IN THE CAYMAN ISLANDS COURT OF APPEAL

CAYMAN ISLANDS CIVIL APPEAL NO. 5 OF 1985

5-06-86 Reported

BEFORE: THE HON. MR. JUSTICE ZACCA, PRESIDENT
THE HON. MR. JUSTICE TELFORD GEORGES, J.A.
THE HON. MR. JUSTICE JAMES KERR, J.A.

IN THE MATTER OF GRAND COURT CAUSE NOS. 274 OF 1981 & 420 OF 1982

AND

IN THE MATTER OF AN APPLICATION MADE TO THE GRAND COURT BY COLEMAN EBANKS (THE ADMINISTRATOR OF THE ESTATE OF MARY-LEE EBANKS (DECEASED) FOR THE APPOINTMENT OF TRUSTEES OF SUMS AWARDED FOR THE BENEFIT OF THE INFANT CHILDREN OF THE DECEASED IN: CAUSE NO. 274/81 & CAUSE NO. 420/82

AND

IN THE MATTER OF ORDERS MADE BY THE HONOURABLE MR. JUSTICE HULL HEREIN ON OCTOBER 11, 1985 AND OCTOBER 18, 1985

AND

IN THE MATTER OF AN APPEAL AGAINST THE ORDERS OF MR. JUSTICE HULL DATED OCTOBER 11, 1985 AND OCTOBER 18, 1985 RESPECTIVELY

BETWEEN:	COLEMAN EBANKS (Administrator of the Estate of Mary-Lee Ebanks Deceased)	-	APPELLANT
AND:	MRS. ENA ALLEN	-	RESPONDENTS
AND:	MRS. DELENE MARIGOLD BODDEN		

Appearances: Mr. T. Shea for Appellant
Mr. A. Smellie for Respondents
Mr. R. Alberga Q.C. with Mr. P. Boni as amici cunae

December 2, 3, & 6, 1985
& June 5, 1986

MR. TELFORD GEORGES J.A.

The issues in this case spring from an accident which took place on 5th July, 1980. Edward Clinton Ebanks (the Insured) failed to control his Pontiac motor car as he was turning left from Watercourse Road driving towards Turtle Farm, ran off the road and injured Marylee Ebanks (the deceased) who was sitting in the walkway of the house in which she lived. She died from

these injuries.

Coleman Ebanks, (the administrator), her father, obtained Letters of Administration of her estate and sued the Insured for damages under the Law Reform Torts Law (Revised) and also under the Estates Proceedings Law 1974 for damages to the deceased's estate and for compensation for her three dependent children Desi, Denis and Salvador and her partially dependent father and mother.

The Insured had pleaded gulity to causing death by dangerous driving and there could have been no question of contesting liability. His Insurers (Motor and General Insurance Co. Ltd., (the Insurers), through their Solicitors wrote confirming that there was no issue as to liability, suggested that there was no need for applying for judgment and stated that a representative of the Insurers would shortly be in the Caymans and a meeting could be arranged to agree damages.

In the event, this did not happen and solicitors for the Administrator applied for the entry of interlocutory judgment for Damages to be assessed. This was duly done and a date for assessment fixed. Less than a week before that date the Insurers wrote their solicitors stating that for reasons not relevant now they were not liable to indemnify the Insured. They instructed their solicitors to cease representing him on their behalf and to notify the solicitors for the administrator of this.

The assessment in due course came up for hearing. The Insured was not represented. Hercules Ag. C.J. assessed Damages in the sum of $69,300.33, with costs to be taxed if not agreed. It was apportioned thus -

"Special Damages (funeral expenses)		$560.00	
Damages under the Estates Proceedings Law			$2000.00
Damages for pre-trial loss			
	Parents:	$1186.00	
	Children:	$13996.80	
		15743.20 (sic)	
Less Damages under Estates Proceedings Law		2000.00	
			Total $13,743.20
Damages for future loss			
	Parents:	$7,800.00	

Children:	
Denis	$ 1,997.13
Desi	$16,640.00
Salvador	$29,120.00
	55,557.13 "

Hercules Ag. C.J. ordered -

" (1) that the sum of $7,800 should be paid out to the parents immediately.

(2) that the full balance remaining after this payment is made should be deposited into court for the benefit of the children and that Trustees be appointed to set up and administer a trust in their behalf until each attained 18 years of age."

