IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2006HCV05105

BETWEEN	PHYLLIS ANDERSON	CLAIMANT
AND	WINDELL RANKINE	DEFENDANT

IN CHAMBERS

Mr. Vaughan Bignall, instructed by Bignall Law for the claimant

Mrs. Symone Mayhew, instructed by Nunes, Scholefield, DeLeon & Co. for the defendant.

Interim Payment – Circumstances in which such a payment is to be made – Interpretation and Application of Rule 17.6 (1) (d) & (2) of the Civil Procedure Rules, 2002, as amended. - Defence filed - Res Ipsa Loquitur.

Heard: November 4 & December 10, 2008

F. Williams, J (Ag.)

Factual Background

In this matter the claimant has sued the defendant for damages arising from a motor-vehicle accident which occurred on the 29th July, 2005. Whilst about to cross the Braeton Main Road on that day, she was struck by a motor vehicle owned and driven by the Defendant.

In paragraphs 3 and 4 of her Particulars of Claim, she alleges that the accident was either caused solely or was contributed to by the negligence of the defendant. Specifically, at paragraph 4 (g) she alleges that the defendant was negligent in that he failed : " to keep the motor vehicle he was driving on the roadway, and passing a motor vehicle that had stopped to allow the Claimant to

cross the roadway by driving on the soft shoulder of the said roadway and colliding into the pedestrian".

Paragraph 5 of the Particulars of Claim states that the principle *res ipsa loquitur* applies.

In his Defence, however, the defendant denies any negligence on his part. He contends that the accident was caused by the claimant's suddenly dashing across the road on his approach, at a time when it was manifestly unsafe to do so. Paragraph 4 of the Defence states: "She gave no indication of an intention to cross the road... As his said motor car was about to pass the said bus stop, the pedestrian ran into the road and collided into his vehicle".

He further avers that the collision was caused solely and/or materially contributed to by the negligence of the claimant.

It will be seen, therefore, that the contentions of the parties in relation to how the accident occurred are diametrically opposed.

The parties are, however, *ad idem* as to the serious nature of the injuries – regardless of where liability might eventually be found to lie. The claimant's injuries, treatment and the prognosis for her recovery are detailed in some nine (9) medical reports, including ones from a plastic surgeon and a neurologist. In the briefest summary of these medical reports, she sustained a head injury with concussion; fractures of the right humerus and left femur; laceration to the tongue and blunt trauma to the abdomen and chest.

It is against this factual background that the Claimant seeks an order for interim payment.

The rule under which the application is made

The relevant rule and the rule under which the application for the order is made is rule 17. 6 (1) (d) and (2) of the Civil Procedure Rules, 2002, as amended.

Those provisions are set out in full hereunder:

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

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

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

(a) insured in respect of the claim;

(b) a public authority; or

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

Paragraph 3 deals with cases in which there are two or more defendants, and so is not relevant for the purposes of this decision, there being only one defendant in this case.

Additionally, there is agreement between counsel on both sides that the requirement at (2) (a) is satisfied in this case, as the defendant is insured.

There is also agreement between counsel (following on their agreement that the injuries are serious), that any damages that might be awarded at the end of the day would be substantial. Their only area of disagreement in this regard is as to whether the award would fall in the band of between $4, 500,000 and $6, 650,000, as the claimant's attorney-at-law contends; or the band of between

$3,000,000 and $3, 500,000, as the defendant's attorneys-at-law contend. The court is also being called upon to decide (if it considers an interim payment to be necessary in this case), whether any such award should be some $3,000,000, as the claimant's attorney-at-law requests; or some $1,000,000, as the defendant's attorneys-at-law suggest.

The focus of the analysis must, therefore, be on a specific part of the requirements of paragraph (d), that is, whether "if the claim went to trial, the claimant would obtain against the defendant... an order... for a substantial amount of money". (emphasis added).

Authorities Submitted for the Court's Consideration

Cases cited by counsel for the claimant

Counsel for the claimant buttressed his submissions that this is an appropriate case in which to make an order for an interim payment by citing two (2) cases:

(i) **Shearson Lehman Brothers Inc and Another v Maclaine, Watson & Co. Ltd. And Others** [1987] 1 W.L.R. 480 (a decision of the English Court of Appeal); and

(ii) (ii) the Malaysian Court of Appeal case of **Monorail Malaysia v Technology Sdn Bhd**. (unreported).

