

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
ANTIGUA AND BARBUDA
(CIVIL)

CLAIM NO: ANUHCV 1999/0232

BETWEEN:

NEVILLE ANDREW

Claimant/Applicant

And

MOORJANI CARIBBEAN LIMITED

Defendant/Respondent

Appearances:

Dr. David Dorsett of Watt & Associates for the Claimant/Applicant

Ms. E. Ann Henry for the Defendant/Respondent

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2007: May 11 August 13
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RULING

[1] **Thomas J:** This is an application filed 12th February 2007, seeking to have paid to the Applicant forthwith the sum of \$50,000.00 by way of an interim payment of damages. The Applicant also seeks the costs of the application.

[2] The grounds of the application are:

1. The Applicant has obtained judgment against the Respondent for damages to be assessed.
2. The Respondent is insured and the insurer has the ability to make payment with respect to the claim.

3. The estimated amount of full damages in the instant matter is substantial exceeding \$300,000.00.
4. It is just and convenient that the Applicant be in immediate receipt of an interim payment.

[3] The general procedure respecting interim payments is governed by Part 17.5 of CPR 2000. It is in these terms:

- "17.5 (1) The claimant may not apply for an order for an interim payment before the end of the period for entering an acknowledgment of service applicable to the defendant against whom the application is made.
- (2) The claimant may make more than one application for an order for an interim payment even though an earlier payment has been refused.
 - (3) Notice of an application for an order must be –
 - (a) served at least 14 days before the hearing of the application; and
 - (b) supported by evidence on affidavit.
 - (4) The affidavit must –
 - (a) exhibit any documentary evidence relied upon by the claimant in support of the application;
 - (b) set out the grounds of the application;
 - (c) state the claimant's assessment of the amount of damages or other monetary judgment that are likely to be awarded; and
 - (d) if the claim is made under any relevant enactment in respect of injury resulting in death – contain full particulars of the
 - (i) nature of the claim in respect of which the damages are sought to be recovered; and
 - (ii) person or persons for whom and on whose behalf the claim is brought.
 - (5) If the respondent to an application for an interim payment wishes to reply on evidence or the claimant wishes to reply on evidence in reply that party must –
 - (a) file the evidence on affidavit; and
 - (b) serve copies on every other party to the application;at least 7 days before the hearing.
 - (6) The court may order an interim payment to be made in one sum or by instalments."

- [4] The immediate procedural requirements of Part 17.5 (3) and (4) have been met in that the notice has been served and is supported by evidence on affidavit, the documentary evidence is exhibited and the grounds are set out in the application.

ISSUE

The issue for determination is whether the Court should exercise its discretion in favour of the Applicant and if so, to what extent.

SUBMISSIONS

- [5] The basic submission advanced by Ms. E. Ann Henry on behalf of the Respondent is that the Application should be dismissed as the conditions under Part 17.5 of CPR 2000 have not been satisfied. This is substantiated by the following: 1. The last visit by the Applicant to the doctor was in December 1999. 2. Exhibit NA2 documents Mr. Clarke's observations on the Applicant. 3. There are no further reports up to May 2007. 4. The injuries are not sufficiently serious to warrant damages in the amount of \$300,000.00. 5. The Applicant's medical expenses are between \$1,900.00 and \$2,000.00. 6. The decision of this Court in Sean James v William Sinclair et al Suit No. 32/1999 is relevant to the issue. 7. There is no adequate legal for an order under Parts 17.5 and 17.6. 8. Paragraphs 4 and 7 of the Applicant's affidavit are inadequate in terms of the injuries sustained and there is no medical evidence which relates to the Applicant's ability to work. 9. The documents constituting NA3 were not sent to the Applicant; they are confidential correspondence between two solicitors and ought not to be put before the Court.
- [6] Dr. David Dorsett's position advanced on behalf of the Applicant is that the Court should exercise its discretion in favour of the Applicant. Other submissions are: 1. In the Sean James case, supra, the Claimant lost consciousness for a period of four hours while in this case the Applicant was in a coma for 2 weeks as reflected at paragraph 3 of the affidavit in support. 2. There are medical reports regarding the Applicant's injuries. 3. The Applicant is without means. 4. With respect to Part 17.5 and 17.6 of CPR 2000 all of the conditions have been satisfied. 5. There is an order of the Court in place in lieu of injunction.

ANALYSIS

[7] It is important to establish, *ab initio*, a clear understanding of the nature and purpose of an order for an interim payment. It is provided by BLACKSTONE'S CIVIL PRACTICE 2002 at paragraph 36.1:

"An order for an interim payment is defined in CPR, r. 25.1 (1) (k) as an order for payment of a sum of money by a defendant on account of any damages, debt or other sum (except costs) which the court may hold the defendant liable to pay. Such orders are likely to be made in claims where it appears that the Claimant will achieve at least some success and where it would be unjust to delay, until after trial, payment of the money to which the claimant appears to be entitled. The purpose behind this procedure is to alleviate the hardship that may otherwise be suffered by Claimants who may have to wait substantial periods of time before they received any damages in respect of wrongs they may have suffered. In addition to providing resources to the Claimant, sometimes making an interim payment will enable the Claimant to pay for treatment, or to save assets which would otherwise be lost, or to have an asset repaired earlier than otherwise be the case, and may thereby reduce the amount of the claim. Further, making an early interim payment will reduce the defendant's liability to pay interest."

