[2019] JMSC Civ. 39

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2014 HCV 05837

BETWEEN	**CHRISTOPHER CUNNINGHAM**	**CLAIMANT**
AND	**DEBULIN EWAN**	**1st DEFENDANT**
AND	**CLAYTON BAKER**	**2nd DEFENDANT**
AND	**RODVILLE FERGUSON**	**3rd DEFENDANT**

IN CHAMBERS

Mr. Paul Edwards instructed by Bignall Law for the Claimant

Ms. Keisha Grant instructed by Dunbar & Co for the 1st Defendant

Heard: 24th May, 21st June, 2018 & 19th March, 2019

Civil Practice and Procedure–Notice of Application for Interim Payment - Part 17 of the Civil Procedure Rules - Rules 17.5 and 17.6 of the Civil Procedure Rules - Principles to be considered by the Court.

Cor: Rattray, J.

[1] The Application for Interim Payment filed on the 2nd October, 2017 in this matter, arose out of a motor vehicle accident which occurred on the 28th September, 2014 on the Mount Rosser main road in the parish of St. Catherine. The collision involved a motor vehicle registered GS1200, owned by the First Defendant, Debulin Ewan and the Second Defendant, Clayton Baker, which at the time was being driven by the Third

Defendant, Rodville Ferguson and another motor vehicle registered GK2210, in which the Claimant, Christopher Cunningham was a passenger, which was travelling in the opposite direction. As a result of the accident, the Claimant instituted these proceedings by way of Claim Form and Particulars of Claim on the 28th November, 2014, to recover damages for negligence in light of the personal injuries he sustained in the collision.

[2] The First Defendant in her Defence filed on the 11th January, 2017, maintained that the driver of her motor vehicle, the Third Defendant, was travelling at a moderate speed up Mount Rosser, at a time when it was raining and was negotiating a corner, when the motor vehicle began to slide to the right. Despite his best efforts to correct the slide and steer the motor vehicle to its correct side of the road, those efforts failed and the First Defendant's motor vehicle skidded on the wet road and collided with the oncoming motor vehicle travelling in the opposite direction. Furthermore, she contended that the Third Defendant did all that he could to avoid the collision with the said motor vehicle, but her motor vehicle *skidded* on the wet road.

[3] In this Application for Interim Payment, the Claimant seeks an Order for an Interim Payment of One Million Six Hundred Thousand Dollars ($1,600,000.00) from the Defendants, or such Interim Payment as this Honourable Court deems just, as a result of injuries he suffered in the accident. On a perusal of the Court file, it does not appear that the Second and Third Defendants were ever served with the Claim Form and Particulars of Claim in this matter. There are no Acknowledgments of Service filed on their behalf, nor any Affidavits of Service filed by the Claimant's Attorneys-at-Law, indicating that those Defendants were properly served and thereby notified of these proceedings. As such, the Application for Interim Payment can only proceed against the First Defendant, whose Acknowledgement of Service was filed on the 29th June, 2015.

[4] The grounds relied on by the Claimant to support the Application for an Interim Payment are set out hereunder: -

a) Pursuant to the **Judicature (Supreme Court) (Validation and Amendment) Act**, 2012;

b) Pursuant to the **Civil Procedure Rules (CPR)**, Rule 17.6 (1) (d) and Rule 17.6(2) (a);

c) The circumstances of the case are such that the Claimant ought reasonably to recover damages against the Defendants, in that if the claim went to trial the Claimant would obtain judgment against the Defendants pursuant to the **CPR**, Rule 17.6 (1) (d) and the Defendants are insured in respect of the claim;

d) Pursuant to the **CPR**, Rule 17.6 (3) (a) in a claim for personal injuries where there are two or more Defendants, the Court may make an Order for Interim Payment for damages against any Defendant in respect of the said claim.

[5] The Application was supported by the Affidavit of Christopher Cunningham in Support of Notice of Application for Interim Payment filed on the 2nd October, 2017. The First Defendant relied on the Affidavit of Keisha Grant in Response to Application for Interim Payment filed on the 22nd May, 2018.

