[2014] JMSC Civ. 218

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2013 HCV 00068

BETWEEN	**STANLEY GABRIEL MARZO MICHEL**	**CLAIMANT**
AND	**BONNETTA BANTON**	**1ST DEFENDANT/ ANCILLARY CLAIMANT/ DEFENDANT**
AND	**DESROY REID**	**2ND DEFENDANT/ ANCILLARY CLAIMANT/ DEFENDANT**

IN CHAMBERS

Treshia Griffiths, of Counsel, for the Claimant

Stuart Stimpson, instructed by Lival for the 1st Defendant/Ancillary Claimant/Defendant

Michelle Shand-Forbes, instructed by Insurance Company of the West Indies, for the 2nd Defendant/Ancillary Claimant/Defendant

Heard: **July 14 and 17 and via teleconference on November 14, 2014, November 28, 2014**

APPLICATION FOR INTERIM PAYMENT – APPLICATION FOR SUMMARY JUDGMENT – CONTESTED ISSUES OF FACT BETWEEN OPPOSING DEFENDANTS WHO HAVE COUNTERCLAIMED AGAINST EACH OTHER – CONTESTED ISSUES OF FACT BETWEEN DEFENDANTS AND CLAIMANT – LEGAL PRINCIPLES TO BE APPLIED

ANDERSON, K., J

The Background

[1] This claim was instituted initially by the claimant against only one defendant, who is now designated as the 1st defendant/ancillary claimant. The claim seeks to obtain, through this court, for the claimant, the following reliefs:

(i) Damages and

(ii) Interest on damages and

(iii) Costs and

(iv) Such further and/or, other relief as this Honourable Court deems just.

[2] The claim, as initially filed, seeks such reliefs arising from that which the claimant has alleged, is negligence on the part of the 1st defendant, 'for that in or around the 2nd September, 2012 the driver of the defendant's motor vehicle was travelling along Holborn Road heading towards Trafalgar Road with the intention of turning right and the driver of the Toyota Altis motor car registered 9080GC was travelling along Trafalgar Road towards Hope Road, when upon reaching the intersection of Trafalgar Road and Holborn Road which is controlled by traffic lights, the defendant's driver proceeded to turn right on to Trafalgar Road without getting the green filter light and collided into the Toyota Altis motor car, the result of which caused the claimant to suffer personal injuries, damages and loss and incur expense.'

[3] In the claimant's particulars of claim, what he has alleged is that on the date when the relevant motor vehicle accident occurred, he was then aged nineteen (19) years and a student, living at 16 Holborn Road, Kingston 10. The 1st defendant was, as at the date of filing of the particulars of claim, then the only defendant and thus, the party referred to now and herein, as the 1st defendant, was, in those particulars of claim, referred to as the defendant. As alleged in the particulars of claim, the claimant and the 1st defendant were, as at the date of the filing of that court document, both 'of' the same address, that being: 16 Holborn Road, Kingston 10, in the parish of St. Andrew. It is in the vicinity of that address, that the relevant motor vehicle accident occurred on

September 2, 2012. That accident occurred whilst the claimant and the 1st defendant were travelling, as passengers in the 1st defendant's motor vehicle, this being a vehicle which was being driven at the material time, by one Kawain Fearon, who has never been named as a defendant to this claim. It is alleged by the claimant, that at all material times, Kawain Fearon (the driver of the 1st defendant's vehicle), was the duly authorized driver and/or agent of the 1st defendant and that allegation has not been disputed by the 1st defendant.

[4] The claimant has further alleged that he was invited to church by the 1st defendant and having accepted that invitation, boarded the 1st defendant's motor vehicle – a Hyundai Elantra motor car registered as 6549 EF, as a back-seat passenger therein. The 1st defendant travelled in the said vehicle at the material time, as a front-seat passenger therein.

[5] He has also alleged that while the defendant's driver – Mr. Fearon, was travelling with he and the defendant in the aforementioned vehicle, along Holborn Road and headed towards Trafalgar Road, upon having reached the intersection of Trafalgar Road and Holborn Road, that being an intersection which was then controlled by traffic lights, the 1st defendant's vehicle, was driven by the 1st defendant's driver onto Trafalgar Road and then turned right. It is alleged that this was done without the driver of the 1st defendant's vehicle having been signalled by a green filter light to do so. In the absence of the driver of the 1st defendant's vehicle having been signalled by the green filter light to turn right onto Trafalgar Road, it is alleged by the claimant, that the 1st defendant, through her servant or agent – that being the 1st defendant's driver, acted unlawfully and negligently and overall, in a manner which was patently unsafe and of course, in disobedience of the relevant traffic lights.

[6] The claimant has further alleged that as a consequence of having disobeyed the relevant traffic lights at the intersection of Holborn Road and Trafalgar Road, the 1st defendant's vehicle collided into a Toyota Altis motor car, which then had a green light, permitting it to proceed onward along Trafalgar Road, in the immediate vicinity of the

junction of Holborn Road and Trafalgar Road. As a result of that collision, it is alleged that the claimant suffered injury, loss and damage.

[7] It is noteworthy that in his particulars of claim, the identity of the owner and/or driver of the vehicle into which the 1st defendant's vehicle allegedly collided, was not made known, albeit that this is not surprising, nor was that information then required to be made known to either the court or the defendant, this not only because the 1st defendant should know same, since it was her vehicle's driver that was undoubtedly involved in the accident, but also because the 1st defendant was present in the said vehicle when that accident occurred and furthermore, because, as at the date when the claim form and particulars of claim were filed – January 8, 2013, no claim was then being pursued by the claimant against whomever was, at the time of the relevant accident, the owner and/or driver of the Toyota Altis motor car.

[8] It is though, nonetheless noteworthy, that the owner and/or driver of the said Toyota Altis motor car, was not named in the claim form or in the particulars of claim, either in passing, much less, as a defendant. Firstly, this is noteworthy, because subsequently, the owner/driver of that Toyota Altis motor car at the time of the accident, was made a defendant to this claim and secondly, because to some extent, the naming of him as a defendant to this claim was preceded by allegations clearly set out in the claimant's particulars of claim, which essentially foreshadowed his having been made a defendant.

[9] Those particular allegations were set out in the claimant's particulars of claim, as particulars of negligence. At numbers (iv) and (v) of paragraph 9 of the claimant's particulars of claim, two of the particulars of alleged negligence of the 1st defendant's driver are specified as follows:

> '(*iv)* *Failing to yield to the Toyota Altis registered 90890 GC which had the green traffic light even though the Toyota Altis was travelling at a high speed to proceed through the intersection on its green light.'*

'(v) Failing to take evasive action upon observing the Toyota Altis registered 9080 GC proceeding through the intersection of Trafalgar Road and Holborn Road with speed.'