It will be noted that there was a minor arithmetical error in the calculation. There was also an error in the method of accounting for the $2000.00 allocated under the Estates Proceedings Law. It should have been added to the total damages and thereafter deducted as a specific allocation. As computed the total damages were $2000.00 short. An order for the payment out of the funeral expenses was not made. Since the pretrial loss in relation to the children had already occurred and had in effect been borne by the Administrator with whom they were living, it would also have been practical to order that that sum be paid out to them and that the amount deposited into court should be confined to the children's future loss which amounted to $47,757.13.

The Insured had no means to satisfy the judgment so the administrator sued the Insurers for the sum awarded and for costs. The matter came on for trial and was settled on the day on which it was to be heard. Summerfield, C.J. having heard counsel for both sides ordered by consent that judgment be entered for the Administrator in the sum claimed, $69,330.33, that the defendant pay interest in the sum of $10,500.00 and legal costs and disbursements in the sum of $14,000.00.

The Insurers were not, of course, parties to the original action in which it had been ordered that the money be paid into court and they paid it to the solicitor for the administrator, no order in that regard having been made by Summerfield C.J.

The size and nature of the trust were such that no trust company was willing to undertake it. There was no official in the Caymans performing duties of a like nature as those performed by the Public Trustee in England. The solicitors applied to the Court for guidance.

The issue of the trustee was speedily and satisfactorily solved. The Clerk of the Court and the Deputy Clerk of Court obligingly agreed to act ex-officio. The solicitors deposited $59,753.93 into Court. At the hearing Mr. Alberga who had appeared for the administrator stated that there was no need for taxation since the sum of $14,000.00 had been agreed and the Chief Justice had approved and that $10,500.00 had been applied to additional costs. The learned judge was of the view that both the $10,500.00 and the $14,000.00 were to be deposited in court pending taxation.

The basis for that view was Order 62 Rule 30 (2) of the English Rules of Court which in effect provides that unless the court otherwise directs costs payable to his solicitor by any plaintiff in any proceedings to which the rule applies shall be taxed under rule 29 and -

> "No costs shall be payable to the solicitor of any plaintiff in respect of these proceedings except such amount of costs as may be certified in accordance with this rule on the taxation under rule 29 of the solicitor's bill to that plaintiff."

The proceedings covered by the rule include proceedings in which money is ordered or agreed to be paid to or for the benefit of any person who is an infant.

Shortly before the learned judge delivered his ruling Summerfield, C.J. in the course of a review of taxation in the case of James D. McCallister v. Santa Cruz Investments Co. Ltd. Civil Appeal 1 of 1984 had cause to consider generally the applicability of Order 62 to the Cayman Islands.

He concluded that s.13 of the Grand Court Law did not import any English substantive Law into the Cayman Islands. It merely conferred on the Grand Court the range of judicial power exercised by the High Court of Justice and Divisional Court in England.

Section 20 of the Grand Court Law imported English procedure and practice in areas in which the law of the Cayman Islands was silent.

Specific provision had been made in s.30 of the Judicature Law, read with the schedules, on the issue of costs and consequently there were no such categories as party and party costs or solicitor and client costs as set out in the schedule.

The issue there being discussed by the learned Chief Justice was different from that now under consideration and I do not think he should be understood to have intended that no provision of order 62 dealing with costs would be applicable to the Cayman Islands. The rule deals with the practice and procedure

and there should be areas in which the law of the Cayman Islands would be silent. Order 62 rule 30 (2) is clearly a salutary rule, in no way unsuited to the circumstances of the Islands. Its purpose is to ensure that sums awarded to infants are not unconscionably gobbles up in costs or that solicitors are not induced to accept unreasonably low settlements by the lure of a substantial offer of costs.

As originally stated in England the practice seemed quite regid. A Practice Note in (1933) W.N. 190 reads -

> " The Rules of the Supreme Court require that in all actions for damages brought on behalf of an infant or person of unsound mind, the costs of the plaintiff both as between party and party and as between solicitor and client, shall be taxed and certified by the Taxing Master, and no costs other than those so certified are payable to the solicitor for the plaintiff. The Rules and the direction are made for the protection of infants and persons of unsound mind and are imperative. It is important that it should be known that if they are deliberately disobeyed, the solicitors responsible are liable to be dealt with for contempt of court."

In a note in the 1982 Annual Practice 80/12/10 it is stated -

> " The addition of the words at the forefront of Order 62 R. 30 (2) 'Unless the Court otherwise Directs', empowers the court in a proper case to direct that the taxation of the costs of proceedings in which money is recovered by a person under disability should be dispensed with and thus to enable the costs of such proceedings to be agreed instead of having to be taxed."

This alteration of Order 62 R.30(2), introduced a radical but welcome change in the practice which recognizes the responsibility and integrity of the body of solicitors in the conduct of proceedings for the recovery of money by a person under disability.

