



[2021] JMSC Civ.128

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**CIVIL DIVISION**

**CLAIM NO. CLAIM NO. 2017 HCV 03258**

<b>BETWEEN</b>	<b>GERALDINE WILLIAMS</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>HECTARES COLUMN</b>	<b>DEFENDANT</b>
<b>AND</b>	<b>ATLAS GROUP INCORPORATED LTD</b>	<b>2<sup>ND</sup> DEFENDANT</b>
<b>AND</b>	<b>OTIS BROWN</b>	<b>3<sup>RD</sup> DEFENDANT</b>

**IN CHAMBERS**

**VIDEO CONFERENCE**

Serena Byron instructed by Kinghorn and Kinghorn appeared on behalf of Sean Kinghorn for the claimant

Monroe Wisdom instructed by Nunes Schofield and Deleon for the first and second defendants, Houston Thompson instructed by Dunbar and Company for the third and fourth defendants.

Heard: June 2, 2021

**Civil – Interim Payment – Damages for Personal Injury – time within which defendants to file response to application for interim payment**

**Master Carnegie (Ag.)**

[1] The application for interim payment arose out of a motor vehicle collision which occurred on 16<sup>th</sup> day of March 2017 along the Bog Walk Gorge in the Parish of St. Catherine. The collision involved a motor vehicle registration number PD 2194

(the taxi) in which the claimant Miss Williams was a passenger, and motor vehicle registration number CK4244 the property of the second defendant and operated by the first defendant. As a result, the claimant instituted proceedings by way of claim form and particulars of claim on October 10<sup>th</sup> 2017 to recover damages for personal injuries sustained. The second defendant filed an ancillary claim and avers that the accident was contributed to by the negligence of the third and fourth defendants. By virtue of the defence filed, and ancillary claim, there is in dispute which defendant or defendants are liable for damages for the personal injury of the claimant.

- [2]** The following were taken into consideration in arriving at a decision: oral submissions advanced by the claimant for an award of interim payments; the oral submissions by the defendants against interim payments; the law surrounding interim payments that is (procedure for application; time within which the defendant can make an application for interim payments conditions to be satisfied in awarded interim payments); Civil Procedure Rules 2002 and the relevant case law.
- [3]** Miss Williams filed an application supported by affidavit for an order for interim payment for the sum of \$1, 500, 000.00. Miss Brown relied solely on the affidavit of Miss Williams and therefore submissions made were without reference to any law, except for the Civil Procedure Rules.
- [4]** The grounds upon which Miss Williams made the application are as follows:
1. This is a claim for damages for personal injuries where all the defendants who could possibly be liable have been put before the Court;
  2. Miss Williams was a passenger in one of the vehicles that collided
  3. One or both sets of defendants will inevitably be held liable for the occurrence of the accident;
  4. There is no allegation of contributory negligence against Miss Williams

5. Consequently, if the claim goes to trial the claimant will obtain judgement for substantial damages from at least one defendant or both sets of defendants pursuant to Rule 17.6 (3)(a) of CPR;
6. 1<sup>st</sup> and 2<sup>nd</sup> defendants are insured with JN General Insurance Company Limited in respect of the instant claim pursuant to rule 17.6(3)(1)(a) notice of proceedings have been filed and served on the said Insurance Company;
7. 3<sup>rd</sup> and 4<sup>th</sup> defendants are insured with Advantage General Insurance Ltd. Notice of proceedings filed and served on both companies in respect of the instant claim pursuant to rule 17.6(3)(1)(a) notice of proceedings have been filed and served on the said Insurance Company;
8. 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.
9. The claimant makes a claim for personal injury sustained as a passenger of the vehicle registered PD2194.

**[5]** The documents relied on by the claimant in support of the application were:

1. Medical report from the Linstead Hospital dated October 9<sup>th</sup> 2020;
2. Medical report from Mr. Omar Francis dated 28<sup>th</sup> July 2020
3. Invoice from Mr. Omar Francis in respect of medical expenses.

**[6]** Oral submissions on behalf of the first and second defendant was that the overall value was not provided in the application and an interim payment can only be made in respect of a reasonable sum. Mr. Wisdom says he cannot concede in such circumstances as there is no establishment as to the overall value of the claim and the sum stated in the notice of application will likely exceed value of the claim. Mr. Wisdom for the defendants further argued that rule 17.5(5) (b) and (c) was not complied with adding that the reason for interim payments are for medical payment and other expenses.

- [7] Miss Thompson agreed with arguments of Mr. Wisdom, and requested that the Court consider the affidavit filed by her on behalf of the third and fourth defendants be considered in arriving at a decision. At the time of this hearing the affidavit of which Mrs. Thompson spoke was not before me and by Miss Thompson's own admission at time of hearing she could not definitively say whether the affidavit she filed on behalf of the third and fourth defendants was filed or even left her office. Subsequent checks revealed that the affidavit was filed on June 2<sup>nd</sup> 2021, but was not uploaded to the system.
- [8] Based on the evidence put forward, the issues to be resolved are whether –
- i. the application is in compliance with CPR 17.5 (5) and 17.6;
  - ii. on the evidence presented, interim payments can be made; and
  - iii. the application in response to the application by Miss Houston against the payment of interim payment should be taken into consideration given the requirements of the CPR.
- [9] The Civil Procedure Rules 17.5 provides that a notice of an application for an order for interim payment must be –
- (a) on served not less than 14 days before the hearing of the application;
  - (b) and supported by evidence affidavit
- [10] An order for interim payment are likely to be made in claims where it appears the claimant will achieve at least some success and where it would be unjust to delay, until after the trial, the payment of the money to which the claimant appears to be entitled **A Practical Approach to Civil Procedure Fifth Edition p. 348**. The Civil Procedure Rules provides that the Court may grant interim remedies including an order for interim payment under rules 17.5 and 17. 6, of a sum on account of any damages or debt or other sum which the Court may find the defendant is liable to pay. One of the main reasons for interim payments is to enable the claimant to pay for treatment **A Practical Approach to Civil Procedure Fifth Edition Supra**.