[10] As can clearly be recognized from those two particulars, it was, from as of the date when the claimant's particulars of claim was filed, clearly being asserted by the claimant, that immediately prior to the relevant collision/accident having occurred, the Toyota Altis motor car – which was the motor car that collided with the 1st defendant's motor vehicle, was being driven at a high speed through the traffic lights which were then on green and thereby directing that vehicle as to how to then proceed while driving along Trafalgar Road.

[11] From a legal perspective, it ought to be made clear by this court at this juncture, that even though the driver of a motor vehicle which is lawfully enabled by a green coloured traffic light to proceed onwards through where that traffic light is positioned, is to be expected to drive through that light, nonetheless, this does not entitle that driver to do so in a manner which is either careless, or as may in an appropriate case, very well be construed by a court as being careless, that being, in a manner wherein that driver is considered to have acted in disregard for the possibility that, for instance, another vehicle driver, or perhaps even a pedestrian, may drive or walk along a road in a manner which is not authorized by Jamaica's traffic laws. In any event, Jamaica also has, in Kingston and St. Andrew, speed limits which will vary, depending on the particular location where a vehicle is being driven. Those speed limits are expected and ought to be expected to be observed by all reasonable and careful drivers. Accordingly, if in a given situation, a speed limit is not observed/complied with, by the driver of a motor vehicle and as a result, loss and/or damage is caused to anyone else, then, even if it is that the driver of that motor vehicle was obeying a traffic light while speeding, that driver would still have been careless in having caused that loss and/or damage. The requirement and expected compliance by a motor vehicle driver, with a traffic light, does not entitle or lawfully enable that driver to drive his or her vehicle in a manner which is otherwise seemingly oblivious and/or certainly in disregard of other road rules. Driving

on roads in Jamaica would be even more dangerous than it already is, if this were not so.

[12] It must be clearly pointed out though, that at this stage, there only exists allegations and counter – allegations, as well as some agreed facts and mostly disputed facts, since, legal proceedings pertaining to this claim have significantly evolved since the date of the claimant's initial allegations as are contained in his claim form and particulars of claim. As such, that which has been alleged and not as yet proven, by the claimant as against the 1st defendant and also, as against the party who is, at this time, named as the 2nd defendant to this claim – this being the owner and driver at the material time, of the Toyota Altis motor car with registration number 9080 GC, remain as no more than unproven allegations, at this time.

[13] The 2nd defendant became a party to this claim, as of February 14, 2013, when an amended claim form and amended particulars of claim were filed, so naming him. The amended particulars of claim has made it clear, that at the time of the accident, both vehicles that were involved in the relevant collision/accident, were insured. The 1st defendant's motor vehicle was insured by Jamaica International Insurance Company Ltd., while the 2nd defendant's motor vehicle was insured with the Insurance Company of the West Indies Ltd. It has been asserted by the claimant, in his amended particulars of claim, that at all material times, he was a belted backseat passenger whilst travelling in the 1st defendant's vehicle and that having accepted the invitation which was made to him by the 1st defendant, to go to the Full Life Ministries Church located at 10 miles, Bull Bay, in the parish of Kingston, he was travelling in the 1st defendant's vehicle at the material time, as a back seat passenger, whilst the 1st defendant was travelling as a front seat passenger thereof and the authorized driver and agent of the 1st defendant, for the purpose of that journey, was Mr. Kawain Fearon, who is the 1st defendant's son.

[14] The claimant's amended particulars of claim has alleged that the relevant collision occurred due to the negligence of the defendants and/or their respective drivers. Whilst this is not at all surprising, bearing in mind that which had, albeit only in

passing at that stage, been alleged in the claimant's particulars of claim in relation to the driving by the driver of the 2nd defendant's motor vehicle at the material time (that being the 2nd defendant himself), of that vehicle, immediately preceding the relevant collision, what is surprising, is that the particulars of negligence in relation to the 2nd defendant, as set out in the claimant's amended particulars of claim, is identical to the same in relation to the 1st defendant. In fact, not only are the particulars of negligence which have been alleged against both defendants, identical, but nowhere amongst those particulars, which are nine in number, is there anywhere to be found, any allegation, even in passing, that at the material time, the Toyota Altis motor vehicle which was being driven by the 2nd defendant, was speeding at all, much less, speeding through any traffic lights. What is though, alleged in the particulars of negligence, in relation to both defendants, is that both defendants failed to obey the traffic lights and proceeded through the traffic lights when it was unsafe to do so and without adhering to the traffic lights at the intersection of Holborn Road and Trafalgar Road. Although there are other particulars of negligence which have been alleged by the claimant against both defendants, the gravamen and foundation of all of those particulars, does appear to this court to be that both of the defendants failed to obey the relevant traffic lights. That this does clearly seem to be the gravamen and foundation of all of those particulars, will be considered more closely, in the context of the claimant's application for summary judgment to be entered against both defendants and for interim payment orders to be made against both defendants.

[15] Various court proceedings and documents have respectively been pursued and filed by the respective parties, since the claimant's amended claim form and amended particulars of claim were filed and served on the defendants. Additionally, mediation has been concluded without resolution of the court dispute and also, a case management conference has been held and trial dates set.

[16] Each of the defendants has filed a defence and understandably and properly, each of them is represented by separate counsel. The 2nd defendant subsequently filed an amended defence and counterclaim ('ancillary claim') against the 1st defendant.

That was filed on February 27, 2014. Prior to that, the 1st defendant had, between February 25 and March 5, 2013, filed both his defence and an ancillary claim against the 2nd defendant. The 1st defendant is relying on his defence as was filed in response to the claimant's claim as constituting the particulars of the claim which he has made against the 2nd defendant. In that defence/those particulars, the 1st defendant has contended that the relevant collision was not caused by the negligence of the driver of her vehicle at the material time, but instead, was either caused or contributed to by the negligence of the 2nd defendant. Interestingly enough, in the particulars of negligence which have been alleged by the 1st defendant against the 2nd defendant, the 1st defendant has alleged, *inter alia,* that the relevant collision was caused by the negligence of the 2nd defendant in – *'failing to take heed of the red traffic light on Trafalgar Road at the intersection with Holborn Road,'* and '*failing to see, heed or act upon the position, path and approach of the Hyundai, which had the right of way at the said intersection.'* It is to be recalled that the Hyundai vehicle being referred to, is the 1st defendant's vehicle.

[17] As can clearly be recognized from those two immediately aforementioned particulars, the 1st defendant is not only not accepting that she is liable to any extent for the collision which resulted in the claimant's injuries, loss and/or damage, but furthermore, is seeking, through this court, by means of her ancillary claim against the 2nd defendant, to recover compensation for her personal injuries, loss and/or damage, arising from the relevant collision, which she has specifically contended, was either exclusively caused, or at the very least, contributed to, by the 2nd defendant's negligence. The 1st defendant also seeks to obtain an indemnity and/or contribution from the 2nd defendant, in the event that the claimant is successful in his claim against the 1st defendant.