[8] It is to be noted that although CPR 2000 does not contain a definition along the lines as that contained in the English CPR 25.1 (1) (k), the general principle can be deduced from Rules 17.5 and 17.6.

[9] The affidavit in support of the application is of even date. In it the Applicant says that he is now 57 years old and that he suffered severe injuries in December 1998 while working for the Respondent. He deposes further that as a result of his injuries he instituted legal proceedings against the Respondent/Defendant claiming damages for negligence. At paragraphs 3 to 5 and 8 he says further that:

"3. My injuries from the fall included shock, swelling over my left eye and forehead, contrecoup, head injury, and intracranial haematoma. The fall I suffered put me in a coma for two weeks. I was in the Holberton Hospital from 21st December 1998 to 25th January 1999. I sustained a hemmanopia or loss of vision of half of the field of vision of both eyes affecting the left side and I experienced severe headaches and vertigo.

4. My injuries and suffering continue. I have problems with my memory. Due to the problem with my memory I cannot recall all of the things that have happened to me since that awful fall. My memory fails me to the extent [that] I cannot remember all of the doctors I have had to seek attention from.

5. I frequently suffer head pains and I lose concentration. I have been diagnosed with epilepsy. I am unable to work to the extent I used to.

8. When I fell in December 1998 I was unable to work for seven continuous months. I used to earn \$15.00 per hour back in 1998. For the seven months I was out of work then I lost

\$18,000.00 in earnings. As stated earlier, I have been unable to resume full time work, a direct and lasting result from the fall. I work off and on. My headaches do not allow me to work for long periods of time at a stretch."

- [10] The applicant says that he now requires funding so that a proper assessment can be made of his current medical attention and, a proper course of treatment can be put in place and some initial payment can be made in respect of the loss suffered over the years.
- [11] The exhibits annexed to the affidavit are marked NA1 and NA2. Exhibit NA1 consists of a series of receipts which give a total of EC\$2,726.00.
- [12] It is common ground that on 2nd November 2005 the Claimant entered judgment in default of defence against the Respondent/Defendant with damages to be assessed. This would satisfy the circumstance prescribed by Part 17.6 (1) (c) in which the Court may make an interim order. This merger of fact and law has the effect of removing the substratum of Ms. E. Ann Henry's main submission on behalf of the Respondent. Thus the remaining sub-issue is purely that of quantum as the Court has decided to exercise its discretion under the said Rule 17.6 (1) (c) in favour of the Applicant.
- [13] The figure of \$300,000.00 is merely the Applicant's estimate of the amount of the damages as required by the Rule 17.5 (4) (c) of CPR 2000. This of course is purely for the guidance of the Court. Further guidance must come from the medical reports which are exhibits to the affidavit in support.
- [14] Dr. D.C. Gaekwad, House Officer, General Surgery, Holberton Hospital in his report signed on 1st April 1999 (NA2) says the following at paragraphs 2 and 3 of his Confidential Medical Report:
- "Clinical examination revealed a semi-comatose male with swelling over the (Lt.) eye and forehead, maintained on assisted positive pressure ventilator via an endotracheal tube. The four extremities did not reveal abnormal passive mobility at the joint or bone crepitus. The diagnosis of contre-coup head injury was confirmed by radiological study (CT scan of the brain, and plain x-ray films of cervical spine, chest) of 21st December 1998 was reported on by the Radiologist as follows:
- (a) Right contral and left spheroid collection
 - (b) Left antero lateral scalp swelling with contre-coup injury

- (c) Ethmoid sinusitis
- (d) Cervical spine reveals no obvious fracture/dislocation

Management consisted of mechanical positive pressure ventilator in the intensive care unit, repeat radiological study of the brain skull, administration of antacid, anticonvulsant medication. Mr. Neville Andrew was extubated completely on 30th December 1998 to breathe on his own."

- [15] The Ophthalmologist, Dr. R. Alford Walwyn on 18th September 1999 issued a certificate in relation to the injury on Neville Andrew, the Applicant. It reads in part as follows:

"At the visit mentioned above he complained of blurred vision, and some headache.

Vision corrected to 20/15 in each eye (normal). Visual field analysis however showed loss of half of the field, indicating that something had gone wrong. A CT Scan showed an area of infarct at the right side of the occipital cortex (the back of the brain).

This loss of vision due to the infarct could be permanent.