The **Shearson** case dealt with a claim for a breach of contract for the sale by the plaintiffs of large quantities of tin. The tin that was ordered was not delivered to the defendants when dealings of tin on the tin market were suspended and the defendants refused to accept delivery. The plaintiffs contended that they were either entitled to the full contract price for the tin of £23.9 million, or, at the least, £7.2 million. The defendants, on the other hand, contended that damages to be

awarded against them could not exceed £5.2. The judge, although being satisfied on the evidence before him that the plaintiffs, at trial, would be entitled to recover a minimum of £5.2, declined to make an order for an interim payment as, in his view, the relevant rules (RSC Ord. 29, rr. 11 & 12) did not permit the making of such and order. His decision was reversed on appeal and the payment of the minimum sum of £5.2 ordered; as the court of appeal felt that, on the evidence before him, he had made too restrictive an interpretation of the rules.

In the **Monorail Malaysia** case, the appellant, whilst crossing the road, was struck and injured by a safety wheel weighing some 13.4 kg, which fell off a monorail tram on a test run. As a result he sustained severe head injuries. The respondents/defendants contended in their defence that the wheel had been dislodged by the act of a third party/parties unknown (*novus actus interveniens*). The judge who heard the application for an interim payment, dismissed the application, mainly on the basis that the applicant/appellant needed to have shown that his condition had deteriorated since the accident; and that if the defence of *novus actus interveniens* succeeded, there would be no substantial award of damages.

The court of appeal, which reversed this decision, held, *inter alia*, that:"It was a type of accident which clearly called for the respondents to explain how the safety wheel could have dislodged and dropped on the appellant, a *res ipsa loquitur* situation – where in the absence of explanation by the respondents, negligence may be inferred". Additionally, it was held that the judge erred in law in drawing conclusions on the defence of *novus actus interveniens*, based on the available material which was, at that stage, untested.

Cases cited by counsel for the defendant

Counsel for the defendant cited the case of **Schott Kem Ltd. v Bentley** [1990] 3 All ER 850.

This case was cited in support of the submission that, in order for the Court to be satisfied that the claimant will recover substantial damages at the trial, the claimant needs to show that there is more than just a *prima facie* case. The application for an interim payment should be considered in two (2) stages: (i) the Court must first be satisfied (on a balance of probabilities) that, if the action proceeded to trial, the claimant would obtain judgment; and such a judgment would be for a substantial amount of money. The standard is a high one. (ii) any such interim payment to be made must also be in such sum as the court considers reasonable.

The **Schott Kem** case was cited, not so much for its facts, but more so for certain propositions relating to interim payments that were therein stated by Neill, LJ. Of the nine (9) propositions stated therein, only numbers (4) and (9) will be set out for the purposes of this case. They are as follows:

(4) "In order for the court to be satisfied that the plaintiff would obtain judgment –

'something more than a prima facie case is clearly required, but not proof beyond reasonable doubt. The burden is high. But it is a civil burden on the balance of probabilities, not a criminal burden.'
(See **the Shearson Lehman case** [1987] 2 All ER 181 at 187...)."

(9) "Interim payment procedures are not suitable where the factual issues are complicated or where difficult points of law arise which may take many hours and the citation of many authorities to resolve."

That case involved an interpretation of RSC, Rule 29, 12 – a rule that is roughly the equivalent of Rule 17 .6 (d) of the Jamaican Civil Procedure Rules.

Analysis and application of the law to the facts

Perhaps the last proposition stated in the **Schott Kem** case might be a convenient starting point to see which propositions of law are applicable to the facts of the instant case.

In doing so, it must be said at the outset that this does not appear to be a case in which "difficult points of law arise which may take many hours and the citation of many authorities to resolve". Additionally, the factual issues perhaps cannot be said to be complicated. But then again, considering that the contentions are diagonally different, for the Court to take a view as to whether the claimant "would obtain judgment against the defendant..." in the words of paragraph 17.6 (d), it seems to me that it could only do so (on these facts) after the competing contentions of claimant and defendant have been distilled or tested in the crucible of a trial.

If this view is correct, then, when proposition (4) above is considered in conjunction with it, the claimant in this case will be seen to face an even more-difficult challenge in establishing her right to an interim payment. On the material available to the Court, there is (on the claimant's case) little more than a bald allegation of negligence against the defendant. This is met, on the pleadings, by an allegation of equal weight by the defendant of negligence against the claimant. There is nothing in the material available to the court at this stage, to "tilt the balance" in favour of either party. In these circumstances, therefore, it would be difficult (if not impossible) for the claimant to establish even a *prima facie* case, let alone attain the higher standard required by proposition (4), in

persuading a court that she, as claimant, "would" obtain judgment against the defendant.

The current English rules (Civil Procedure Rules {CPR}, r. 25.7 (1) (c), contain wording that is the same as the predecessor rules – Ord. 29, rr. 11 (1), (c) and 12 (1) (c).

CPR, r. 25.7 (1) (c), reads as follows: -

An interim payment may be ordered only if: "(c) the court is satisfied that, if the claim went to trial, the claimant would obtain judgment against the defendant from whom the interim payment is sought for a substantial sum of money...".