[18] The 1st defendant is also alleging, contrary to that which is the claimant's case, that it was after the traffic light facing Holborn Road had turned to green, that the Hyundai turned right. Also, the 1st defendant has specifically denied that the claimant was wearing any seat belt at the time of the collision/accident.

[19] The 2nd defendant is, for his part, alleging that, *'on September 2, 2012, he was travelling along Trafalgar Road in the direction of Hope Road. The 2nd defendant will further say that on reaching the intersection with Holborn Road the traffic lights were green and he proceeded when the driver of motor vehicle registered 6549 EF drove from Holborn Road into the path of his vehicle, thereby causing the collision. The 2nd defendant therefore contends that he is not liable for any negligence as alleged or at all and that the accident was caused by the negligence of the driver of motor vehicle registered 6549 EF.'* (Para. 8 of the defence of the 2nd defendant) In the stipulated particulars of negligence alleged by the 2nd defendant as against the 1st defendant, two of the particulars alleged, are as follows –

> *'b) Failing to obey the traffic lights at the intersection of Holborn and Trafalgar Roads,' and 'd) Driving into the path of the 2nd defendant's motor vehicle when it was manifestly unsafe to do so.'*

The 2nd defendant has also counterclaimed for damages for negligence, against the 1st defendant and two of the particulars of negligence alleged by him against the 1st defendant, are as follows:

> *'b) Failing to obey the traffic lights at the intersection of Holborn and Trafalgar Roads which was showing red for his direction of travel.*
>
> *d) Driving into the path of the 2nd defendant/Ancillary Defendant's motor vehicle when it was manifestly unsafe to do so.'*

[20] In the final analysis therefore, insofar as accepted and disputed allegations are concerned, with respect to the relevant accident/ collision which concerns the parties to this claim, what is clear, is as follows: The claimant is contending that said collision was caused by the joint negligence of the 1st and 2nd defendants. The claimant has not alleged in his claim against the defendants, that each of the defendants was jointly and/or severally liable to the claimant, for damages for negligence, arising out of the said collision. The latter-mentioned type of particularization would certainly, it seems to this court, not only have been more appropriate in a case such as this, but also, have been the typical type. As things now stand though, as specifically stated by the

claimant in paragraph 12 of her amended particulars of claim – *'That the said accident was caused by the negligence of the 1st and 2nd defendants and/or their respective drivers.'* The particularization by the claimant, of his claim against the defendants in that way, will be of some significance to this court's determination of the applications for court orders which have been filed by the claimant and thus, will be addressed further on in these reasons, in the segment hereof, wherein the relevant law is being carefully considered. As far as the defendants are concerned, the 1st defendant is contending that the collision was caused, or at the very least, contributed to, by the negligence of the 2nd defendant, whereas, the 2nd defendant is contending that the collision was exclusively caused by the negligence of the 1st defendant. Accordingly, each of the defendants to the claimant's claim are pursuing ancillary claims for damages for negligence, against each other.

The nature of the applications now before this court for determination

[21] In an application for court orders which he filed on May 16, 2014, the claimant has sought an order from this court that the defendants make an interim payment to him, either in the sum of $2,000,000.00 *or 'in the manner that this Honourable Court deems just.'* The main grounds put forward by the claimant, for the making of such an order by this court, are as follows:

> *'b) Pursuant to **rule 17.6 (3) (a) of the Civil Procedure Rules (CPR) 2002**, if the claim went to trial the claimant would obtain judgment against at least one of the defendants against whom an order for interim payment is being sought for a substantial amount of money and/or for costs even if the court has not yet determined which of the defendants is liable and/or the level of apportionment of each defendant.*
>
> *c) Pursuant to **rule 17.6 (3) (b) of the CPR 2002**, this is a claim for personal injuries and it is satisfied that the 1st and 2nd defendants were insured in respect of the claim. In this respect the 1st defendant is insured with Jamaica International Insurance Company Limited in respect of the instant claim and the 2nd defendant is insured with the Insurance Company of the West Indies in respect of the instant claim.*

d) The claimant is a twenty years old, recent high school graduate in desperate need of immediate funds to finance his orthodontic treatment and cost for further neurological examination.

*e) Pursuant to **rule 17.6 (4) of the CPR 2002**, the court is being asked to order an interim payment of a reasonable proportion of the likely amount of final judgment.'*

[22] That application by the claimant for an interim payment order to be made against the defendants first came before this court on July 14, 2014 and on that date, initial arguments were made before me, after which, this court had initially reserved its ruling on the said application. Having thereafter considered the claimant's application for interim payment more closely, this court decided and so informed the parties' counsel during the next scheduled hearing in chambers on July 17, 2014, that further oral arguments needed to have been made to this court as regards same and in addition, that skeleton submissions and authorities should be filed and served by the parties on various legal issues which I had raised with the parties' counsel, arising from the claimant's application for interim payment. Those further oral arguments were made before this court on August 15, 2014.

[23] Subsequent to this court's hearing of the claimant's application for interim payment, in chambers, on July 17, 2014, the claimant filed an application for court orders, seeking thereby, an order that this court award summary judgment in favour of the claimant, as against both defendants, in respect of this claim.

The Claimant's Application For Summary Judgment

[24] The claimant's application for summary judgment to be entered against both defendants, has put forward several grounds in support of that application and it is worthwhile to set out each of these. They are as follows:

'a) The 2nd defendant violated the Road Code and the Road Traffic Act by disobeying an obvious red solid traffic light whilst travelling along Trafalgar Road towards the general direction of Hope Road in Toyota Altis motor vehicle registered 9080 GC thereby causing and/or substantially

contributing towards a collision with the 1st defendant's Hyundai Elantra motor vehicle registered 6549 EF.

b) The 2nd defendant violated the Road Code and the Road Traffic Act by driving in excess of 50 kilometers per hour, which is the prescribed speed limit along Trafalgar Road, and drove in excess of 80 kilometers per hour thereby making it difficult, if not impossible for the 2nd defendant to take any evasive action in avoiding the motor vehicle accident.

c) The driver of the 1st defendant's Hyundai Elantra motor vehicle registered 6549 EF made a right turn from Holborn Road via the intersection of Holborn Road and Trafalgar Road in order to enter Trafalgar Road without a ball green traffic light and failed to observe that it was manifestly unsafe to do so thereby causing and/or contributing to the motor vehicle accident and failed to avoid said motor vehicle accident.

d) That the 1st and 2nd defendants were negligent as pleaded in the applicant's amended claim form and amended particulars of claim filed herein on February 14, 2014.

e) If this matter went to trial the claimant would obtain judgment against the 1st and 2nd defendant.

f) In the ordinary course of things this sort of motor vehicle accident would not have happened if the 1st defendant's driver and the 2nd defendant exercised proper care, therefore affords reasonable evidence even in the absence of an explanation by the 1st and 2nd defendants that this motor vehicle accident arose from the want of care, negligence can therefore be presumed under the doctrine res ipsa loquitur.

g) The 1st and/or 2nd defendants have no real prospect of successfully defending the claim.'