**[11]** Rule 17.5 (5) of the CPR sets out what must be included in the affidavit in support of an application for interim payment. The rule states 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;
  - (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.

**[12]** The Rule 17.6 (2) and (3) of the CPR lays out the conditions to be satisfied in order to be awarded interim payments in respect of claim for personal injuries -

- (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 –
- (a) is 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 a 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.

[13] Rule 17.6 (3) provides 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) If the claim went to trial, the claimant would obtain judgement 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.

## **APPLICATION OF THE LAW**

[14] As there is no issue as to whether rules were followed in submitting the application, it is left to be considered whether the application made it is appropriate for an interim payment to be paid.

[15] Interim payments are available in any type of claim whether in contract, tort or under any other principle of law **Commonwealth Caribbean Civil Procedure, Gilbert Kodilinye and Vanessa Kodilinye p. 289**. It is therefore trite that this claim is one for which interim payments are available.

Interim payments is a payment in advance on account of any damages which a plaintiff may ultimately be awarded at the conclusion of the trial. The purpose of an interim payment is to ensure that a claimant is not kept out of his money for an unduly long period. P. 288

Further the purpose is to alleviate the hardship that may otherwise be suffered by claimants who may have to wait substantial periods of time before the recover any damages in respect to wrongs **A Practical Approach to Civil Procedure Fifth Edition Supra.**

- [16] At the time of hearing the application the claimant's attorney estimated the length of the time of the trial estimated for three to five years and refers to this period as unduly long. The argument advanced in respect of undue length of time is tied to the issue of hardship suffered by the person claiming interim payment during or the before trial. The claimant's attorney request for an order an interim payment of \$1,500,000.00, is in the absence of any information regarding the overall assessment of the claim, that is assessment of damages or other monetary judgement likely to be awarded.
- [17] Mr. Wisdom argued that the established principle is that the Court must not order an interim payment of more than a reasonable proportion of the likely amount of the final judgement. Mr. Wisdom further argued that he cannot concede to such an order as the amount of the claim has not been established and therefore it cannot be said that \$1,500,000.00 is a reasonable sum, in the absence of an overall value of the claim. Mr. Wisdom went on further to state that rule 17.5 (5) (b) and (c) were not complied with nor other reasons for interim payment in respect of medical expenses and payment of other things to offset hardships etc. I agree with Mr. Wisdom on this point.
- [18] The sole reliance on medical report and invoices in respect of same, totalled at a little over \$36,000.00 representing the sum for special damages. Further, there was no evidence put forward as to any hardship that the claimant is experiencing in meeting medical bills as a result of the collision, or mounting medical expenses as a result of the injuries sustained in the collision. I must add that rule 17.5 (5) is

not to be read disjunctively and therefore the affidavit should include all in respect of subparagraph (5) where applicable.

[19] All four defendants are insured in respect of claim another condition for making an application for interim payment **Commonwealth Caribbean Civil Procedure Gilbert Kodilinye and Vanessa Kodilinye pp. 289-290**. Given the evidence, the claimant has satisfied this condition as per CPR 17.6 (2)(a). However, the question remains if the action proceeded to trial, would the claimant obtain judgment for substantial damages against the defendant or, where there are two or more defendants, against anyone of them? There is no contributory negligence on the part of the claimant, and it is still in dispute which defendant is liable and could be argued therefore that one or more of the defendants could all be liable and the claimant, could likely succeed in obtaining judgment against one or all of the defendants. Indeed, the court must be satisfied that the claimant will succeed. The authority for succeeding on this ground is set out in **Christopher Cunningham v. Debulin Ewan et al [2019] JMSC CIV 39, 2014 HCV 05837**.

The claimant must satisfy the court that if the claimant's claim went to trial she would obtain judgment against the defendants. This requires a higher standard than the ordinary civil standard of balance of probabilities.

British and Commonwealth Holdings plc v Quadrex Holdings Inc. [1989] QB 842 at p. 866 the burden of proof is

‘requires that 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...’

The facts of **Christopher Cunningham v. Debulin Ewan et al [2019] JMSC CIV 39, 2014 HCV 05837** that case is to be distinguished from this case as there was evidence as to what the overall assessment of damage would be and therefore the means to assess the likely award and by extension what a reasonable payment would be. In addition, there was no dispute as to whether the claimant is liable or the defendant. In this case the question is whether on the evidence given it is one

for which an order for interim payment can be made in the absence of an overall assessment.

The claimant may likely succeed, however in the absence of an overall assessment of the claim and given the evidence presented it cannot be said that the claimant would likely be awarded substantial damages, but would recover damages nonetheless.

- [20]** Miss Thompson signalled her desire to have her client's affidavit evidence considered of which neither Miss Brown nor Mr. Wisdom object. Perusing the contents of Miss Thompson's affidavit did not have an impact the decision arrived at, but the approach suggested in coming to the overall assessment is helpful.
- [21]** On the evidence presented this application is not one for which an order for interim payment can be made as per CPR 17.6 (4).
- [22]** Order for interim payment is refused, claimant is at liberty to reapply for interim payment; and costs to the defendants to be agreed or taxed.