[2015] JMSC Civil 116

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. HCV 05009 OF 2013

BETWEEN	**ADMINISTRATOR GENERAL FOR JAMAICA (On behalf of the Near Relations and Dependants as Representative Claimant for the estate of Mark Henry, Deceased)**	**CLAIMANT**
AND	**LLOYD LEWIS**	**1st DEFENDANT**
AND	**URLINE LEWIS (also known and referred to as Erlene Lewis)**	**2nd DEFENDANT**

Ms. Catherine Minto, instructed by Nunes, Scholefield, DeLeon & Co. for the claimant/applicant.

Ms. Kelly Greenaway, instructed by Samuda & Johnson for the defendants/respondents.

Application for Interim Payment - Rule 17.6 (1) & (2) of the Civil Procedure Rules – Principles Governing Such a Grant – Defence of "Agony of the Moment" or "Inevitable Accident" - Affidavit of Information and Belief - Whether Requirements for Such an Affidavit Met- Rule 30.3 (1) & (2), CPR.

IN CHAMBERS

Heard: May 8 and June 17, 2015.

Coram: F. Williams, J.

Introduction

[1] Central to a resolution of this matter is a proper understanding of the defence of "agony of the moment". In my understanding of it, this defence is synonymous with what is known as "inevitable accident".

[2] I understand the substance of that defence to be this:

> "**Generally**. In an action, based on negligence, it is open to a defendant to establish that there was no negligence on his part, in which event he will then succeed in defeating the claim. Where the facts proved by the plaintiff raise a prima facie case of negligence against the defendant, the burden of proof is then thrown upon the defendant to establish facts, negativing his liability, and one way, in which he can do this, is by proving inevitable accident.
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> **Meaning of inevitable accident**. Inevitable accident is where a person does an act, which he lawfully may do, but causes damage, despite there having been neither negligence nor intention on his part…"

[3] The foregoing is an excerpt from the seventh edition of **Charlesworth & Percy on Negligence**, page 196, paragraph 3-83. In paragraphs 3-84 to 3-85 of the same work, there ensues an interesting discussion of the defence of inevitable accident with several cases cited.

[4] Among the cases cited is that of **Ritchie's Car Hire Ltd. v Bailey** (1958) 108 LJ 348. In that case a driver of a motor vehicle who had been sued, advanced the defence that his early-morning collision with a kerbside tree had occurred as a result of the fact that a cat had suddenly and unforeseeably darted out in the road in front of him from his

near side, and he had swerved in an effort to avoid the said collision. This defence (of inevitable accident) which he advanced succeeded.

[5] The case of **Fawkes v Poulson & Son** (1892) 8 TLR 725 is yet another in which the defence succeeded. In that case the plaintiff, a boilermaker working in the hold of a ship, was injured by a bale that slipped from a crane as it was being lowered into the hold. The defendants, a stevedoring firm, were successful on appeal in establishing the defence of inevitable accident, it having been proven that to always prevent bales from slipping was a practical impossibility.

[6] The case of **The Albano** [1892] P 419 was also mentioned for the proposition (per Lord Esher, MR), that, for the defence of inevitable accident to succeed, the defendant must satisfy the court that something over which he had no control happened, and the effect of which could not have been avoided by the exercise of care and skill.

The Instant Case

The Claim

[7] As might be inferred from the name of and description in the title of this claim, this is a suit that arises from a fatal accident. It is brought pursuant to the Law Reform (Miscellaneous Provisions) Act and the Fatal Accidents Act to recover damages on behalf of the estate; and near relations and dependants of the deceased, respectively.

The Facts

[8] On July 3, 2013, the deceased, a pedestrian who was standing on the Bog Walk Main Road in the parish of St. Catherine, lost his life. He was struck by a motor car owned by the 1st defendant, and being driven by the 2nd defendant, his wife. It is alleged that, at the material time, the 2nd defendant was acting as the servant or agent of the 1st defendant.