[25] Both of the claimant's applications (one seeking summary judgment and the other, interim payment) are being vigorously opposed by both defendants. This court has received and carefully considered each party's detailed and helpful written submissions, as well as many authorities being relied on by the parties and thanks the

parties for same. Though not necessarily referred to in detail herein, it is to be understood that this court has, to the extent warranted, relied on same in enabling it to make the required rulings. Equally, this court has carefully considered and applied to the extent as warranted, the respective parties' oral submissions in respect of the claimant's application for interim payment. During a teleconference which was held by this court, with respect to this matter, this court had informed the parties that it would not hold an oral hearing of the claimant's application for summary judgment – as had earlier been scheduled by this court, but instead, would utilize the respective parties' submissions, as a substitute for an oral hearing.

[26] In support of the claimant's application for interim payment, which was filed on May 16, 2014 the claimant has deponed to and relies on, an affidavit which was filed on May 16, 2014. In support of the claimant's application for summary judgment, the claimant has deponed to an affidavit which was filed on August 14, 2014. It is noteworthy, that neither of the defendants has filed any affidavit evidence in response to either of the claimant's applications for court orders. In the circumstances, as far as both of those applications are concerned, there exists no disputed affidavit evidence. This is a very important point, which will be addressed further on in these reasons for ruling, as it will undoubtedly have significance in determining how the claimant's respective applications ought to be resolved by this court.

[27] As earlier herein stated, there were certain specific legal issues raised by this court with the parties' counsel, when the claimant's application for an interim payment order, came before this court on the second occasion, for hearing. Those specific legal issues are as follows:

(i) *What meaning should be given by this court, to the term – 'judgment against a defendant for a substantial amount of money' – that being the term/ phraseology used in* ***rules 17.6 (1) (d) and 17.6 (3) (a) of the CPR****? In particular, what sum should be considered by this court, as constituting a substantial sum?*

(ii) *Can this court properly determine that a substantial award of damages would be made against both defendants in this claim, or against either of the defendants and if so, against which one?*

(iii) Can an interim payment order properly be made against a defendant who counterclaims?

All of these legal issues and others as regards the claimant's application for an interim payment order and also, all pertinent legal issues as regards the claimant's summary judgment application, will next be addressed in these reasons.

[28] It is provided for, by **rule 15.2 (b) of the CPR**, that –

> *'The court may give summary judgment on the claim or on a particular issue if it considers that - ... (b) the defendant has no real prospect of successfully defending the claim or the issue.'*

[29] The respective statements of case of the parties, are patently in dispute with one another, as regards the issues of fact which are most important to this court, for the purpose of determining whether or not the respective defences as filed by the respective defendants, do or do not have any realistic prospect of success. On the face of the claimant's case, as per his statement of case and on the faces of the defendants' cases, as per their statements of case, it is impossible for this court to conclude that neither of the defendants' defences, has any realistic prospect of success. On the face of it, each of the defendants' defences, has a realistic prospect of success. It is only after a trial has been held, whereupon the respective evidence of the respective parties, would have been fully contested, that this court will then be in a proper position, legally, to conclude as to which party has made out his or her case and perhaps even more fundamentally, whether the claimant has proven his claim against either defendant and if so, against which of those defendants.

[30] From the statements of case of the parties, there are several options which will be open to this court, insofar as a determination of liability is concerned. One option in that regard, would be for the court to hold the 1st defendant completely liable for the injuries, loss and/or damage caused to the claimant. Another option is to hold the 2nd defendant completely liable for the injuries, loss and/or damage caused to the claimant. A third option is to hold both defendants liable to varying degrees, for the injuries, loss

and/or damage caused to the claimant. A fourth option is that no one is held liable for the injuries, loss and/or damage caused to the claimant. A fifth option is that the 1st defendant is held liable to the 2nd defendant for the loss and/or damage caused to him. A sixth option is that the 2nd defendant is held liable to the 1st defendant for the injuries, loss and/or damage caused to him. A seventh option is that the 1st defendant is held liable to the claimant, for his injuries, loss and/or damage, but the 2nd defendant is held liable to contribute to the 1st defendant, a specified portion of the value of what the claimant will recover from the 1st defendant , arising therefrom.

[31] What is clear therefore, is that, it is seriously disputed as to which of the defendants should be held liable to the claimant and also, whether any of the defendants should be held liable at all. At trial, the claimant would have the burden of proving his case on a balance of probabilities. If however, for whatever reason, he fails to meet that burden of proof, then, his case against each defendant, or at least, as against any of the defendants who he has not proven his case against, surely will fail and judgment must then be awarded either in favour of the defendants, or at least, in favour of one or the other of the defendants.

[32] This case has not yet reached the trial stage. We are now instead, at the stage wherein, undoubtedly very late in the day, bearing in mind that case management and mediation have already been concluded, there exists an application by the claimant for summary judgment and for an interim payment order. Is this court now in a proper position to conclude that the defence of either defendant or of both defendants, has *'no real prospect of success?'*

[33] This court has applied the understanding of the immediately above- quoted term, as was laid down by Lord Woolf MR, in **Swain v Hillman** – [2001] 1 ALL ER 91, as this is the test which has also been applied in respective Jamaica Court of Appeal cases. In that regard, see for instance: **ASE Metals NV and Exclusive Holiday of Elegance Ltd**. – [2013] JMCA Civ. 37.

[34] The words *'no real prospect of success,'* are, as stated by Lord Woolf in **Swain v Hillman** *(op. cit.)* words that do not need any amplification, as they speak for themselves. The word, *'real'* directs this court to the need to see whether there exists a realistic, as opposed to a fanciful prospect of success, the phrase does not mean, *'real and substantial'* prospect of success. The party opposing such an application therefore, is not required to put forward compelling evidence, but instead, can successfully oppose same by putting forward enough evidence to raise a real prospect of a contrary case. In that regard, see: **Korea National Insurance Corporate v Allianz Global Corporate and Specialty AG** – [2007] EWCA Civ. 1066. In the final analysis, in deciding upon, a summary judgment application, this court must, whenever considering whether the respondent to such an application has a case with a realistic prospect of success, consider same, taking into account very carefully, the over-riding objective of dealing with the case justly. This is consistent with the general requirement, as set out in our constitution for there to be a fair trial in civil cases wherein disputed issues, whether of law, or fact, or conjoined law and fact, exist. This was made clear by England's House of Lords, in**: The Three Rivers District Council v Bank of England (N0. 3)** – [2003] 2 AC 1, in the context of Article 6 (1) of the European Convention on Human Rights.

