

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. HCV 0210/2003

BETWEEN	VICTOR CHANG	CLAIMANT
AND	MINOTT SERVICES LTD.	1 ST DEFENDANT
AND	DERRICK BROWN	2 ND DEFENDANT

Mr. Andrew Irving for Claimant

Mr. Phillip Dale instructed by Mr. Eme Usim for both Defendants

Heard 12.02.04, 17.03.04 & 25.03.04

Straw, J (Ag.)

The claimant, Mr. Victor Chang collided in the back of a Leyland truck in the early morning of 21.01.02 along East Kings House Road. This truck is owned by the 1st defendant.

The 2nd defendant, Derrick Brown was the driver at the material time and had experienced some mechanical difficulties, as a result of which the truck had been left in a stationary position on the roadway.

The claimant suffered personal injuries and is suing both defendants for damages. The trial date has been set for 13.10.05. The application for consideration before the court is by the claimant for an order for interim payment of One Million Dollars (\$1,000,000.00) by virtue of Rule 17.1 (1) of the Civil Procedure Rules (2002).

Conditions to be satisfied

Rule 17.6 describes the conditions to be satisfied before any such order for interim payment can be made. The relevant factors to be considered in this particular case are as follows:

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

(a) ---

(b) ---

(c) ---

(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.

Rule 17.6 (2) is also relevant.

17.6 (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.

Rule 17.6 5 (a) states that the court must take into account contributory negligence (where applicable).

The first hurdle that the claimant must clear is that the court must be satisfied on a balance of probabilities that the claimant would obtain judgment.

In the affidavits of Victor Chang and Roderick Graham, it is alleged that the truck was parked in a dark area on East Kings House Road without any lights or rear lights on.

On behalf of the defence, the affidavit of Mr. David Minott states that the truck was parked in a well lit area along the East Kings House Road and at a point where the road was straight with no visual impediments.

Reasons for Judgment

An examination of the cases cited in Bingham's Motor Claims Cases by J A Taylor 9th edition under the heading 'unlighted vehicles', pages 218 to 227 reveal that the results vary according to the specific and particular facts of each case. In **Hill v Phillips**, (1963) 107 SOL JO 890, CA it was held that the lorry driver was negligent in leaving an unlighted obstruction which was a danger to oncoming traffic. He should have done something to illuminate the trailer; he could have left the lorry behind it with the lights on.

In **Parish v Judd** (1960) 3 ALL ER, 33, the court stated that the mere fact that an unlighted vehicle is found at night on a road is not sufficient to constitute a nuisance; that there must also be some fault on the part of the person responsible for the vehicle. While the court accepted that the presence of an unlit vehicle on a dark road at night is prima facie evidence of negligence, on the particular facts, it was held that no danger was presented by the presence of the defendant's motor car.

In the case of **Watson v Heslop** (Court of Appeal, 5 March 1971) which was cited by counsel, Mr. Irving, the plaintiff was found to be guilty of contributory negligence. Similarly, in **Dawrant v Nutt** (1960) 3 ALL ER pg 681, the plaintiff was also found guilty of contributory negligence.

I am of the view that either of three (3) results are possible at the trial of this case. The claimant could be found to be totally responsible for his personal injuries, the defendant could be held liable or both parties could be held guilty of contributory negligence.

In the circumstances, the claimant has failed to satisfy the court that he would obtain judgment against the defendant. In this particular case, although the defendant could be held guilty of contributory negligence, the proportion of his liability could only be mere guess work at this stage.

The application for interim payment is therefore refused. In all the circumstances, the court will make no order as to costs.

Liberty to apply.