IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN CIVIL DIVISION

IN CHAMBERS

CLAIM NO. 2007 HCV 03390

BETWEEN	ETTA BROWN	CLAIMANT
AND	ATTORNEY GENERAL	DEFENDANT

Mr Orane Nelson instructed by K. Churchill Neita and Co. for the Claimant.

Ms Lisa White instructed by The Director of State Proceedings for the Defendant.

Civil Procedure – Interim payment, application for – Claimant alleging negligence – injury allegedly inflicted by defendant's vehicle – Defendant denying liability – Claimant needing funds to finance surgical procedure connected to injury – Decision at the trial will be based on credibility - Whether order for interim payment appropriate - CPR r. 17.6

26 and 30 May and 3 August 2011

BROOKS J

On 30 May 2011, I refused an application by the claimant Ms Etta Brown for an order for an interim payment. At that time I promised to put my reasons in writing. I now fulfil that promise.

Ms Brown filed her claim against the Attorney General of Jamaica to recover damages for injuries she received on 2 November 2006, when, on her account, a motor truck struck her, injuring her left foot. The vehicle was owned by the National Works Agency (the NWA) which is an executive agency of the Government of Jamaica. According to Ms Brown, at the time that the vehicle struck her, it was being negligently driven by Mr Winston King, an employee of the NWA.

Ms Brown asserts that the injury which she received requires her to undergo at least two major surgical procedures. She says that she is unable to afford these procedures and has applied for an order that the NWA makes an interim payment to her of $1,500,000.00 to allow her to pay for the surgeries.

The Attorney General has resisted the application, stating that Miss Brown has not satisfied the requirements to allow this court to grant her prayer.

The issues to be resolved by the court are, firstly, whether she would have been entitled to an interim payment and if so, what would have been the appropriate figure.

Principles governing interim payments

The authority to make an order for an interim payment

This court has no inherent power to order a defendant to make an interim payment to a claimant. The rationale for that proposition is that our system of civil justice determines that no defendant should be held liable to pay "until liability has been established by a final judgment" (see paragraph 12 of *R (on the application of Teleos plc and others) v Commissioners of Customs and Excise* [2005] EWCA Civ 200 (delivered 2 March 2005)). The view, concerning the absence of the inherent discretion, was first expressed in *Moore v Assignment Courier Ltd.* [1977] 1 WLR 638 but has been reinforced in a number of cases since. These cases include *Shearson Lehman Brothers Inc and another v Maclaine, Watson & Co. Ltd*. [1987] 1 WLR 480 (another pre-Civil Procedure Rules case). In *Shearson*, Nichols LJ pointed out, at page 491F, that the power of the court to award interim payments was derived from statutory authority, namely section 32 of the English Supreme Court Act 1981.

The statute mentioned by his Lordship specifically authorised rules to be made to allow for interim payments. It is against that background that rules 9-18 of Part II of Order 29, of the Rules of the Supreme Court in England, were formulated giving the power to the court to order interim payments. Those rules have been replaced by rule 25.7 of the English Civil Procedure Rules.

In Jamaica, it is rule 17.6 of the Civil Procedure Rules 2002 (the CPR) which gives the power to this court to make orders for interim payments. Rule 17.6 is in very similar, though not identical, terms to rule 25.7 of the English Civil Procedure Rules. The statutory authority for ordering interim payments in Jamaica, is contained in section 4 (2) (j) of the Judicature (Rules of Court) Act (as amended in 1997).

Interim orders have been made in a number of cases, including the unreported decision of Mangatal J in *McCook v Williams Thomas and Associates Electrical Contractors Co. Ltd. and another* 2005 HCV 1171 (delivered 4 May 2007). These cases have been mostly personal injury claims.