[35] The burden of proof is on the applicant, who is, in this case, the claimant, to satisfy this court, that the respondent's case has no real prospect of success. Where the applicant can establish and has established a *prima facie* case against the respondent, there then will be cast upon the respondent, an evidentiary burden to show a case answering the case advanced by the applicant. A respondent, who shows a *prima facie* case in answer, should ordinarily be allowed to take the matter to trial.

[36] In this case, what is thus far clear, is that there exists significant disputes of fact between the parties. Those disputes cannot properly be resolved by this court without there being a trial. This court cannot accept the claimant's allegations as made against either or both defendants, without having required the parties to undergo cross – examination. Disputed issues of fact, which are placed before a court by means of affidavit evidence, ought invariably to be resolved by that court after having had, the

respective deponents be cross-examined in respect of the evidence which they have provided to that court, under oath and via affidavit. See: **Edward Seaga and Western Broadcasting Services Ltd.** – [2007] UKPC 19 and **Lascelles Chin and Ramona Chin** – [2007] UKPC 57. In respect of the matter now at hand, neither party applied to this court, as could have been done, pursuant to the applicable rules of court **(see rule 30.1 (3) of the CPR)**, for an order requiring the respective deponents to attend for cross-examination. Perhaps though, it is understandable why the claimant, in particular, would not have exercised that option, since, if he had applied to cross-examine the defence witnesses, in all likelihood, this court would, perforce, have ordered that he make himself available for cross-examination. This would then have no doubt, created great difficulty for him, since he has given evidence, for the purposes of his applications for court orders, which this court accepts, since it is undisputed, that he presently resides in the United States of America and is there, working in minimum wage earning jobs, as his only means of income. No doubt also, somewhat understandably, the defendants would not have wished to open themselves up to cross-examination upon their affidavit evidence, in circumstances wherein, for the purposes of the claimant's applications which are now before this court, no burden of proof exists on either of their shoulders.

[37] In any event though, it perhaps matters not, that no such application for cross-examination of the respective deponents/parties/witnesses for parties, was made by anyone, for the purposes of the claimant's summary judgment application, since, in all likelihood, even if such an application had been made, in circumstances such as these, wherein the parties and their witnesses have specifically deponed to the conduct of the parties, in terms of their driving, which led up to and ultimately resulted in the pertinent motor vehicle accident having occurred, such application would not have been granted. This is because, summary judgments applications should not be converted either into early trials held in chambers or more generally, into mini – trials. See: **Cotton v Rickard Metals Inc.** – [2008] EWHC 824. This should not be understood though, as expressing, or even implying, that cross-examination of witnesses, upon summary judgment applications, will in all cases, be impermissible.

[38] On the basis of the affidavit evidence which exists before this court at this time, this court has no hesitation whatsoever, in concluding that the defendants have been able to show a *prima facie* case in answer to the claimant's case. The defendants, having met the evidentiary burden cast upon them, of showing a *prima facie* case in answer to the *prima facie* case established on the claimant's evidence for the purposes of the claimant's summary judgment application, it follows inexorably, that the claimant has in respect of his summary judgment application, failed to meet the burden of proof cast by the law, solely on his shoulders, that being the burden of satisfying this court that either or both of the defendant's case (s) has/have no real prospect of success.

The claimant's application for interim payment

[39] There exists under Jamaica's CPR, various bases upon which the Supreme Court may make an order for a defendant to make an interim payment to a claimant, or into court. That interim payment would be the payment of a sum of money by a defendant to one, or in favour of one who has made claim against him in the Supreme Court and if an order were to be made for an interim payment, that order would necessitate that such payment be made in advance of the expected date for commencement of trial. **Rules 17.5 – 17.9 of the CPR** set out an overall guide as to the legal principles that should guide a court in deciding upon an application for an interim payment. In the case at hand, the claimant has applied to this court for an order that either or both of the defendants make an interim payment to the claimant. It is noteworthy in that regard, that since the defendants are separately represented by legal counsel, their respective responses to that application, are by no means identical, except in one important respect, this being that both defendants have strongly urged this court not to grant that application against their respective clients. Both defendants are insured in respect of the relevant motor vehicle accident, which this claim pertains to and indeed, as far as the second defendant is concerned, his defence to this claim is being vigorously pursued by his insurer's attorney, acting on his behalf.

[40] As would be clear from what has been set out above in these reasons, neither defendant has admitted liability in respect of the claimant's claim and neither has there

been any judgment awarded in the claimant's favour, as against either defendant. This claim is scheduled to proceed to trial and thereat, the factual issues of dispute between the parties, will have to be resolved.

[41] If though, this court is satisfied that if this claim went to trial, the claimant would obtain substantial damages against at least one of the defendants (even if the court has not yet determined which of them is liable), then it is open to this court and this court should, if 'dealing with the case justly' as defined in **rule 1.1 of the CPR**, grant an order for the defendant who is expected to be held liable, to make an interim payment directly to the claimant, or into court, in favour of the claimant. See: **rule 17.6 (3) of the CPR** in that regard. Thus, not only must this court firstly, be satisfied, on a balance of probabilities, that this court will upon trial of this claim, award judgment for substantial damages against at least one or the other, or at most, against both defendants; but also, this court must consider it to be 'dealing with the case justly' for such an order (order for interim payment) to be made. The latter consideration is as equally important as the former, since, as per **rule 1.2 of the CPR** – *'The court must seek to give effect to the overriding objective when interpreting these rules or exercising any power under these rules.'*

[42] This court has not been able to resolve the important disputes of fact which exist as between all of the parties to this claim. Indeed, I would state that just as it would, as a general rule, be inappropriate for this court to conduct a mini-trial for the purposes of resolving a summary judgment application, the same must also be true in respect of an application for interim payment. This court should not conduct a mini-trial, on an interim payment application, for the purpose of determining whether it is satisfied on a balance of probabilities that, at trial, the claimant will succeed, in proof of his claim, against one defendant or the other, or as against them both and also, for the purpose of determining whether it is satisfied on a balance of probabilities that, at trial, the claimant will not only succeed in proof of his claim against one or the other, or both defendants, but also, will be awarded a substantial sum as damages against whomever of the defendants is/are held liable.

[43] Let me address the issue of whether a substantial sum will be awarded as damages to the claimant, against either or both defendants, this of course, only assuming for present purposes, that this court were to conclude that the claimant will be partially or wholly successful in proof of his claim against the defendants.

