

**Judgment 65/2004**

**Angenent v. Pring – Royal Court (Civil  
Action File 717) – 30 December, 2004**

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**Personal injuries claim – plaintiff’s application for interim payment of £50,000 – present judgment limited to the issue of jurisdiction of the Royal Court to order such a payment – held that the Court has no inherent jurisdiction to order such a payment – desirable that provision should be made for an interim payment regime.**

**IN THE ROYAL COURT OF GUERNSEY**

The 30th day of December 2004 before Patrick John Talbot Q.C, Lieutenant Bailiff; sitting alone.

JENNIFER ANGENENT

Plaintiff

And

DAVID J PRING

Defendant

WHEREAS on 7th and 8th day of December 2004 the Lieutenant Bailiff considered an application by the Plaintiff dated 5th day of November 2004 seeking inter alia an interim payment in the sum of £50,000 in advance of the final trial of the issues remaining in the action and heard thereon Advocates J.P. Greenfield and J. M. Wessels, Counsel for the Plaintiff and Defendant respectively the Lieutenant Bailiff this day gave judgment in the terms attached hereto and RULED that the Royal Court has no jurisdiction to make an order for an interim payment in favour of a party to civil proceedings before the Court and DISMISSED this limb of the said application.

S. M. D. ROSS  
Her Majesty’s Deputy Greffier

**IN THE ROYAL COURT OF GUERNSEY**

**No. 717**

**ORDINARY COURT**

**BETWEEN:**

**JENNIFER ANGENENT**

**Plaintiff**

**and –**

**DAVID J PRING**

**Defendant**

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**J U D G M E N T**

**of Patrick John Talbot QC, Lieutenant Bailiff**

**30 December 2004**

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**Background**

1. This is an application by the Plaintiff for an interim payment in the sum of £50,000 in advance of a full trial of the issues remaining in the action.
2. The action is a personal injuries claim by the Plaintiff against the Defendant, an orthopaedic surgeon, arising out of an operation performed by the Defendant upon the Plaintiff on or about 20 October 1999. The operation was, it seems, intended to expose and excise the L4/5 disc in the Plaintiff's spine but, in apparent error, the Defendant exposed and operated on the L3/4 inter-vertebral disc, and not the L4/5 disc.
3. The Plaintiff claims substantial damages from the Defendant, and the trial of the issue of damages, (which will involve oral evidence from the Plaintiff and from expert medical

witnesses,) will take place in the first half of 2005. I have been appointed by the Bailiff to be the presiding judge and I shall be sitting with Jurats.

4. By letter from his advocate, Advocate Jeremy Wessels, to the Plaintiff's advocate, Advocate John Greenfield, dated 25 October 2002, Mr Wessels confirmed that "liability is no longer in dispute although my client continues to reserve his position on causation and of course on quantum." This position is subject to a partial admission made in an expert's report served on behalf of the Defendant on part of the causation issues. The position is not entirely clear and I shall assume for present purposes that issues of both causation and quantum will arise at the full hearing on damages.
5. In correspondence passing between Advocates attempts were made to agree a procedure under which an interim payment in advance of damages could be made to the Plaintiff on behalf of the Defendant, (who is insured), but these attempts did not succeed.
6. In these circumstances, the Plaintiff took the unusual course of applying, by application dated 5 November 2004, for an interim payment of £50,000.
7. It is not in issue between the parties that, if the Royal Court has jurisdiction to make such an order, and if the Court were minded in the exercise of its discretion, to make such an order, a sum of £50,000 would be appropriate.
8. The issues between the parties relate, first, to the question of jurisdiction and, secondly, if I were to find that the Royal Court had jurisdiction to make an interim payment, to the question of discretion, namely, whether, in all the circumstances of the case, I thought it just to make an order. I agreed that I would give judgment on the issue of jurisdiction before I passed to consider the question of discretion and I have not considered the considerable written material, including an affidavit from the Plaintiff, expert's reports and helpful submissions from the advocates, at the time of writing this judgment, which relates only to the issue of jurisdiction.

### **The Rules**

9. There is no provision in the Royal Court Civil Rules 1989, ("the 1989 Rules",) for the making of an interim payment. The 1989 Rules were made pursuant to an express power contained in

section 64(1) of the Reform (Guernsey) Law 1948, which declared that the “powers and functions of a legislative nature as regards the following matters, namely:-

...

(b) The making, variation, modification and revocation of Rules of Procedure in the Royal Court and any Division thereof ...;”  
remained vested in the Royal Court.