[6] When the Application for Interim Payment originally came before this Court on the 24th May, 2018, it was adjourned part heard to the 21st June, 2018, for the parties to file and serve Written Submissions and Authorities. At the adjourned hearing date, Mr. Edwards on behalf of the Claimant, indicated to the Court, as is also highlighted in his Written Submissions filed on the 30th May, 2018, that his client was now seeking the reduced sum of Five Hundred Thousand Dollars ($500,000.00), instead of the amount of One Million Six Hundred Thousand Dollars ($1,600,000.00), originally claimed as an Interim Payment.

[7] Counsel Mr. Edwards commenced his submissions by indicating that the collision between the motor vehicles occurred in the lane that his client was travelling in from the opposite direction. This he argued would raise a presumption of negligence on the part of the Third Defendant. He contended therefore that the First Defendant would be liable for the Third Defendant's negligence on the principle of vicarious liability.

[8] Mr. Edwards further contended that the First Defendant relied primarily on the skid by her driver, the Third Defendant, in order to rebut the presumption of negligence. He however, insisted that to merely establish that there was a skid is not sufficient to displace that presumption. He further argued that to merely rely on the circumstances that a skid occurred, without more, is equally insufficient. Counsel Mr. Edwards indicated that what is necessary is an explanation, which is consistent with no default resting on the shoulders of the driver of the motor vehicle, to release the owner from liability. In that regard, Mr. Edwards cited and relied on the case of **Laurie v Raglan Building Company Limited** [1942] 1 KB 152, in which Lord Greene MR at page 154 stated: -

> *"…the plaintiff gave evidence which showed that the position of the lorry over the pavement was due to a skid, and it is contended on behalf of the defendants that, assuming a prima facie case of negligence, that circumstance is sufficient to displace the prima facie case. In my opinion, that is not a sound proposition. The skid by itself is neutral. It may or may not be due to negligence. If, where a prima facie case of negligence arises, it is shown that the accident is due to a skid which happened without default of the driver, the prima facie case is clearly displaced, but merely to establish the skid does not appear to me to be sufficient for that purpose."*

[9] Counsel submitted that in the Defence filed, there is no allegation that the rain, incline, corner, speed, or wet road had anything to do with the skid. He further submitted that there was no nexus created between the skid and the prevailing conditions at the time of the accident. The First Defendant, he argued did not place any reliance on the conditions to explain how the skid occurred. The Defence put forward, he contended, did not amount to an explanation that the skid was through no fault of the Third Defendant, and as such, it is insufficient to displace the presumption of negligence. Therefore, Counsel Mr. Edwards argued that on a balance of probabilities, the Claimant would obtain judgment against the First Defendant.

[10] On the question of whether his client would receive substantial damages if the matter went to trial, Mr. Edwards relied on the case of **Hugh Douglas v Morris Warp**, **Vincent McPherson**, **Sergeant Boreland and the Attorney General for Jamaica**, Suit No. C.L. 1984/D130, a judgment delivered by James J on the 6th April, 1994. (Cited at **Khan Report** Volume 4 at page 210). In that case the Claimant's injuries were

bruises to the right upper limb and weals over the right shoulder, bruising of the left upper limb with swelling to the left arm, tenderness over humerus, swollen and tender left forearm and swollen and tender left thigh. An award of One Hundred and Forty Thousand Dollars ($140,000.00) was made for personal injuries in April, 1994, by using the Consumer Price Index (CPI) of 25.03. This figure Counsel submitted updates to approximately One Million Three Hundred and Eighty-One Thousand Five Hundred and Forty-Two Dollars Fifteen Cents ($1,381,542.15) using the CPI of 247.0 for April 2018.

[11] In reliance on the abovementioned case, Counsel Mr. Edwards submitted that having regard to the injuries of his client, the likely sum to be awarded would not be less than One Million Two Hundred Thousand Dollars ($1,200,000.00). In relation to special damages, he argued that at this stage the sum stands at Thirty-One Thousand Dollars ($31,000.00). Costs he submitted, would not be less than the sum of Two Hundred Thousand Dollars ($200,000.00). This in total would bring the entire value of the claim to One Million Four Hundred and Thirty-One Thousand Dollars ($1,431,000.00). Mr. Edwards maintained that it was speculative whether or not his client was wearing his seatbelt at the time of the accident. He argued that even if his client was not wearing his seatbelt, the Court could always make a deduction from any judgment awarded.