This change negatives the statement by the Lord Chief Justice made in 1933 (Practice Note (1933) W.N. 190).

The note, however, goes on to stress that the purpose of the rule remains unaffected - the protection of persons under a disability and taxation will only be dispensed with where the court has considered the matter and is satisfied that there will be no prejudice.

The development is carried a stage further in the 1985 Annual Practice which, in my view, reaches the core of the matter and, provides an outline for the practice which should be adopted in this court. It is set out in rule 80/12/16.

> "Agreeing costs dispensing with taxation. Generally speaking there is no objection to the plaintiff and the defendant agreeing the costs payable between parties. The plaintiff's solicitor's own costs must, however, be taxed unless the Court dispenses with taxation. Thus it may be prepared to do in the following cases:-
>
> (i) if the solicitors satisfy the Court that their costs will be met by a trade union or other third party without recourse to the plaintiff.
>
> (ii) if the solicitors undertake to take no more than is recovered as costs from the defendant. It is then the practice to add to the order for costs against the defendant the words 'the plaintiff's solicitor waiving all further costs' and to make an order dispensing with taxation of the solicitor's costs."

Under this practice costs will not become payable out of the damages awarded to the person under a disability unless the court is satisfied that it is reasonable to do so.

Understandably we have not been addressed on the correctness of the approach used by the Chief Justice in the case of James D. McCallister v. Santa Cruz Investments Co. Ltd. (supra). If it is correct there could be no taxation of party and party costs between a plaintiff and his or her own solicitor. Nonetheless since infants and persons under disability would be involved in relation to whenever the court always has special powers it could require that such a bill be presented to the Registrar for certification of its reasonableness in cases where a further sum as costs over and above the sum paid by the defendant is to be deducted from an infant's award of damages.

Adaptation of procedures devised elsewhere for other conditions almost invariably leads to inelegant improvisations and the opportunity may well be seized now that the problem has been raised to draft a local rule to deal with a situation which is bound to recur.

I turn now to consider the application of the the rule as I have attempted to formulate it to the circumstances of this case. Since Hercules Ag. C.J. was dealing with costs as between the defendant Insurer and the plaintiff Administrator there was no reason why he should not have ordered that costs should be agreed if that was possible. The Chief Justice was similarly recording a consent order which dealt with costs between plaintiff and defendant. There is generally no objection to that. It would, therefore, be consistent with the proposed rule that the solicitors for the Administrator should keep the $14,000.00 paid to them as costs.

Retention of the sum of $10,500.00 raises other issues and in other circumstances the court would have required that this sum be scrutinised by the Registrar as it would be in a taxation of solicitor and client's costs to certify its reasonableness. In this case such an order can be dispensed with. As has been already pointed out the pretrial damages payable to the parents and the children should in the first place have been ordered to be paid to the Administrator. The Administrator as father of the deceased was entitled to his share and as the person who had looked after the children since the death of the deceased he should have been reimbursed for the expenses he had undoubtly incurred. The sum which should have been deposited in court was $47,757.13. I have not worked out an exact calculation but I feel reasonably certain that awarding interest on that sum at the maximum rate permissible under S.62 (2)(b) of the Judicature Law it would not reach the sum of $59,753.93 which the solicitors in fact deposited. It was clear therefore that any additional claim for costs made by the solicitors for the plaintiff would not reduce the Damages payable to the infants. The need for certification did not, therefore, arise.

Accordingly it was ordered:-

1. That the sum of $59,753.93 already paid into court by C.S. Gill & Co., be hereby approved as representing essential compliance with the order made by Hercules Ag. C.J. on 15th August, 1982 for payment into Court of the sum to be deposited for the benefit of the children.

2. That the sum of $14,000.00 agreed to be paid by Motor and General Insurance Co. Ltd., towards the legal costs the plaintiff Administrator be retained by the solicitors C.S. Gill & Co., to be applied towards the satisfaction of the costs due them from the plaintiff.

3. That the amount of $1446.41 being interest due on the parents' share of the award be retained by C.S. Gill & Co.

4. That the costs of this application be taxed and paid out of the children's fund.

5. That there be liberty to apply.

I agree.

I agree.

Eldemire, Shane

You have been found guilty of one count of attempted rape and one count of indecent assault on a female.

The Crown case depended on the authenticity of the source of your finger print and palm print impressions, which were produced in evidence at the trial. The jury by its verdict was satisfied that these were discovered at Mrs. Kaufman's house and Mrs. Cargill's house respectively and that the irrestible inference to be drawn in each case was that you were the person who committed the offence.

