IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 2001/J104

BETWEEN	ENID JOHNSON (ADMINSTRATRIX IN THE ESTATE YORKSLADDA JOHNSON, deceased	CLAIMANTS
A N D	SOUTH-EAST REGIONAL HEALTH AUTHORITY	1ST DEFENDANT
A N D	THE ATTORNEY GENERAL OF JAMAICA	2ND DEFENDANT

Mr. Norman Samuels for the Claimant

Mr. John Spencer instructed by the Director of State Proceedings
For the 1st and 2nd Defendants

Application for Interim payment

Heard on 30th October 2006 and 7th November, 2006

MORRISON, J (Ag.)

There is a contest of facts and issues between the parties hereto in so far as it relates to the question of liability for the medical deterioration of the Claimant, Mr. Yorksladda Johnson, since deceased.

In brief, it is the contention of the Claimant that consequent upon his being injured in a motor vehicle accident on 31st July, 1996, he was admitted to the Kingston Public Hospital. There, he was diagnosed as suffering from the following injuries:

a) fracture of the left distal femur

b) fracture of the mid shaft of the left tibia

c) swollen and deformed left thigh

d) laceration over left leg exposing the left tibia and the distal part of the left leg was rotated.

The Claimant asserts that the 1st Defendant was negligent in the way that he was treated and cared for by them in that they had failed in removing the gentamyicin beads from the affected area in time, or at all, from the affected areas thus precipitating a marked deterioration of his health. He further complains that he was discharged from the hospital which he subsequently revisited on 13 occasions thereafter and that on none of those occasions did he receive any attention from the 1st Defendant. That, in view of this later dereliction of duty he had to visit a private medical practitioner and, ensuing therefrom his right leg had to be amputated below the knee it having become gangrenous; that it was oppressed with peripheral vascular disorder and diabetes milletus.

In contrast, the 1st Defendant do not say that the Claimant was suffering from the aforementioned conditions but that the conditions were being monitored by them through the prescriptions of antibiotics and medication.

The 1st Defendant denies, however, that the Claimant complained to them (doctors and nurses) about severe pains in his right leg and that the complaints were ignored.

Significantly, that at no time prior to the 19th November, 1999 did the Claimant make any complaints to them about pains in his right leg.

Further, that on the 19th November, 1999, upon receiving a complaint from the Claimant in respect of pains in his right foot that they advised him of the possibility that he had peripheral vascular disease and that investigations were ordered. Thereafter the Claimant

was referred to the general surgery of the hospital and, importantly, the Claimant was advised to stop smoking.

Finally, the 1st Defendant asserts that after the 19th November, 1999, that the Claimant did not return to them for his scheduled appointments. In summary, the Defendants say that they took all the reasonable steps to provide care to the Claimant while he was a patient at the 1st Defendant's institution.

Mr. Yorksladda Johnson having parted this life during the pendancy of this case his Executrix, Miss Enid Johnson, was substituted as Claimant. The Claimant's attorney-at-law rested his submissions on the pleadings and on cases in which damages were awarded.

The application before me comprises a triad but is in the main one which seeks an interim payment under Rule 17.1(d) of the Civil Procedure Rules 2002.

It is poignant to observe that the interim payment relief is a discretionary one.

Rule 17.6(a)(d) states that, "the court may make an order for an interim payment only if 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..." (emphasis supplied).

Any deliberation of the above quoted rule involves two considerations. Firstly, the court must be satisfied that if the action proceeds to trial that the Claimant will obtain judgment. Secondly, assuming that the answer to the aforementioned is in the affirmative, the Court would consider whether to invoke its discretionary powers in ordering an interim payment.

In **Shanning Ltd. v George Wimpey Ltd** [1988] 3 All E.R. 475 at 482 one finds an authority for the interpretation of the rule. Quoth Glidewell, L.J. "...the first stage was to answer the question was he (Judge /Court) satisfied, that if the action proceeded to trial the Plaintiff would obtain judgment for a substantial sum.... If, but only if, the Court is satisfied at stage 1 then it proceeds to stage 2 whether, in its discretion, it should order an interim payment and if so, of what amount."

The question which begs to be asked is what is the standard of proof for the words, "would obtain judgment" as used in the rule 1, supra. Notably, the Claimant's attorney-at-law did not take issue with this cited authority

In Blackstone's Civil Practice, 2002 at page 363 and in particular paragraphs 36.7 the following is stark "..... in it has to be shown that the claimant will win on a balance of probabilities, but at the upper end of the scale, the burden being a high one. Being likely to succeed at trial is not enough."

Applying the above to the present case it seems to me that the very question which a court of trial has to answer will depend largely on the *viva voce* and other evidence of the witnesses in the case and the court's appraisal of them. A mere sterile cursory look at the pleadings, contested at that, cannot in my view meet the high burden as adumbrated above. In my mind only a palpably weak defence would admit that.

It is painfully obvious (no pun intended) that on the pleadings the 1st Defendant is not saying *mea culpa*. In fact the 1st Defendant strongly refutes the allegations of the Claimant. It would be entirely premature, if not unwise, certainly at this stage to form a view as to the outcome of this case at trial. Thus, the application for interim payment is denied.

Having come to the view as I have, it is no disrespect by me not to mention the other authorities submitted to me in relation to damages awarded in comparable outcomes. It is an exercise which I consider to be otiose . In the ratio decidendi of Shanning's case supra, it was held that, "if the court was not satisfied at the first stage .... it could not then proceed to the second stage and exercise its discretion by making an interim payment order." To this I am entirely beholden.

In closing it is opposite to observe that it might be equally wrong to order an interim payment to a party who might not be able to repay if an adjustment was required under the C.P.R.: see **Harnon (FEM Acades (UK) Ltd. (In liquidation) v (The Corporate Office Of The House Of Commons** (2000) The Times 15th November.

The application for interim payment order is denied.