[12] Ms. Grant for her part argued that the first and primary hurdle the Claimant must clear, is whether he can obtain judgment against her client. In order to do so, the Clamant must meet the standard of proof as outlined by Lloyd LJ in **Shearson Lehman Brothers Inc and Others v Maclaine Watson and Company Limited and Others** [1987] 1 WLR 480, at page 489 where he said: -

> *"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."*

[13] Counsel Ms. Grant contended that her client's Defence outlined that the accident was not due to any negligence on the part of the Third Defendant, but instead was caused by a skid. She further accepted that the Authorities have held that a skid by itself does not necessarily amount to negligence, but places a heavy onus of proof on

the Defendant, and as such is a triable issue. She urged the Court to reject the Claimant's submissions that no nexus was created between the skid and the conditions of the terrain, as the location of the accident is a well-known one. It is a winding hilly terrain and is generally difficult to navigate. These perils she argued were increased by the wet conditions when the accident occurred and the mere fact that the accident happened on Mount Rosser speaks for itself and supports her client's submission of this being a triable issue. Counsel also argued that it is not for her client to prove her Defence at an Application for Interim Payment, but for the Claimant to prove that the Defence will fail. Ms. Grant insisted that her client's burden of proof does not arise until the trial.

[14] Further, Ms. Grant submitted that her client is not aware of the Claimant's involvement in the accident or of his alleged injuries, as strict proof would be required from the Claimant to prove these allegations. These she maintained are triable issues that go to the heart of establishing negligence. Counsel also asserted that there are inconsistences with the medical reports of the Claimant that must be addressed at trial. In addition, she argued that the medical evidence relied on by the Claimant reveals that the Claimant was a front seat passenger, who was not wearing a seatbelt. That she contended, raises the issue of contributory negligence. According to Counsel Ms Grant, the medical evidence does not support the Claimant's assertion that he has been recommended to do plastic surgery. She argued that although Dr. Glegg's report dated the 5th October, 2014, gives a prognosis of requiring plastic surgery review, there is nothing to indicate that the review was in fact done and a referral given or any estimate of the costs obtained from a plastic surgeon. Further, the Claimant has not shown the need for urgency, as the medical reports are dated almost four (4) years ago, and it would appear that no further treatment or medical care has been sought by the Claimant. Counsel Ms. Grant also pointed out that there is no evidence of any hardship being endured by the Claimant, as he has no disability and is able to perform his daily duties.

[15] In the circumstances, Counsel maintained that the total damages to be recovered by the Claimant, if any, ought not to exceed the sum of Nine Hundred Thousand Dollars ($900,000.00). Such sum she contended ought not to be considered a substantial sum as is required by Rule 17.6 (d) of the **CPR**. That rule provides, *inter alia*, that the Court may make an Order for Interim Payment only if satisfied that if the claim went to trial, the Claimant would obtain judgment against the Defendant from whom an Order is sought, for a substantial amount of money.

[16] She cited the cases of **Paula Yee v Leroy Grant and Anor**, Suit No. C.L 1989/Y011, reported at page 204 in **Harrison's Assessment of Damages**, 1st edn (the judgment sum now converts to Two Hundred and Thirteen Thousand Two Hundred and Ninety Eight Dollars ($213,298.00) using the CPI for April, 2018 of 247.0) and **Aneita Hall v Denham Dodd and Audrey Wilson**, Suit No. C.L 1987/H161, reported at page 205 in **Harrison's Assessment of Damages**, 1st edn, in which the Claimant actually underwent plastic surgery, which is absent from the Claimant in this matter. The awarded sum of Thirty Thousand Dollars ($30,000.00) in September, 1990 would now convert to One Million Two Hundred and Eight Thousand Eight Hundred and Nine Dollars Thirteen Cents ($1,208,809.13) using the CPI for April, 2018 of 247.0.

[17] In concluding her submissions Ms. Grant indicated that if the Court is minded to grant the Claimant an Interim Payment, that figure should be no more than Three Hundred Thousand Dollars ($300,000.00).