The authority granted by the CPR

Rule 17.6 (1) outlines the parameters for granting interim payments. The five broad areas outlined in that rule for approval of an application for interim payment, make it clear that the court must be satisfied that the claimant is very likely to succeed in the claim. The claimant therefore has to show that at least one of the five conditions applies. The condition which is relevant to the instant case is set out in sub-paragraph (d) of rule 17.6 (1):

> "…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…"

For this particular condition, the authorities confirm that although the standard of proof which the claimant has to meet is the civil standard of a balance of probabilities, the proof at the stage of the application should be at the "upper end of the scale of probabilities" (see paragraph 17 of the judgment of Mangatal J in *McCook*, mentioned above). In *Shearson*, mentioned above, Lloyd LJ, at page 481a, said of the standard required:

> "…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."

Where the claim is for damages for personal injuries, the claimant is also required by rule 17.6 (2), to show that the defendant is insured in respect of the claim, is a public authority or is a person, whose means, allow that defendant to make the payment. The point is that the interim payment can be financially afforded by the defendant. Also along this vein, rule 17.6 (3) requires the interim payment to be not more than a reasonable proportion of the likely final judgment.

Finally, in considering an application for interim payment, the court must consider averments of contributory negligence and any relevant set-off or counterclaim (see rule 17.6 (5) and *Shanning International Ltd v George Wimpey International Ltd* [1988] 3 All ER 475).

Application to the instant case

In the instant case, before considering the amount which may be ordered, the court must consider whether any of the conditions set out in rule 17.6 (1) has been satisfied. In this exercise for this case, the court is limited to an examination of the documents which have been filed thus far. No witness statements have been ordered, or filed, and Ms Brown's affidavit in support of the

present application does not address the matter of how she sustained her injury. It is therefore, only the Particulars of Claim and the Defence which may be of any assistance.

In her Particulars of Claim, Ms Brown, who was an employee on the worksite where she sustained the injury, avers that the NWA's driver negligently drove the NWA's truck. Among other things, she stated that he failed to keep a proper look out, failed to keep proper control of the truck and failed to give adequate warning, to Ms Brown, of the truck's approach.

Apart from not admitting that the truck came in contact with Ms Brown, the Attorney General as the statutory defendant has denied that there was any negligence on the part of the driver of the truck. The defence denied that the driver lost control of the truck or allowed it to run backward hitting Ms Brown. In addition, the defence averred that Ms Brown was either wholly to blame for her injury or she negligently contributed thereto. It accused her of being too close to the truck and failing to pay adequate or any attention to the truck.

In my view, the decision on liability will depend on the view that the tribunal of fact will take of the witnesses, having seen their respective witness statements and observing the demeanour of each witness, in cross-examination. On that basis, I cannot say that Ms Brown, in the words of rule 17.6(1) (d), "would obtain judgment against" the NWA. Mangatal J was able to make that finding in *McCook*, mentioned above. In *McCook*, certain factors tilted the balance in favour of the claimant. In the instant case, no such factor exists.

I find myself to be in a very similar position to that in which F. Williams J (Ag), was, in *Anderson v Rankine* 2006 HCV 05105 (delivered 10 December

2008). That case was also a claim arising out of a motor vehicle striking a pedestrian. The learned judge, at page 7 of his judgment, said that the likelihood of the claimant succeeding could only be determined "after the competing contentions of claimant and defendant have been distilled or tested in the crucible of a trial". He went on to say:

> "On the material available to the court, there is (on the claimant's case) little more than a bald allegation of negligence. 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 "tilt the balance" in favour of either party".

In those circumstances the learned judge found, as I have in respect of the instant case, that it was not possible at the application stage to find that the claimant would have succeeded. In the circumstances this application must fail.

Conclusion

Rule 17.6 of the CPR gives this court the authority to make orders for interim payments. Rule 17.6 (1) (d) requires Ms Brown to show, to a high standard, that she is likely to succeed in her claim. Ms Brown has, however, failed in her effort to demonstrate that she would succeed in her claim against the NWA. The issues rest on the credibility of the witnesses. The pleadings alone, at this stage, do not, therefore, permit the court to find that she would succeed at the trial. The application must fail.

1. The application for interim payment is refused;
2. Costs to the defendant to be taxed if not agreed.