These words are in *pari materia* with those contained in the Jamaican provision.

Discussing the current English rules, this is how the required standard of proof is treated with in **Blackstone's Civil Practice, 2008,** (at page 454, para. 36.9): -

"On an application under CPR, r. 25.7 (1) (c) or (d), the court has to be satisfied on the balance of probabilities that the claimant 'would' obtain judgment. This wording is identical to that used in the old rules (RSC, ord. 29, rr. 11 (1) (c) and 12 (1) (c), and it ought to be the case, despite the new approach to interpretation, that the same principles will apply regarding the standard of proof on these two grounds. If so, it has to be shown that the claimant will win on the 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." (Emphasis added).
The leading authorities under the old rules establishing these principles were *Shearson Lehman Brothers Inc. v Maclaine Watson and Co. Ltd* [1987] 1WLR 480 and *British and Commonwealth Holdings plc v Quadrex Holdings Inc.* [1989] QB 842."

This paragraph is repeated almost verbatim in **A Practical Approach to Civil Procedure** (seventh edition) by Stuart Sime at page 347.

In **Civil Procedure** (second edition) by Paula Loughlin and Stephen Gerlis, the authors' view of the position is stated thus: - "An interim payment may be made... where the claimant has a very strong claim against the defendant".
"They are regularly made... where liability is often easily established". (emphasis added).

Paragraph 36.13 of **Blackstone's Civil Practice, 2008** (page 456), **is** also quite instructive: it likens applications for interim payment to applications for summary judgment. The paragraph reads as follows: -

> "It is quite common to combine applications for summary judgment with applications for interim payments. Summary judgment is available where the defence has no real prospect of success, and interim payments are available where the claimant can show that liability will be established. Obviously, these are quite similar concepts."

Res Ipsa Loquitur

We are all familiar with the doctrine of *res ipsa loquitur*.

We know, for example, that in some cases, it is possible for a claimant to "rely on the mere fact that something has happened as affording prima facie evidence of want of due care on the other's part: *res ipsa loquitur* is a principle which helps him to do so". (per Devlin, J. in **Southport Corp. v Esso Petroleum Co. Ltd.** [1953] 3 W.L.R. 773, at page 781).

In Clerk and Lindsell on Torts (14th edition – page 596), this is how the principle and its application have been summarized:

"It is ... a convenient label to apply to a set of circumstances in which a plaintiff proves a case so as to call for a rebuttal from the defendant, without having to allege and prove any specific act or omission on the part of the defendant. He merely proves a result, not any particular act or omission producing the result. If the result, in the circumstances in which he proves it, makes it more probable than not that it was caused by the negligence of the defendant, the doctrine *res ipsa loquitur* is said to apply, and the plaintiff will be entitled to succeed unless the defendant by evidence rebuts that probability".

Some of the circumstances in which the doctrine has been held to apply are, for example:-

(i) Where a claimant was struck and injured by a bag of flour which fell from an upstairs window of a defendant's shop (see **Byrne v Boadle** (1836) 2 H&C. 722).

(ii) Where a claimant was struck and injured by a bag of sugar which fell from a crane, whilst the claimant was lawfully walking through a doorway over which the crane was fixed (see **Scott v London Dock Co**. (1865) 3 H&C. 596.

Can the doctrine, at this stage of the matter, be said to apply to this case?

In light of the two completely different competing contentions, the answer to this question must, at this stage, be "no". As of now, the question of liability is evenly balanced.

Conclusions

From the foregoing analysis of the facts and examination of the relevant law, the conclusions that may be drawn and principles stated in respect of an application under Rule 17.6 (d) are these:-

(i) For a claimant to successfully apply for an interim payment, he/she must satisfy a court that he/she will likely win the case against the defendant.

(ii) The standard by which that must be done is the civil standard (i.e. proof on a balance of probabilities), but such proof must be effected at the higher end of that scale.

(iii) It is expected that such applications will only succeed where the claimant has a very strong claim and where his/her action is likely to be easy to establish. Establishing a "mere" prima facie case will not be enough.

(iv) Where the competing contentions on the part of the claimant and the defendant are, on the pleadings, of equal weight, and nothing emerges at that stage to "tilt the balance", such an application will likely fail.

(v) Even where the claimant might be able to establish a ground for the making of an interim payment, the court still retains a discretion in deciding whether or not such a payment should be made (see **Blackstone's Civil Practice, 2008** (page 456, para. 36.14).

It will be seen that the claimant's application in the instant case does not meet the threshold requirements set out in paragraphs (i) to (iv) of these principles.

The claimant's application must, therefore, be refused with costs to the defendant to be taxed, if not agreed.