[18] An Interim Payment is a payment made in advance on account of any damages that a Claimant may be awarded at the end of a trial. The purpose of such a payment is to prevent hardship and prejudice to the Claimant by ensuring that he/she is not kept out his/her money for any long period, particularly in respect of personal injury claims. Rule 17.5 of the **CPR** governs Interim Payments and provides as follows: -

> *"(1) In this rule and in rules 17.6 to 17.10 the term "**claimant**" includes a defendant who counterclaims.*

(2) The claimant may not apply for an order for an interim payment before the end of the period for entering an acknowledgment of service applicable to the defendant against whom the application is made.

(Rule 9.3 sets out the period for filing an acknowledgment of service.)

(3) The claimant may make more than one application for an order for an interim payment even though an earlier application has been refused.

(4) Notice of an application for an order must be -

(a) served not less than 14 days before the hearing of the application; and

(b) supported by evidence on affidavit.

(5) The affidavit must -

(a) briefly describe the nature of the claim and the position reached in the proceedings;

(b) state the claimant's assessment of the amount of damages or other monetary judgment that are likely to be awarded;

(c) set out the grounds of the application;

(d) exhibit any documentary evidence relied on by the claimant in support of the application; and

(e) if the claim is made under any relevant enactment in respect of injury resulting in death, contain full particulars of the person or persons for whom and on whose behalf the claim is brought; and

(6) Where the respondent to an application for an interim payment wishes to rely on evidence or the claimant wishes to rely on evidence in reply, that party must -

(a) file the evidence on affidavit; and

(b) serve copies on every other party to the application, not less than 7 days before the hearing of the application."

[19] Rule 17.6 of the **CPR** sets out the conditions and the matters to be satisfied before the Court can make an Interim Payment: -

"(1) The court may make an order for an interim payment only if -

(a) the defendant against whom the order is sought has admitted liability to pay damages or some other sum of money to the claimant;

(b) the claimant has obtained an order for an account to be taken as between the claimant and the defendant and for any amount found due to be paid;

(c) the claimant has obtained judgment against that defendant for damages to be assessed or for a sum of money (including costs) to be assessed;

(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; or

(e) the following conditions are satisfied -

(i) the claimant is seeking an order for possession of land (whether or not any other order is also being sought); and

(ii) the court is satisfied that, if the case went to trial, the defendant would be held liable (even if the claim for possession fails) to pay the claimant a sum of money for rent or for the defendant's use and occupation of the land while the claim for possession was pending.

(2) In addition, in a claim for personal injuries the court may make an order for the interim payment of damages only if the defendant is -

(a) insured in respect of the claim;

(b) a public authority; or

(c) a person whose means and resources are such as to enable that person to make the interim payment.

(3) In a claim for damages for personal injuries where there are two or more defendants, the court may make an order for the interim payment of damages against any defendant if -

(a) it is satisfied that, if the claim went to trial, the claimant would obtain judgment for substantial damages against at least one of the defendants (even if the court has not yet determined which of them is liable); and

(b) paragraph (2) is satisfied in relation to each defendant.

(4) The court must not order an interim payment of more than a reasonable proportion of the likely amount of the final judgment.

(5) The court must take into account -

***(a) contributory negligence (where applicable);** and*

(b) any relevant set-off or counterclaim."

[Emphasis supplied]

[20] F. Williams J (Ag) (as he then was) in **Phyllis Anderson v Windell Rankine** (unreported), Supreme Court, Jamaica, Claim No. 2006 HCV 05105, a judgment

delivered on the 10th December, 2008, at page 11, stated the principles in respect of an Interim Payment pursuant to Rule 17.6 (d) of the **CPR** as follows: -

> *"(i) For a claimant to successfully apply for an interim payment, he/she must satisfy a court that he/she will likely win the case against the defendant.*
>
> *(ii) The standard by which that must be done is the civil standard (i.e. proof on a balance of probabilities), but such proof must be effected at the higher end of that scale.*
>
> *(iii) It is expected that such applications will only succeed where the claimant has a very strong claim and where his/her action is likely to be easy to establish. Establishing a "mere" prima facie case will not be enough.*
>
> *(iv) Where the competing contentions on the part of the claimant and the defendant are, on the pleadings, of equal weight, and nothing emerges at that stage to "tilt the balance", such an application will likely fail.*
>
> *(v) Even where the claimant might be able to establish a ground for the making of an interim payment, the court still retains a discretion in deciding whether or not such a payment should be made (see **Blackstone's Civil Practice**, **2008** (page 456, para 36.14)."*

