

C.S. J  
22. 4. 94

IN THE GRAND COURT OF THE CAYMAN ISLANDS  
HOLDEN AT GEORGE TOWN, GRAND CAYMAN

22-04-94

Cause No:548/1993

BETWEEN :	JAMES CLEAMON BAUCOM	PLAINTIFF
AND :	ANTONIO MACHADO EBANKS	FIRST DEFENDANT
AND :	ROLLIN EBANKS	SECOND DEFENDANT

Mr.O'Riordan for Plaintiff  
 Mr.Quin for first Defendant

ORDERS

Schofield J.

This is an application made by the plaintiff against the first defendant for an interim payment pursuant to Rule 49A of the Grand Court (Civil Procedure) Rules.

The claim arises out of a motor vehicle accident which occurred on the 12th May 1993. The first defendant, whose representation is provided by his insurance company , does not deny liability. He has pleaded contributory negligence on the part of the plaintiff alleging that the Plaintiff was negligent in failing to wear the seat belt



fitted to the vehicle. The allegation that this failure contributed to the injuries sustained by the Plaintiff is denied.

The rule of Court under which the application is made reads:

"49A. (1) In an action for personal injuries the plaintiff may, at any time after the writ has been served on a defendant and the time limited for him to appear has expired, apply to the Court for an Order requiring that defendant to make an interim payment."

It is as well here to recite Rule 49C subrules (1) and (2)

"49C. (1) If, on the hearing of an application under rule 49A, a Judge in Chambers is satisfied-

(a) that a defendant against whom the order is sought has admitted liability for the Plaintiff's claim;

(b) that the plaintiff has obtained judgment against a defendant for damages to be assessed ;or

(c) that if the action proceed to trial, the plaintiff would succeed in the action whose injuries or death the plaintiff's claim arises and would obtain judgment for damages against the defendant or, where there are two or more defendants against any of them, he may, if he thinks fit and subject to subrule (2), order the defendant to make an interim payment of such amount as he thinks just, not exceeding a reasonable proportion of the damages which in his opinion are likely to be recovered by the plaintiff.

(2) No order shall be made under subrule (1) unless it appears to a judge in chambers that the defendant or, if there are two or more defendants, any of them is-

(a) a person who is insured in respect of the plaintiff's claim;

(b) a public authority or a statutory corporation; or

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



In this case the first defendant is insured in respect of the plaintiff's claim. I may, therefore, if I think fit order the first defendant, who has admitted liability, to make an interim payment of such amount as I think just. This must not exceed a reasonable proportion of the damages which in my opinion are likely to be recovered by the plaintiff.

Three points, which were accepted by both counsel, fall to be made in respect of the exercise of this discretion. First, in determining the amount of damages I think it likely for the plaintiff to recover I must, of course, take into consideration the defendant's counterclaim. Second, it is not necessary for the plaintiff to satisfy the court of his need for an interim payment or that he will suffer prejudice if he does not obtain one (see Schott Kem Ltd. v Bentley and Others [1990] 3 All E R 850). Third, that in this jurisdiction where interest cannot be ordered to be paid on special damages until the date of judgment, (unlike in other jurisdictions where interest may be ordered to run from the date the suit is filed) it would usually be unjust to keep a plaintiff out of such special damages as he inevitably falls to be awarded.

One further point needs to be addressed. Counsel for the first defendant argued that for me to award an interim payment I would have to be satisfied that the damages likely to be recovered are substantial. Such is the case under the English Rules which require the Court to be satisfied that the damages are likely to be substantial. This requirement is not echoed in the amended Grand Court (Civil procedure) Rules, and I am not thus restricted.

The plaintiff suffered injuries in the accident, which included a



whiplash injury from which he maintains he has not yet fully recovered. He claims against the first defendant substantial medical expenses and loss of earnings and will urge a substantial award by way of damages for pain, suffering and loss of amenities. The extent of the claim under these heads is hotly disputed by the defendants. It is right to say that the defendants allege that the plaintiff is malingering; that the injuries are not as substantial as he claims and that he should have been back to full time employment shortly after the accident. This is not the place to fully investigate the dispute or to analyze the substantial medical reports submitted in this application. It is sufficient for me to comment that upon the documentary medical evidence before me I am not surprised that the defendants' insurers are putting the plaintiff to strict proof of the extent of his injuries.

The defendants' insurers have already made good the loss to the plaintiff on the damage to his vehicle. They have already paid for him to go overseas to undergo certain medical examinations. They have made a payment into Court. Clearly they have not manifested a desire to keep the plaintiff out of what they consider to be his rightful claims. Furthermore, they have indicated an anxiety to get this matter to trial and defence counsel has stated that from the defence point of view they could be ready for trial in two weeks or so. Having regard to these factors and to my view that the defendants may satisfy the Court that the award of general damages should be relatively small I do not consider it just to make an interim award which covers general damages or, indeed, the bulk of the special damages which are contested. The plaintiff's counsel maintains he may not be



able to get to trial very quickly because he may seek further medical opinions. We are eleven months from the date of the accident. Already we have the opinions of several doctors and specialists from on and off these Islands. The plaintiff has had time and opportunity enough to obtain his medical opinions. If those who have examined and treated him so far considered that he needed further specialist advice, I am sure they would have referred him for such.

On the other hand there seems no reason for me to keep the plaintiff out of those undisputed expenses on which he will not be able to receive interest. These include car rental expenses, physiotherapy treatment, medical supplies etc. and are computed in his supporting affidavit at \$5782.46. Of course I must take account of a possible reduction on the amount awarded for contributory negligence. Counsel agree that at the highest this would be a reduction of twenty five per cent .

In the circumstances therefore I order the first defendant to make, within seven days hereof, an interim payment of \$4300 to the plaintiff to be deducted from the payment into court.

I would remind the parties of the provisions of Rule 49B, Subrule (3):

"49B (3) Notwithstanding the making or refusal of an order for an interim payment, a second or subsequent application may be made upon cause shown by reason of a change of circumstances."

One circumstance leading me to refuse an interim payment in respect of general damages and the disputed special damages was the declared willingness of the defence to get to early trial. If early trial proves



impossible through no fault of the plaintiff I would regard that as a change of circumstances.

I shall hear argument on costs.



A rectangular box containing a handwritten signature in dark ink. The signature appears to be "D. Schofield" written in a cursive style.

D. Schofield

Judge

22nd April 1994.