The Defence

[9] In their defence, the defendants deny that the accident occurred as a result of the negligence of the 2nd defendant. They deny as well that the 2nd defendant was acting as the servant or agent of the 1st defendant. The accident, they contend, was caused without any negligence on the part of the 2nd defendant, who, in the agony of the moment, in an attempt to avoid a head-on collision with a negligent motorist who, approaching from the opposite direction, overtook a line of traffic and was on her side of the road, swerved and the now-deceased was struck. The exact terms of the defence contending agony of the moment are set out in paragraphs 4, 5 and 6 of the defence filed on January 28, 2014, reproduced hereunder:

> "4. …the Defendants say that at the material time, the 2nd Defendant was driving the said motor vehicle registered 7501 EA along the Bog Walk Highway in the direction of Linstead when an unknown motorist proceeding in the opposite direction along the said road in a line of traffic, attempted to overtake vehicles in the said line.
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> 5. The said driver who was attempting the overtaking manoeuver, proceeded onto the incorrect side of the road directly into the path of the said motor vehicle registered 7501 EA, forcing the 2nd Defendant to take immediate evasive action by swerving to the left away from the overtaking motor vehicle and onto the soft shoulder, where it collided with the Claimant.
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> 6. The Defendants therefore say that the said accident was caused by the negligence of the unknown driver."

Rule 17.6 - Interim Payments

[10] It is best at this stage to remind ourselves of the provision in the Civil Provision Rules (CPR) governing the grant of interim payments. This (rule 17.6 (d)), sets out the elements or matters to be considered in deciding whether or not the order for the interim payment should be made. It reads as follows:

"**Interim payments - conditions to be satisfied and matters to be taken into account**

17.6 (1) The court may make an order for an interim payment only if –

(d) except where paragraph (3) applies, it is satisfied that, if the claim went to trial, the claimant would obtain judgment against the defendant from whom an order for interim payment is sought for a substantial amount of money or for costs; …"

[11] The question that therefore arises for the court's consideration is whether this court, at this stage of the proceedings, can be satisfied that, if the claim went to trial, the claimant would obtain judgment against the defendants.

[12] From the cases previously cited, in which the defence of inevitable accident succeeded, it should be apparent that the claimant's way to obtaining judgment is by no means clear-cut or obstacle-free. Who knows? At the end of the day the claimant might very well succeed. On the other hand, the claimant's claim may fail. However, at this stage, looking solely at the pleadings, the simple truth is that one cannot tell how the matter will eventually be resolved. The central issue will be one of credibility and it cannot be (neither would it be possible) for the court to attempt to resolve this issue at this stage – the resolution of such a matter depending in large measure on the witnesses' demeanour, and the way in which they give their evidence. It depends (in other words), on how the evidence unfolds.

[13] It would have become apparent, as well, that the facts of this case from the perspective of the defence being advanced, is not very dissimilar from the facts in, especially, the case of **Ritchie's Car Hire Ltd**. Who is to say, therefore, that the defence being advanced in this case cannot succeed? Or that, if the matter proceeded to trial, the claimant would obtain judgment against the defendants or either of them?

[14] In the approach that I am taking, I consider myself fortunate to be in the good company of Brooks, J (as he then was), in the case of **Etta Brown v The Attorney-General** (claim no. HCV 03390 of 2007, delivered August 3, 2011), who found as follows at page 6 of the judgment:

> "Rule 17.6 (1) (d) requires Ms. Brown to show, to a high standard, that she is likely to succeed in her claim. Ms. Brown has, however, failed in her effort to demonstrate that she would succeed in her claim against the NWA. The issues rest on the credibility of the witnesses. The pleadings alone, at this stage, do not, therefore, permit the court to find that she would succeed at the trial. The application must fail."