10. Accordingly, although at the time of making the 1989 Rules it was open to the Royal Court to make provision bringing into Guernsey practice a procedure for the making of an interim payment to a successful party, in advance of a full trial of the issue of damages, no such course was taken.
11. The courts of England and Wales had such a regime in place at the time of the making of the 1989 Rules. In fact, they had been able to make orders for interim payments in the case of proceedings for personal injuries, since the passing of section 20 of the Administration of Justice Act 1969 and the consequent passing of amendments to Order 29 of the Rules of the Supreme Court 1965 in 1970. In the late 1970’s, the interim payment regime was expanded to all civil proceedings before the English courts and the provisions of the Civil Procedure Rules 1999 contain an interim payment regime.
12. Advocate Greenfield contended that, since the Royal Court was master of its own procedure, a Judge of the Royal Court sitting on his own was entitled, if he thought it just and proper, to make an order for an interim payment, despite the absence of rules to that effect in the 1989 Rules.
13. Reliance was placed upon the well-known decision of the Court of Appeal of Guernsey in ***Cherub Investments Limited v The Channel Islands Aero Club (Guernsey) Limited*** (1982). The issue in that case related to an amendment of pleadings by entering an *exception de fonds* on the day fixed for trial. The Court of Appeal found that there was such a right and made other findings which are not material to this case. At page 6 of the judgment, the President, Mr. Leonard Hoffmann Q.C., (as he then was,) said:

“It seems to me that the correct approach to this matter is to bear in mind that the Ordinance of 1851 was part of a set of general rules made by the

Court to regulate its procedure but that the Court remains master of its own procedure **and can allow a departure from those rules when justice requires this to be done ...**”

14. Advocate Greenfield further relied upon the decision of Day DB in *Laughton v Main*, sitting in this Court on 14 January 2000 on appeal from the Court of Alderney. The issue in the case related to the question whether the Court of Alderney had power to order interrogatories and to require a defendant to answer a Notice to Admit Facts. Day DB found that the absence of any specific rule relating to interrogatories or notices to admit was not fatal to the application for such procedural steps to be allowed. At page 3 of his judgment Day DB said:

“... the central question is whether the Court, in the absence of any specifically enacted Rule can in any particular case order certain procedures to be followed, so that, in effect, it can make and apply rules during the course of litigation. ...”

Deputy Bailiff Day found that the Court of Alderney had unlimited jurisdiction in civil matters and that it had the power to permit the raising of interrogatories and service of Notices to Admit Facts in proper cases.

15. Finally, Advocate Greenfield relied upon the decision of the Court of Appeal of Guernsey in *Morton v Paint* (1996), where the Court of Appeal found that the Royal Court had the power, as it were, to develop the common law of Guernsey in advance of any statutory provision being passed by the States of Guernsey, and introduced into Guernsey law as a Law. Particular reliance was placed upon passages in the judgment of the President of the Court, Sir Louis Blom-Cooper Q.C. The issue in the case related to the “ambulatory” nature of the evolution of the common law and the Court of Appeal, in effect, decided to “bring the law of Guernsey into line with the statutory rule in England” relating to issues of occupiers’ liability “and not to allow a parting of the ways for the two jurisdictions ...”. The learned Judge of Appeal held, in that case, that such an adoption of English rules could be done judicially and that it was an example of the evolutionary nature of the growth of the common law of Guernsey. Further explanation can be found in the judgment of Southwell JA.
16. Advocate Greenfield addressed me helpfully on differences between the Royal Court of Guernsey and the Supreme Court of England and Wales. He argued

- that the decision in *Morton v Paint* was broad in principle,

- that historically the Royal Court had recognised that neither it, nor its rule-making body, namely, the full Royal Court, meet as often as their counterparts in England; and
- that the Royal Court had a more direct and “total” involvement in the making of its own rules than the Supreme Court Rules Committee.

He, therefore, contended that the Royal Court had a broad jurisdiction to make an interim payment order in an appropriate case without any need for specific rule-making or the passing of a Law introducing an interim payment procedure.

17. Advocate Wessels, on behalf of the Defendant, argued that the Royal Court had no power, in the absence of a specific Law or of an express provision in the 1989 Rules to that effect, to make an order for interim payment in any civil proceedings before the Royal Court, whatever the merits might be in any particular case.
18. As a matter of starting principle, he argued that the Royal Court had the powers it needed to have in order to act properly as a Court, which he called “the necessity approach”. In this regard, he relied upon passages in the judgment of Smith J.A. in the decision of the Court of Appeal of Jersey in *Mayo Associates v Cantrade Private Bank Switzerland (CI) Limited* [1998] JLR 173, and the well known dictum of Lord Morris in *Connelly v DPP* [1964] A.C. 1254, at page 1301, which is in the following terms,

“There can be no doubt that a Court which is endowed with a particular jurisdiction has powers which are necessary to enable it to act effectively within such jurisdiction. I would regard them as powers which are inherent in its jurisdiction. A Court must enjoy such powers in order to enforce its rules in practice and to suppress any abuse of its process and to defeat any attempted thwarting of its process.”