[44] The jurisdictional limit for claims in the Magistrate's Court of Jamaica, is now $1,000,000.00. See: **The Judicature (Resident Magistrates) (Increase in Jurisdiction) Order 2013 Resolution**. There is no doubt that to very many people in Jamaica, $1,000,000.00 would be considered as constituting a substantial sum of money. This therefore must mean that inevitably, all claims coming before this court, for damages for personal injuries, will be claims seeking, by means of awards for general and/or special damages, sum of money which, in each case, would likely be viewed, from the claimant's subjective viewpoint, as being a substantial sum of money.

[45] For the purposes of an interim payment application therefore, it seems to me, that in this court's consideration as to whether or not it is satisfied that if this claim went to trial, a substantial sum would be awarded as damages, in the claimant's favour, as against either or both defendants, this court cannot and ought not to consider same from the subjective viewpoint of the claimant, or even, of either defendant. The question of what would be considered a 'substantial sum' as an award of damages, must instead, be considered by this court objectively, utilizing this court's vast experience in addressing award of damages in similar type cases which of course, come before it on a regular basis.

[46] From that objective standpoint, this court has to consider firstly, what would likely be the damages award made in respect of this particular claim and whether that award is one which would be considered by a reasonably informed jurist – this as distinct from a reasonably informed observer, as being an award of a substantial sum. I would address the objective standpoint, as being that of the reasonably informed Jamaican jurist, because, awards of damages are never made in this country, by anyone other than jurists and thus, the objective viewpoint must be considered from the reasonably

informed Jamaican jurist's perspective, since in Jamaica, it is only a jurist who can and will make awards of damages in any case.

[47] Furthermore, it is to be carefully noted, that this court must take into account contributory negligence (where applicable) and any relevant set-off or counter claim. See **rule 17.6 (5) of the CPR** in that regard. Clearly, this court would have to take into account same, in determining whether or not the claimant has satisfied this court, on a balance of probabilities, that even if he succeeds in proving his claim against one or the other, or as against both defendants, he will be awarded a substantial sum as damages, against that defendant or both defendant(s). This must be so, since if there was contributory negligence on the claimant's part and the defendant has specifically so alleged, then the quantum of damages to be awarded to the claimant, must/will be reduced by the court to the extent of his apportioned responsibility, in terms of his negligence, for the accident. (See: **Law Reform (Contributory Negligence) Act**, in this regard). Also, if there is a counterclaim made by the defendant against the claimant and that counterclaim is successful, then it would mean that the claimant's damages award will either be reduced to the extent of the sum awarded as damages in the defendant's favour, arising from the counterclaim, or alternatively, it may even mean that the claimant may be required to pay a sum as damages to the defendant – this if the award of damages on the defendant's counterclaim, exceeds the award of damages made in the claimant's favour, against that defendant.

[48] In respect of this claim, the defendants have neither made any counterclaim against the claimant, nor contended that he was contributorily negligent in having contributed to the relevant motor vehicle accident's occurrence. This is entirely understandable, since the claimant was not, when that accident occurred, driving any of the vehicles involved. He was, at that time, a passenger in a vehicle owned by the 1st defendant, which was then being driven by her admitted agent – Mr. Kawain Fearon.

[49] There is though, filed by each defendant against the other, a counterclaim, or in other words, ancillary claim and also, there exists, one against the other, respective allegations of contributory negligence. These must be considered by this court for the

purpose of determining whether, on a balance of probabilities, it is satisfied that a substantial award of damages will be made against either or both defendant(s).

[50] In the final analysis, it is clear to this court, that if this court were to be able to conclude that the claimant would, at trial, succeed in proving his claim against either or both defendants, it is highly likely that a substantial sum would be awarded as damages, in the claimant's favour. From the authorities on damages provided to this court by the claimant's counsel, this court accepts that the likely range of general damages award in a case such as this, would be between $2 and $5 million. The lowest end of that range would be, to my mind, a substantial award of damages and of course, this does not take into account, the sum that would likely be added thereto, as an award of special damages – for which the claimant is claiming the sum of over $696,000.00. Whilst the claimant may have difficulty at trial, in proving his entitlement to recover the full of that claimed sum as special damages, nonetheless, he should be able to recover at least a portion thereof and this would therefore mean that the sum to be awarded to him as damages, exclusive of interest and costs, would, if he succeeds in proving his claim against either or both defendant(s) at trial, likely be even higher than $2 million – which is at the lowest end of the likely range of the award of damages which would then be made by this court.

[51] This court has considered the ancillary claims which have been filed by the defendants against each other and whilst this may enable one or the other of the defendants to reduce his/her liability, if it has been determined by this court, that the claim against him or her has been duly proven, nonetheless, what it would mean, in any event, is that a substantial sum would still, in all likelihood (balance of probabilities) be awarded to the claimant, it is only that such sum may be apportioned as between both defendants, to an extent that this court would not, at this stage, be able to determine.

[52] In circumstances such as the present therefore, if this court were to be satisfied, on a balance of probabilities, that the claimant would succeed in proving his claim against both defendants, then this court would, if it were to be able to properly order an interim payment to be made against either or both defendant(s), have to also be

satisfied, on a balance of probabilities, that one or the other of the defendants, or both of them, will each be ordered, at trial, to pay a substantial sum as damages to the claimant.

[53] This court is unable to properly so conclude, at this juncture. Whilst this court is satisfied that if the claimant succeeds in proving his claim against either or both defendant(s), a substantial award of damages will be made, overall, in his favour, this court cannot stop there, in deciding on whether an interim payment order should be made and if so, as against which of the defendants, or whether it should be made against both of them.

[54] This court cannot stop there, because, it is only if this court is satisfied, in respect of a personal injuries claim, that a defendant will be held liable to the claimant and will be ordered, at trial, to pay a substantial sum as damages to that claimant, that this court can properly make an order against that defendants for there to be made either directly to the claimant, or, in favour of the claimant and through payment into court, an interim payment.

[55] In fact, it is one of the legal requirements for the making of an interim payment order by this court, that this court should, if making such an order, 'not order an interim payment of more than a reasonable proportion of the likely amount of the final judgment.' (Quotation from **rule 17.6 (4) of the CPR**). Accordingly, this court must, firstly, be satisfied, on a balance of probabilities, that liability will be assessed against one or the other of both of the defendants and the court must equally, be satisfied that, if judgment will likely be awarded against one or the other or both of the defendants, that such liability will be determined against the particular defendant against whom the order for interim payment is to be made.