[12] In relation to the standard of proof, that case, too, discussed it, referring to the case of **Shearson Lehman Brothers Inc and another v Maclaine, Watson & Co. Ltd**. [1987] 1 WLR 480, and quoting Lloyd, LJ, who, at page 481a, said the following:

> "…Something more than a prima facie case is clearly required; but not proof beyond reasonable doubt. The burden is high. But it is a civil burden on the balance of probabilities, not a criminal burden." (Emphasis added).

[13] I have also reviewed the cases cited by counsel for the applicant, in particular the case of **Lewis v Baker**, claim no. HCV 06486 of 2009, delivered January 17, 2014. Having done so, it seems to me that that line of cases treats with a different factual situation from the present case, dealing (as that line of cases does) with circumstances of alleged contributory negligence and where a defendant's negligence has created a dilemma for the claimant, who takes evasive action in the agony of the moment (see, for example paragraphs 17 and 18 of that judgment).

[14] Another consideration that is important to consider in and of itself is the fact that, at the trial, the claimant's case would be expected to be advanced by an eye-witness who

would testify to the circumstances in which the deceased met his demise. Is such a witness available? We do not at this stage know for certain.

[15] All these considerations have made me unable to accept the submission made on behalf of the applicant that, for the defence of agony of the moment or inevitable accident to succeed, it must have been the claimant who put the defendant in the agony or dilemma. The said considerations have steered me to conclude that in relation to this issue, the claimant has failed to discharge the high burden required to make out a case for the grant of an interim payment.

[16] This finding by itself is sufficient to disentitle the applicant to the orders being sought. However, in the event that I have erred in coming to this conclusion, it might be best to give some brief consideration as well to the other main challenge made on behalf of the respondents.

The Challenge to the Applicant's Affidavit Evidence

[17] The substance of this challenge is that, by the applicant's failure to follow the requirements of rule 30.3, there is no sufficient admissible evidence before the court to enable the court to either to have a first-hand account of a witness for the claimant to consider against that being put forward by the 2nd defendant; or for it to have a sufficient basis for arriving at an appropriate quantum for any interim payment.

[18] This is the wording of rule 30.3:

> **"Contents of affidavit**
>
> 30.3 (1) The general rule is that an affidavit may contain only such facts as the deponent is able to prove from his or her own knowledge.
>
> (2) However an affidavit may contain statements of information and belief -
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> (a) where any of these Rules so allows; and

> (b) where the affidavit is for use in an application for summary judgment under Part 15 or any procedural or interlocutory application, provided that the affidavit indicates-
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> (i) which of the statements in it are made from the deponent's own knowledge and which are matters of information or belief; and
>
> (ii) the source for any matters of information and belief."

[19] A perusal of the three affidavits filed on behalf of the applicant leads me to agree entirely with the submissions made in paragraphs 34, 35, 38 and 39 of the respondents' written submissions dated the 8th of May, 2015, the more important parts of which might be summarized as follows: (i) exhibit CM1 amounts to inadmissible hearsay as it is compiled, not based on the personal, first-hand knowledge of the affiant of the affidavit to which it is attached; but on information received by the affiant, the sources of which have not been stated; and/or for which there is no corroborative affidavit or document; (ii) such supporting evidence must have been or still be available; (iii) the other affiants as well have not stated the source of matters to which they have deponed in their affidavits.

[20] I accept as well, in this regard, the principles enunciated in the case of **In re Young Manufacturing Company Limited** [1900] 2 Ch 753, to the following effect:

> "An affidavit of information and belief, not stating the source of the information or belief, is irregular, and therefore inadmissible in evidence, whether on an interlocutory or a final application; and a party or solicitor attempting to use such an affidavit will do so at his peril as to costs…"

[21] Incidentally, in what might be regarded as a tacit admission of the correctness of the respondents' submissions on this point, the applicant filed a supplemental affidavit

on May 12, 2015. However, as this was done without the court's leave, its contents cannot be considered.

[22] In all the circumstances, therefore, the application must be dismissed.

Orders

i. Application dismissed.

ii. Costs to the respondents to be agreed or taxed.