[21] For the Claimant to succeed on an Interim Payment Application, he must therefore satisfy the Court that if his claim went to trial, he would obtain judgment against the First Defendant. In order to determine this, a higher standard of proof would be required than the ordinary civil standard of on a balance of probabilities. Sir Browne-Wilkinson VC expressed the view, in **British and Commonwealth Holdings plc v Quadrex Holdings Inc** [1989] QB 842, at page 866, that the burden of proof: -

> *"…requires the court, at the first stage, to be satisfied that the plaintiff will succeed and the burden is a high one: it is not enough that the court thinks it likely that the plaintiff will succeed at trial…"*

[22] In the case of **Blue Waves Investment Limited v Jamaica Bauxite Mining Limited** [2017] JMCC Comm 36, Batts J at paragraph 8 stated that: -

> *"It is well established that the burden, on an applicant for interim payment, is a high one. The Claimant must show to a high standard that she is likely to succeed in her claim. It must be demonstrated that the Claimant "would" obtain judgment, see **Etta Brown v AG HCV 03390 of 2007** unreported judgment of Brooks J (as he then was) as applied by F. Williams J (as he then was) in **Administrator General for Jamaica v Lloyd Lewis [2015] JMSC Civil 116** unreported 17 June, 2015."*

[23] In the earlier mentioned case of **Laurie v Raglan Building Company Limited**, cited by Mr. Edwards, a ten wheeled heavy laden lorry being driven at ten to twelve miles an hour, skidded and killed the Plaintiff's husband, who was on a pavement. The Plaintiff brought an action in negligence seeking damages for her husband's death. Lord Greene MR who delivered the judgment of the Court, concluded that where a motor vehicle was in a position or location where it had no right to be as a result of a skid, raises a presumption of negligence against the driver of the motor vehicle. Furthermore, the learned Master of the Rolls indicated that a skid is neutral, as it may or may not be due to negligence. Therefore, in order to prove that a skid was as a result of negligence, evidence would have to be led in that regard. On the facts of that particular case, there was evidence, which was elicited at the trial that showed that the skid was due to the negligence of the driver.

[24] I find the case of **Oliver v Sangster** (1951-1955) 6 JLR 24 to be helpful. The headnote of that case indicates that the Plaintiff was injured when a station wagon, in which he was a passenger, came in contact with a motor car driven by the Defendant. The collision which occurred on the Plaintiff's side of the road was caused by the Defendant's car skidding across the wet and slippery surface of the roadway. The only allegation of negligence against the Defendant was that his vehicle was travelling too fast and skidded, and the only allegation as to the cause of the skid was the speed at which the car was travelling. MacGregor J who delivered the judgment of the Court indicated at page 26: -

> *"That a prima facia case of negligence was established against the Defendant seems to be beyond dispute. His car suddenly crossed the road, in front of the Plaintiff's vehicle, which at the time was on its proper side of the road. What, therefore, was the onus on the Defendant, and, did he discharge that onus?"*

[25] At page 30, the Court concluded that: -

> *"…the respondent satisfied the Resident Magistrate that the cause of the collision was the skid of his car on the wet and slippery surface of the road, that the skid happened without fault on his part and that it was not caused by the fact that he was driving at an excessive speed. The Plaintiff was therefore in the position he was in when he began, and, as he made no other allegation of, and offered no further evidence of negligence against the Defendant, he failed to establish that the accident happened through the negligence of the Defendant."*

[26] I also find the case of **Richley v Faull (Richley, Third Party)** [1965] 3 All ER 109, to be of assistance. In that case, two cars were approaching each other in opposite directions, each on its proper side of the road. The surface of the road was wet and this made the road slippery. The Defendant's car then skidded across the road into the path of the car driven by a Third party, and ended up on its wrong side facing in the opposite direction. The Third party's car collided with the back of the Defendant's car, throwing the Plaintiff, who was a passenger in the Third party's car, against the windscreen which broke. The Defendant gave no explanation why the car skidded. Mackenna J at page 110 expressed that: -