Indecent assault is a lesser offence than attempted rape and I take into account the fact that, fortunately, the assault on Mrs. Cargill was of a limited nature. Nevertheless she was an elderly woman living alone. You broke into her house late at night lightly dressed, you intruded into the privacy of her bedroom, you lay against her on her bed, and made an uninvited, indecent proposal to her. When she screamed, you put your hand on her face.

Looking at the episode in the way most favourable to you- by which I mean that although lying against her outside the blanket and putting the proposition to her, you did not actually touch her indecently and that you left when she screamed - it cannot be said that this was a minor assault. Breaking into an elderly woman's bedroom at night in these circumstances is a serious matter. Mrs. Cargill appears to me to be a person of character but it was inevitable that what you did must have caused her to suffer fright, shock and feelings of anger and humiliation.

Some ten months later, you repeated this kind of conduct. You broke into Mrs. Kaufman's house in the early hours of the morning. Apart from her elderly nanny and her young son, she also lived alone. For the reasons that I have already explained to you, I do not regard the earlier incident as a minor one, but there is no doubt that this second attack was altogether more sustained.

You were naked. The struggle lasted some time. You threatened to kill her if she did not keep quiet. You put your hand over her face, with a towel, and you indecently handled her. She, too, showed a good deal of courage and put up a spirited fight but again there can be no doubt that you subjected her to fear and indignity.

The second attack was an aggravated repetition of the first incident. If I take into account the details of the incidents in the United States, as described in the medical report which has been provided to the Court by Dr. Knight at the instance of your counsel, there is an indication that your conduct has become increasingly more serious.

You are 25 years old. You are no longer a person of immature years, as such. The medical report does not disclose evidence of impairment of your faculties, nor of psychotic disturbance or of other psychiatric abnormality.

However, although Dr. Knight does not comment on it, there is one other feature of the two offences to which I wish to refer. It appears evident that you are a much stronger person than the women involved. Yet in both cases, having commenced an assault of a serious nature, you broke off after resistance. It was as well, of course, and the simple answer may be that you panicked. But I want to draw the attention of those who will be responsible for you to this aspect of your behaviour as well as the apparent progression in the extent to which you have disturbed women in their homes. It appears to me to be at least possible that these things may provide a further insight into your personality, and that they should therefore be noted. The ages of the women in my view may also be a factor to be considered.

I do not know the full circumstances of the family tragedy that occurred in Australia but it is clear that at the time you were very young and although the report does not explain it in any depth, I have little doubt that it must have had a very considerable bearing on your subsequent development.

I accept the medical report, so far as it goes, and in particular that you are legally responsible for your conduct, but I am not satisfied that there is no need for further assessment of your psychological condition, primarily to complement the preventative sentence I will pass, with a view to reducing the possibility of your committing further offences in the future, but also in the interests of your personal rehabilitation. It has been evident during this trial and the medical report confirms that you have a family who are willing and able to support you.

You must accept that my first concern will be to make sure, so far as I can, that you do not commit offences of this kind again. People are entitled to the protection of the law against this kind of molestation in their homes at night.

Your counsel on more than one occasion expressed a concern about prejudice against you. I do not consider that that danger was as great as he may have feared but I accept that this case did give rise to public interest and discussion. You were originally charged with several offences, of which you have been acquitted of all but two. The events that led to this trial were bound to cause a certain amount of fear and concern in the

community. Human nature is what it is and amongst the public as such, the kind of comment with which your counsel was concerned is always a possibility. In my experience however, jurors themselves when they come together in a courtroom nearly always apply themselves conscientiously to the matters in issue. In this case, as I indicated after they reached their verdict, I associate myself with the jury's findings. So far as the court itself is concerned, any outsider who may seek by his or her comments to affect the issue will find it counter-productive to do so. It will inevitably lead to even closer scrutiny of a case and even greater readiness to give a defendant the benefit of a doubt. So far as I am concerned, I do intend to pass a sentence with the aim of preventing you from re-offending; I have no intention of imposing one of undue punishment by way of retribution.

Having regard to all of these factors, and also the period of time during which you have already been in custody, I sentence you on the count of attempted rape, to 4½ years imprisonment, and on the count of indecent assault to 2½ years imprisonment. The sentences are to be concurrent and will run from the date on which you were arrested. I also recommend that the prison authorities should take steps to provide for or to allow you to receive in prison further medical attention as may be desirable for the reasons I have given and I ask Crown Counsel to ensure that these matters are brought to their attention.