Reliance was also placed on revealing and persuasive passages in the much-cited, and commended, article by Sir Jack Jacob, *The Inherent Jurisdiction of the Court* (1970) 23 Current Legal Problems 27.

19. In *Mayo* Smith J.A. said, at page 188 & ff.:

“In our view, the vital clue to the nature of inherent jurisdiction in its procedural setting ... is necessity. The Court has a particular procedural power because it has to have it to be a Court in any meaningful sense.

On this basis, the power to require the attendance of witnesses, whether to testify or to produce documents, the power to control abuse of the process or the Court, the power to dismiss claims for want of prosecution, the power to issue practice directions, the power to decide who may or may not appear before the Court, the power to correct errors in its own orders and many other powers may all be recognised as derived from a single pool, not of powers but of power drawn upon as necessity dictates. It will be observed that this approach is antithetical to a definition of inherent jurisdiction based simply on fairness or by reference to what is perceived in a particular situation to be just. If inherent jurisdiction exists to enable a Court to order that a thing be done, fairness and justice will obviously be factors to be taken into account when the Court is deciding whether or not to exercise its discretion to do so order; but the conclusion that it will be fair or just to order that a thing be done does not determine whether there was inherent jurisdiction to order it.”

20. Next, Advocate Wessels referred, in general terms, to the denial of the English Courts, in reported cases, that it has any inherent power, in the absence of statutory provision or provision in the rules of procedure, *e.g.*, to make interim payment orders; he gave many other examples of such denial, which I need not mention.
21. It is well-known that the introduction in 1970 of a scheme of procedure permitting interim payments in personal injury actions in the courts of England and Wales followed the powerful report of the Win Committee on Personal Injuries Litigation, Cmnd. 3691, dated July 1968.
22. Advocate Wessels argued that, since it was necessary in England and Wales to pass an Act of Parliament, and then to introduce amendments to the Rules of the Supreme Court 1965, in order to introduce an interim payment regime, these matters were persuasive, in this Court, on the issue whether or not the Court had inherent jurisdiction to order an interim payment. In support of this argument he relied upon two reported English cases.
23. First, he relied upon the decision of the Court of Appeal in *Moore v Assignment Courier Limited* [1977] 1 WLR 638. That case was a defended possession action and, in advance of the trial, the landlord applied for an order that the tenant should make interim payments on account, but the Court of Appeal held that it had no jurisdiction to make such an order. At page 642 F/G of his judgment, Sir John Pennycuik found that the issue, (which is identical to the issue in this case,) whether the Court had inherent jurisdiction to make an order for interim payment

“clearly raises an issue of substantive right, namely: in circumstances such as these, can the tenant be ordered to make interim payment to the landlord?”

The learned Judge firmly concluded that the Supreme Court had no jurisdiction to make such an order in the absence of any provision in any rule to that effect. He continued:

“It may at first sight seem attractive and fair that the court should make such an order, but I do not know of any ground on which the court could be said to possess that jurisdiction. ... Also there is the position that in this class of case very considerable difficulty would arise from an application for such an order. The court would have to go into the facts of the particular case, which might involve all sorts of difficulties in calculating the minimum amount which it was fair to order by way of interim payment. The procedure would work only in very simple cases.

On all these grounds it seems to me that the claim advanced upon these appeals is one which cannot be sustained. It seems to me that the court has no power, either under any express rule in the Rules of the Supreme Court or under its inherent jurisdiction – certainly not under any statute – to order such an interim payment, nor is there any judicial authority for saying that the court has such a power. The answer must be that the court does not possess such a power ...”

Whilst Geoffrey Lane L.J. saw some justice in the introduction of a rule permitting interim payments, he said:

“It is not ... permissible for this court to manufacture such a rule ...”

Equally powerful reasoning is, in my view, also contained in the judgment of Megaw L.J.

24. Secondly, Advocate Wessels placed reliance upon the decision of the Court of Appeal in ***The Fuohsan Maru*** [1978] 2 All ER 254, a case relating to issues of arbitration law and summary judgment practice. By a majority, the Court of Appeal found that, even if the Court had jurisdiction to refuse a stay of proceedings out of the Arbitration Act 1975, summary judgment would not be granted to the Plaintiff since it would be impossible to identify or quantify any particular part of that claim which was indisputably due or in respect of which there was no defence. The decision of ***Moore v Assignment Courier Limited*** was applied. Geoffrey Lane LJ resisted what he described as:

“The obvious temptation to decide this question in favour of the wholly meritorious plaintiff against defendants who have less than no merits”.

