, the proper approach is that where the Court is faced with such a degree of uncertainty, it should conclude that it is unable to make a determination of reaching an opinion as to what is likely to be recovered in those damage areas of uncertainty.

[11] The plaintiff submits her affidavit evidence and medical reports support the claim that the soft tissue injuries suffered in the motor vehicle accident on September 2015 have developed into a widespread chronic pain condition that has significantly impacted her daily life including the ability to sit, stand and walk. The medical prognosis for recovery is poor. Accordingly, the injuries sustained in the collision resulted in a “substantial inability to perform the essential tasks of her regular employment despite reasonable efforts to accommodate” and, therefore, meet the requirements “serious impairment” as opposed to “minor injuries” under

the *Insurance Act*, R.S.N.S. 1989, c.231 (*Act*) and the *Automobile Accident Minor Injury Regulations* (N.S. Reg. 94/2010) (*AAMIR*).

[12] The plaintiff submits that a likely award for assessment of damages at trial would be as follows:

a. General damages -	\$45,000 - \$55,000
b. Past loss of income -	\$20,484.04
c. Loss of earning capacity -	\$70,000 - \$100,000
d. Loss of housekeeping and valuable services -	\$15,000

[13] The plaintiff estimates likely recovery of damages including pre-judgment interest in the rate of \$147,000 to \$188,000.

[14] The plaintiff has applied for and received CPP disability benefits.

[15] The defendant submits the medical evidence supports a finding that the plaintiff suffers from Fibromyalgia which pre-dates the motor vehicle accident of September 2015. The defendant points to the plaintiff's family physician's report as well as the report of Dr. Koshi. Dr. Koshi's report and conclusions are inconsistent with the report of Dr. Loane including causation and prognosis for recovery.

[16] Dr. Loane reports that the plaintiff developed wide spread chronic pain condition as a result of the accident that appears to be not improving or possibly regressing.

[17] Dr. Koshi reports that the plaintiff's pain is best described as Fibromyalgia that was not caused by the motor vehicle accident. The soft tissue injury sustained in the accident likely recovered within a matter of weeks to a few months.

[18] The defendant submits that the plaintiff's different and inconsistent statements to treatment providers as well as video surveillance evidence raises the issue of credibility. Further, that the soft tissue injuries suffered by the plaintiff are minor injuries which "cap" the amount of general damages recoverable. That depending on the court's findings from the evidence, the plaintiff could well receive an amount less than the "cap" for 2015 being a maximum of \$8,352.

[19] Further complicating the issue of damages, the defendant advises the court there is outstanding litigation pending in respect of the plaintiff's section B claim for weekly indemnity. If successful, the defendant is entitled to deduct the amount. Moreover, in light of the plaintiff's receipt of CCP disability benefits, the defendant will be able to deduct both past and future payments from an assessment

of damages. This creates uncertainties in respect to the plaintiff's loss of income claim.

[20] Having reviewed the evidence relied upon by the parties in this motion, I find I am unable to make a reasonable determination of damages the plaintiff is likely to recover. I am satisfied there are live issues of causation and credibility. The weighing and balancing of expert reports, assessment of credibility and resulting findings are all matters for the trier of fact.

[21] As a result, the plaintiff's motion is denied.

[22] Costs are awarded to the defendant in event of the cause.

Scaravelli, J.