> *"I, of course, agree that where the respondents' lorry strikes the plaintiff on the pavement or, as in the present case, moves on to the wrong side of the road into the plaintiff's path, there is a prima facie case of negligence, and that this case is not displaced merely by proof that the defendant's car skidded. It must be proved that the skid happened without the defendant's default…"*

[27] Reference is also made to the Trinidadian case of **McAree v Achille** (1970) High Court, Trinidad and Tobago, No. 438 of 1968 (unreported), in which Rees J at page 1 had this to say: -

> *"…a skid in itself does not displace the prima facie presumption of negligence arising from the defendant's car being in a position where it had no right to be. On the contrary a skid raises a presumption that the driver was either going too fast or applied his brake too suddenly having regard to the road condition prevailing at the time."*

[28] The above mentioned Authorities clearly establish that the fact that a Defendant's motor vehicle is in a place or position where it has no right to be, would raise a prima facie case of negligence. The prima facie case of negligence is however, not displaced merely by proof that the Defendant's motor vehicle skidded, as evidence is required to prove that the skid happened without the default of the Defendant.

[29] On the facts of the present case, the First and Second Defendant's motor vehicle skidded and collided into the motor vehicle travelling in the opposite direction, in which the Claimant was a passenger. The fact that the Defendants' motor vehicle was on the incorrect side of the road raises a prima facie case of negligence. In attempting to rebut the prima facie case of negligence, the First Defendant has indicated that the motor

vehicle was travelling at a moderate speed in the rain and while negotiating a corner it began to slide to the right. The motor vehicle then skidded on the wet road and collided with the oncoming motor vehicle travelling in the opposite direction.

[30] It must always be borne in mind in dealing with an Application of this nature, that this is not the trial of the substantive action. The issue here is whether an Order for an Interim Payment is appropriate in the circumstances, bearing in mind the prima facie case of negligence against the First Defendant. To extricate herself from liability with respect to an Order for an Interim Payment, the First Defendant is obliged to provide evidence to show that the skid and ultimately the collision occurred through no fault on the part of her driver, the Third Defendant.

[31] The First Defendant has not provided, whether in her evidence or her Defence, an explanation as to what led to or caused the skid. She has not expressly stated that it was the weather conditions and/or the road surface and/or any other factor at the time which caused her motor vehicle to skid. However, what the First Defendant has done in her Defence, is to indicate that the Third Defendant was driving at a moderate speed in the rain when the motor vehicle began to *slide* to the right. This does not provide an explanation as to the cause of the skid and or rebut the presumption of negligence.

[32] Furthermore, no evidence has been led by or on behalf of the First Defendant as to the speed at which her motor vehicle was travelling prior to and/or at the time of the accident. Nor is there any evidence before the Court to show that the accident occurred through no fault nor omission on the part of the Third Defendant. Therein lies the challenge faced by the First Defendant in this matter. In an Application of this nature, if the blanket of blame is not to fall squarely on the shoulders of the First Defendant, the burden rests on her to lead evidence to satisfy the Court that her motor vehicle skidded across the road and collided with the motor vehicle in which the Claimant was a passenger, without any fault on the part of the driver, the Third Defendant.

[33] No exculpatory information has been led on behalf of the Third Defendant in this regard. The only explanation advanced is that the motor vehicle he was driving, skidded

across the wet road and collided with the car, in which the Claimant was a passenger. However, as has been stated in the Authorities cited in this judgment, a skid does not, in and of itself, displace a prima facie case of negligence.

[34] At this stage, based on the evidence presently before the Court as well as the pleadings of the First Defendant, I am satisfied on a balance of probabilities that if the claim went to trial, the Claimant would obtain judgment against the First Defendant. Accordingly, I hereby make an award of an Interim Payment in the following terms: -

(a) The Claimant is granted an Interim Payment in the sum of Three Hundred and Fifty Thousand Dollars ($350,000.00), such payment to be made by the First Defendant to the Claimant's Attorneys-at-Law, within twenty-one (21) days of the date hereof;

(b) Costs of the Application are awarded to the Claimant, such costs to be taxed if not agreed and paid within fourteen (14) days of taxation or agreement.