25. It is clear from the two English cases, to which I have referred, that the principal reasons for the decisions of the Court of Appeal were the absence of rules for interim payments in the Rules of the Supreme Court and the need for Parliament to introduce a statute, namely, section 20 of the Administration of Justice Act, 1969, allowing for the introduction of such a regime.
26. It was, therefore, contended on behalf of the Defendant that the States of Guernsey would need to pass a Law like section 20 of the Administration of Justice Act 1969 in order to introduce a regime of interim payments. Alternatively, the Royal Court would need to amend the 1989 Rules to do so.
27. Advocate Wessels also argued that it was “highly debatable” whether a rule allowing for interim payments would be a rule of practice or procedure regulating the machinery of the Courts and argued, in reliance upon *Moore v Assignment Courier Limited*, that the better view was that such a rule related to substantive rights, rather than merely to procedure. Finally, on the question of apparent differences between the Royal Court and the Supreme Court of England and Wales as rule-makers, Advocate Wessels stressed that the Royal Court acted as a rule-maker when sitting “institutionally” and not when sitting by a single judge deciding individual cases on a summary basis.
28. In reply, Advocate Greenfield reminded me that there has been discussions over a number of years between the Royal Court and the Advocates of Guernsey on possible amendments of the 1989 Rules, which might, I think he argued, include the introduction of an interim payments scheme.

### **Decision**

29. In my judgment, the Royal Court has no inherent jurisdiction to make an order for an interim payment in favour of a party to civil proceedings before the Court. In the absence of any rule in the 1989 Rules permitting an interim payment, I find that there is no inherent power to make such an order and I dismiss that part of the application dated 5 November 2004.

30. Issues of fact arising in civil proceedings before the Royal Court are, of course, decided by the Jurats, unless the Court is sitting summarily under Rule 55 of the 1989 Rules or sitting in order to give directions or to make any other interlocutory order of the kinds specifically referred to in the 1989 Rules. The Royal Court is master of its own *procedure*, but, unless circumstances such as those in *Morton v Paint* arise, (*i.e.* where the Court expressly extends the common law of Guernsey judicially as part of the evolutionary growth of the law), or circumstances exist such as those listed by Smith JA in *Mayo Associates v Cantrade Private Bank*, I consider that the Court has no other inherent power to do what it thinks is just and fair. In my judgment, Guernsey law mirrors, in this respect, the English law position on interim payments dealt with by the Court of Appeal in *Moore v Assignment Courier Limited* and *The Fuohsan Maru* before the expansion of the English interim payment regime, by further amendment of the Rules of the Supreme Court in the late 1970's.
31. I gratefully adopt the approach of Smith JA sitting in the Court of Appeal of Jersey in *Mayo Associates v Cantrade Private Bank* (*supra*), at page 188, which I have quoted in paragraph 19 above. As the learned Judge of Appeal said, where a Judge concludes that it would be fair or just to order that a thing be done, that does not determine the question whether there was inherent jurisdiction to order it. There is, to my mind, a clear distinction to be drawn between cases like *Laughton v Main*, where the issues before the learned Deputy Bailiff were procedural issues, namely, whether or not the Court of Alderney had power to order the raising of interrogatories and the service of a Notice to Admit Facts, and cases where substantive rights are involved. In my judgment, the making of an interim payment raises substantive rights, namely: in circumstances such as these, can the apparently negligent surgeon be ordered to make interim payment to his injured patient? I find that, in applying the laws of Guernsey, I should follow the persuasive approach of Sir John Pennycuick in the Court of Appeal in *Moore v Assignment Courier Limited*, at page 642.
32. One further factor supports, I think, the view which I have taken. In Guernsey the Jurats would normally deal with all questions of fact which remain live. Although in the instant case the size of the interim payment requested, namely £50,000, would not be an issue between the parties, there are just as likely to be cases in the future of real factual difficulty and complexity, where, for instance, the size of an interim payment would be in issue and would have to be decided by the Jurats. It would not, as I see it, be possible for a presiding Judge to make findings of fact himself, when issues of fact central to the application were at large; that would be the role of the Jurats. This seems to me to introduce something of a constitutional issue into the equation and,

although not perhaps determinative, I believe that the point adds support to the conclusion which I have formed, *i.e.* that there is no jurisdiction in the Royal Court to make an order for interim payment.

33. Finally, I wish to record my view that modern civil litigation probably requires a Court to have an interim payment regime in place, so that that justice of claims may be met as quickly as possible, even where the full amount of damages which a successful plaintiff may obtain at the end of the trial cannot be properly estimated or where because, for instance, of the unavailability of expert witnesses, a final hearing date is far off in the future. Nevertheless, it is not for me to introduce such a scheme. That is a matter for others to consider, if they see fit.

Patrick John Talbot QC  
Lieutenant-Bailiff

30 December 2004