[56] It could hardly be otherwise, since, this court could not properly make an interim payment order against a defendant, in circumstances wherein this court is not satisfied, on a balance of probabilities, that a judgment of liability will be made as against that defendant. If this court were to act otherwise, not only would it be acting contrary to

rule 17.6 (3) of the CPR, it would, additionally, not be exercising its discretion as to whether to make an interim payment order, in a manner, which could, properly be considered as 'dealing justly' with its exercise of that discretion.

[57] Furthermore, this court must be equally satisfied that a substantial award of damages would be made against one or the other, or both defendant(s). This court would also have to go on to determine, at this stage of this claim, what that likely substantial award of damages would be, since otherwise, this court would not be in a position to make an interim payment order for payment to be made by the appropriate defendant, or by the defendants, to the claimant, of a sum which is not larger that a reasonable proportion of the likely judgment award.

[58] In the case at hand, because of the disputed facts, not only as between the defendants, but also, as between the claimant and the defendants, this court is unable, at this stage, to find itself satisfied, even on a balance of probabilities, as to which of the defendants, if any of them at all, will be held liable for having negligently caused the relevant accident. Whilst this court is satisfied that it is probable that one or the other of the defendants will so be held liable, this court is unable to determine whether one or the other of the defendants will be held wholly or partially liable to the claimant and thus, be ordered to pay damages to the claimant, arising from that defendant's negligence, which has caused him loss and damage. Equally, this court is not satisfied as to whether both defendants will be held liable at trial, to varying degrees, to pay to the claimant, damages for negligence. Furthermore, this court is not satisfied that even if each defendant were to be held liable to the claimant for damages for negligence, what award this court would likely make, in the claimant's favour, as against each defendant.

[59] It may very well be for example, that this court may conclude that each defendant is 50% liable to the claimant, arising from their negligence, which contributed to the occurrence of the relevant accident. If so, would 50% of $2,000,000.00 constitute a substantial award of damages? This court does not so accept. Furthermore, what if this court were to determine that one defendant is 90% liable to the claimant for damages

for negligence and the other is liable only to the extent of 10%, then clearly, following from the aforementioned, this court clearly would not and could not properly make an interim payment order against the defendant who will be held liable to the extent of 10%. Can this court, at this stage, feel satisfied as to which of the defendants will, in all probability, be held liable to the claimant? The simple answer to this question is – 'NO.'

[60] For the aforementioned reason alone, this court will not grant to the claimant, the interim payment order which he has sought. For the sake of completeness though, this court will, further on in these reasons, address its mind as to whether this court is satisfied that judgment will likely be made, in terms of liability, against one or the other, or both of the defendants.

[61] To put it simply, this court is not, at this stage, satisfied on a balance of probabilities, that judgment as to liability will arise out of the trial of this claim, against both defendants. It all depends on the trial judge's view of the evidence which will be presented at that trial, before him or her. It also, of course, will depend on what is in fact the evidence presented at trial, by the respective parties and/or any other witnesses who may be called upon to testify on their behalf.

[62] Whilst this court is satisfied that an adjudication of liability will be made upon trial of this claim, as against one or the other of the defendants, this court is wholly unable at this stage, to draw any conclusion whatsoever, even on a balance of probabilities, as regards which of the defendants will likely, upon trial, be held liable, or whether both defendants will be held liable, to varying degrees. This is because, on paper at this stage, the scales of weight as regards the respective defendants' defences and ancillary claims, appear to this court, to be evenly balanced. Of course too, if both defendants are held liable to the claimant, it will then mean that the sum likely to be assessed by the trial court, as being payable by each defendant, as damages to the claimant, will be determined, based on the degree to which each defendant is held liable to the claimant, for having negligently caused his loss and injuries. As such, it may very well be that neither defendant, individually, will be ordered, at trial, to pay 'a substantial sum' as

damages to the claimant. Furthermore, if even it may be concluded that one of the defendants may be ordered to pay 'a substantial sum' as damages to the claimant, the question has to be asked again – which of the defendants will likely be so ordered? This court had found itself wholly unable to answer this question. In any event, the question does not properly even arise for consideration by this court, since this court is not at all convinced, at this stage, even on a balance of probabilities, that both defendants will be held liable to the claimant, for damages for negligence, nor, as to which of the defendants will likely be held liable. All that this court is convinced of at this stage, on a balance of probabilities, is that one or the other, or perhaps both of the defendants, will be held liable to the claimant for damages for negligence. It should be noted though, that even though this court is convinced of that, at this stage, such finding of this court, will not and cannot bind the trial judge.

[63] In the circumstances, not only would it not be in keeping with the applicable rules of court, for this court to order either or both defendants to make an interim payment or interim payments (as the case may be), it also would not, when considered holistically, constitute this court as having, in exercise of its discretionary powers as to whether or not to make an interim payment order, dealt with this case justly. This court cannot and must not act on speculation, nor on sympathy for any of the parties to this claim. As such, this court has not done that.

[64] Counsel for the claimant has submitted that since this court has discretionary power, for instance, to order a defendant to reimburse, either in whole or in part, another defendant who has made in an interim payment (see **rule 17.9 (2) (c) of the CPR)** and since both defendants are insured, if at trial it is determined that only one of the defendants is liable and the defendant so held liable was not the one earlier ordered to make the interim payment to the claimant, then it will be easy for that defendant who made the interim payment, to be reimbursed by the other defendant, who is also insured.

[65] This court though, should not be expected by any party to this claim, to act on a speculative basis as to which of the defendants will likely be held liable to the claimant,

for damages for negligence, since, all that would have gone wrong in this court having so acted, will undoubtedly be rectified at a later stage, once judgment has been rendered by a court, following upon the trial of this claim. That cannot be a correct approach for this court to take, in respect of matters of this nature. This court should always endeavour to administer justice, from the beginning until the end of all court proceedings. Thus, for instance, a trial court should not make a finding in favour of a party, who is not legally entitled to that finding in his favour, but that finding was made because, the trial judge concluded that even though he is likely in error in having made that finding, in all likelihood, that error will be corrected, at a later stage, on appeal. That certainly cannot be an appropriate way for this court to exercise its discretion in a manner which deals with cases justly.

[66] In any event though, whilst this court would have the discretionary power to order one defendant to reimburse the other, in whole or in part, this court does not have the legal authority to order that interest be paid in respect of that sum which is thereafter to be reimbursed. As such, the defendant who was ordered to make the interim payment and who is, after trial, determined by the trial court either as not being liable to the claimant at all, or if liable, then only so to a relatively minimal degree, not only would have suffered the injustice of having either been ordered to make an interim payment, but also, even when reimbursed, would still have lost monetary value, since no interest would have been accruing on the sum to be reimbursed. This court thus, rejects the claimant's counsel's submission on this point.