In my opinion the injury to the brain could be the result of a head injury, for example the fall mentioned in para. 2."

- [16] Mr. H. A. Clarke, Neurological Surgeon, on 20th January 2000 wrote to Watt and Associates (NA2) concerning Neville Andrew. After detailing the patient's history and the examinations carried out, concluded thus:

"By way of summary, however, I repeat, Andrew Neville sustained a blunt head injury as a result of the injury on Dec. 21, 1998. The injury was accompanied by a sudden loss of consciousness. Mr. Neville denied any (bad feels) or dizziness prior to the fall. He initially complained of a seizure disorder. However no further episodes were reported since the day of admission to Holberton Hospital.

Finally, Mr. Neville has a 5-8 percent risk of seizure in the future."

- [17] Finally, Dr. L. Henry Johnson, Consultant – Internal Medicine, Holberton Hospital gave a certificate concerning the said Neville Andrew. It is in these terms:

"This patient was interviewed and examined by me during his admission September to October 1999. He was diagnosed with epilepsy secondary to head injury and uncontrolled hypertension. He is presently being managed as an out-patient of the medical team for his epilepsy and hypertension. The above mentioned admission occurred 10 months after Mr. Neville Andrew was hospitalized in the Intensive Care unit for an intracranial bleed which occurred after he fell from a height of 12 feet."

- [18] The many extracts from the various medical reports or certificates were made in response to learned counsel for the Respondent's contention that the injuries are not of such a nature to warrant damages of \$300,000.00. However, as noted above this figure is of the Applicant's making as he is required to do. In any event, based on the evidence, it is the

view of the Court that the injuries are serious. What is more is the fact that the Applicant was re-admitted to the Holberton Hospital where he was diagnosed with epilepsy secondary to the head injury and uncontrolled hypertension.

[19] Under Part 17.5 (5) the Respondent is entitled to reply on evidence. This has not been done. Therefore for the purposes of this Application the following aspects of the evidence stand uncontradicted. The Applicant:

1. Is a carpenter.
2. Was injured almost eight years ago.
3. Was hospitalized from 21st December 1998 to 25th January 1999 of which ten days were spent in the intensive care unit.
4. Has had the nature and extent of his medical condition certified by a House Officer, General Surgery, Holberton Hospital, a Neuro Surgeon, an Ophthalmologist and a consultant in internal medicine at the Holberton Hospital.
5. After the accident, was unable to work for seven continuous months.
6. Lost \$18,000.00 in earnings.
7. Is in need of money to have an assessment made.

QUANTUM

[20] The approach of the English Courts to the amount to be ordered is summarized in this way in BLACKSTONE'S CIVIL PRACTICE at paragraph 36.13:

"The court is not permitted to order an interim payment of more than a reasonable portion of the likely of any final judgment, taking into account any contributory negligence and any relevant set-off or counter-claim (CPR r 25.7 (4) and (5)). This is the same test as before the CPR, when different judges took very different views of a 'reasonable proportion' of the final award might be. Generally, most judges err on the side of caution. In personal injuries cases many judges are very reluctant to look further than the statement of past and future loss and damage, and then take a view on which heads are likely to survive at the hearing, and disregard general damages for pain, suffering and loss of amenity. Other judges are prepared to look at the likely level of damages in the round and include all heads of damages."

[21] In MARIA HUGHES v PHILTON BASCOMBE and THE ATTORNEY GENERAL OF ANTIGUA AND BARBUDA Civil Suit No. ANUHCV 2003/0116 Mr. Justice Don Mitchell ordered an interim payment of \$30,000.00 with respect to a whip lash injury suffered by the Applicant which

required orthopaedic attention. This resulted from a traffic accident and the learned judge did specifically say that the payment was to cover medical expenses specified in the application. It would appear that part of the reasoning in arriving at the quantum is this statement: "There is no complaint that she has not adequately stated her assessment of the amount of damages that are likely to be awarded. I am satisfied that if this action proceed to trial, Ms. Hughes would obtain judgment for a substantial sum." That said, the factor in favour of Mr. Andrews is that he has obtained judgment against the Defendant.

[22] The only concrete figures before the Court is the medical expenses thus far and the loss of earnings. These are \$2,726.00 and \$18,000.00, respectively. There is no estimate of necessary medical attention but the Court has considered what the various specialists have said in their reports or certification. In this connection it is critical to re-introduce one of Ms. Henry's submission to the effect that the injuries are not serious given the fact that there are no medical reports since January 2000. But that is only one inference which may not be reasonable given even the old reports. The other inference is that the Applicant, a carpenter by calling, simply does not have the resources to seek the further medical attention.

[23] Having regard to the evidence and looking at the likely damages 'in the round' the Court hereby orders the sum of \$45,000.00 to be paid by way of interim payment and costs of \$2,500.00. Both amounts must be paid within 30 days of the date of this order.

Errol L. Thomas
Judge