[67] The claimant's counsel had also, in oral submissions before me, contended that there has been placed before this court, no affidavit evidence from either of the defendants, deponing as to how the accident occurred, or at all disagreeing with the claimant's affidavit evidence which, amongst other things, has categorically stated that the relevant collision, *'was caused and/or substantially contributed to by the negligent driving and/or management and/or operation, of the 1st and 2nd defendant's motor vehicles with registrations 6549 EF and 9080 GC respectively.'* The claimant's counsel is correct in that assertion. Based on that assertion, the claimant's counsel has further

contended that since there exists no affidavit evidence from the defendants, this court should accept the claimant's evidence, that it was the defendant's negligence which caused the relevant accident.

[68] Whilst the claimant's further contention in that regard does have some weight to it, this court does not agree with it, in the particular circumstances of this court's exercise of its discretion as to whether or not to make an interim payment order against either or both defendants, in this claim. This court does not agree with it, firstly, because, a mere assertion of negligence on someone's part, is not the same as providing evidentiary proof of such negligence. The mere assertion of 'negligence' carries no weight whatsoever with this court. The term 'negligence' is in law, a term of art, which has been developed, over decades, as a legal concept which is applied by courts, time and time again. The entitlement of a person to recover from another, through a court of law, damages for negligence, depends not only on proof of carelessness. Everything has to be contextualized in terms of that carelessness and in addition, causation and financial loss, or injury to the person, must be proven, in order for a party to properly be able to recover, through a court, damages for negligence. Furthermore, the court would also have to be satisfied that a duty of care existed, in the particular circumstances of the particular case and would next have to go on to consider the scope of that duty of care (if any), that was owed, in that particular case.

[69] Whilst the claimant had given evidence in his affidavit, which was filed on May 16, 2014, of the relevant collision as having occurred, in terms of the details of that collision, he has, in that affidavit, referred to his amended claim form and amended particulars of claim. This court has paid due regard to both of same and equally therefore, it has paid due regard to the assertions made by the defendants in their respective statement of case, which have been certified as true, by the defendants. In any event, as those statements of case consists of filed documents in this claim, this court could have and did, in fact, take judicial notice of same. The claimant and defendants' statements of case make it clear to this court, that there exists a marked divergence of facts, as to what caused the relevant collision/accident and as to whose fault it was that either wholly caused or contributed to same. In the circumstances,

whilst it would have been ideal for the defendants to have placed before this court affidavit evidence in support of their respective statements of case, the non-existence of such, does not at all, in the particular circumstances of the particular interim payment application which is now before this court, oblige this court to accept that it is the defendants' negligence which either caused or substantially contributed to the occurrence of the relevant collision/accident.

[70] There is one final legal point which this court will now address in these reasons and it is as regards a matter which this court had invited the parties' counsel to give consideration to, in making their respective submissions to me. It is the issue as to whether an interim payment can properly be sought as against a defendant who is pursuing a counterclaim. Upon having carefully considered this issue, this court is now convinced that there is nothing which would preclude a claimant from seeking an interim payment order as against a defendant who has filed a counterclaim. If it were otherwise, then this court would not be able to take into consideration any counterclaim in deciding either as to whether an interim payment order can be made, or as to what sum should be paid as an interim payment, pursuant to that order. As things now stand under the applicable rules of court though (see **rule 17.6 (5) of the CPR**), the court must give consideration/ 'take into account' any relevant counterclaim, in deciding on matters pertaining to an application for an interim payment order. How can the court take same into account, if this court cannot, in any event, make an interim payment order against a defendant who counterclaims? This question is only posed rhetorically, since it clearly can result in only one answer, this being that if this court were not legally empowered to make an interim payment order against a defendant who counterclaims, then there can be absolutely no need to take such counterclaim into account, in deciding on how this court should exercise it discretion in relation to an application for an interim payment order.

[71] In any event though, in the present case, neither of the defendants have filed any counterclaim/ancillary claim against the claimant. Instead, they have wisely chosen to file their respective counterclaims/ancillary claims against each other. Undoubtedly

therefore, the claimant in the present case, is legally entitled to pursue his application for an interim payment order against both of them.

[72] What is to be noted though, for future reference in an appropriate case, is that **rule 17.5 (1) of the CPR** provides that the term 'claimant' includes a defendant who counterclaims. As such, whilst if there is a case in which a claim is brought against a defendant for damages for personal injuries, the claimant in that case, can, in certain circumstances, seek an interim payment order from this court, if, the defendant in that case, has counterclaimed against that claimant, it would also be open to that defendant to seek an interim payment order against that claimant. That would indeed be an interesting legal scenario and is well within the realm of probability.

Res Ipsa Loquitur

[73] The claimant is relying on the maxim *'res ispa loquitur'* to assist him in proving his claim. The simple meaning of that latin maxim is – *'The facts speak for themselves.'* That maxim is usually relied on by a claimant, in circumstances wherein the factual nature of the known and undisputed facts surrounding a particular claim founded on the law of tort, are such that they irresistibly point to there having been negligence on the defendant's part, in the absence of that defendant having provided to the court, a suitable and adequate explanation as to how it was that that factual scenario occurred, without there having been any negligence on his part. See: **Roe v Minister of Health** – [1954] 2 Q.B. 66, at pp. 87-88, per Morris, L.J.

[74] *Res ipsa loquitur* though, has no applicability whatsoever, in circumstances such as in the present claim, wherein, the claimant has placed before this court, in his statement of case as regards both defendants, specific allegations as to each defendant's actions, leading up to the relevant motor vehicle accident having occurred, which he contends, either caused, or substantially contributed to the occurrence of same. In such circumstances, where the claimant will be seeking to put forward at trial, evidence as to what caused that motor vehicle accident, the claimant cannot properly rely on the said latin maxim to assist him in proving his claim. That maxim does not act

as a means of corroboration of the claimant's account. Instead, it can assist a claimant, in circumstances wherein the claimant's account or the account of the claimant's witnesses, as to what happened, is lacking certain ordinarily important details. On this point, see: **Barkway v South Wales Transport Co. Ltd.** – [1950] 1 ALL E.R. 392. In any event, both defendants have put forward, their own respective accounts as to how the relevant accident occurred. As the defendants' said accounts, are not to be considered at face value, as being valueless, those accounts cannot simply be disregarded by this court, at this stage of these court proceedings.

Conclusion

[75] This court thanks the parties for their helpful written and oral submissions and wishes counsel to note, that it has carefully considered all of same, but to the extent that specific reference has either not been made to any, or to any particular aspect of same, this was merely for the sake of brevity, rather than intended as disrespect to counsel for their helpful work done in that regard. It is ordered that the claimant's application for summary judgment is denied and that the claimant's application for interim payment is also denied. The costs of those applications are awarded to the defendants, with such costs to be taxed, if not sooner agreed.

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Hon. K. Anderson, J.