GRAND COURT - CAYMAN ISLANDS

IN CHAMBERS
IN THE GRAND COURT FOR THE CAYMAN ISLANDS

CAUSE NO: 1 OF 2006

24-8-06(2) file

BETWEEN:	ANNA YVONNE CHIN-WELDS	PLAINTIFF
AND :	VANBURN WALTON WELDS	DEFENDANT

CORAM: HARRISON J (Ag.)

Appearances:
Mr. Shaun McCann of Campbells for Plaintiff/Applicant.
Ms. Sheridan Brooks of Brooks & Brooks for Defendant/Respondent

Dates of hearing: August 9, 11 2006

SUMMONS FOR INTERIM PAYMENT OF DAMAGES

JUDGMENT

1. This application is made by the plaintiff pursuant to Order 29 rule 11(1) of the Grand Court Rules (1995) Revised and she is seeking an order for interim payment of damages in the sum of CI$13,010.51 for personal injuries inflicted upon her by the defendant or alternatively any such amount as this Honourable Court thinks fit. She also seeks an order for the defendant to pay her costs of the application.

Background to the application

2. The plaintiff commenced an action in the Grand Court for assault and is seeking special, general and aggravated damages. She alleges that during the course of their marriage she was assaulted by her husband and was seriously injured. He was charged and convicted for the assault and sentenced to a term of imprisonment on May 23, 2003. He was further ordered at the trial to pay the plaintiff the sum of $15,000.00 for her medical expenses.

3. The writ of summons and statement of claim were served on the defendant on 3rd January 2006 but he failed to acknowledge service of the documents. Default judgment was therefore entered against him and for damages to be assessed.

4. In separate proceedings relating to matrimonial property issues between the parties, the court had ordered the plaintiff to pay the sum of CI$13,937.40 to the defendant.

The plaintiff's injuries and treatment

5. At the time of her injury the plaintiff was 32 years of age. She was hospitalized at George Town Hospital and on the 27th January 2003 she was transferred to the Otolaryngology Centre in Kingston, Jamaica for surgery to be done by Dr. Hal Shaw. She had sustained the following injuries:

   (i) Facial edema

   (ii) bilateral periorbital eccyhmosis.

   (iii) scleral haemorrhage

   (iv) epsitaxis.

   (v) posterior neck pain.

   (vi) left shoulder pain.

   (vii) left wrist pain.

   (viii) tripod fracture of the lateral orbital process.

   (ix) comminuted fracture of the lateral wall of the left maxillary sinus.

   (x) fracture of the posterior aspect of the zygomatic arch.

   (xi) blow out fracture of the left orbit with a comminuted fracture of the mid and posterior aspects of the floor of the orbit with slight herniation through the fracture.

6. The plaintiff experienced pain and grave hardships for several months after the incident. She has stated in her affidavit in support, that the trauma affected her psychologically. She would get awake at nights due to nightmares and would cry, tremble, sweat, and have stomach pains.

7. Several medical doctors had seen the plaintiff in 2003. She was referred to Dr. Douglas Van Putten by Dr. Foley and in his medical report of the 16th June 2003, he stated inter alia:

> "...I had the opportunity to see your patient, Anna Welds recently in my office.....the patient demonstrated lid retraction of the left lower lid with lateral ectropion and canthal angle mal-position. She does have significant superior sulucus syndrome superiorly due to previous trauma." "I feel that the lid retraction can be repaired.....The approach could also lead to placement of a dermis fat graft to the inferior orbital rim and the orbit. This will help the superior sulcus some, but not enough. In all likelihood, additional surgery will be needed to be performed which would require doing a blepharoplasty on the opposite eyelid and removing a small amount of fat for symmetry. The first surgery will take approximately two hours under general anesthetic. Of interest too, as you know, we have a new vein laser...which would nicely remove the hemengioma on her left temple brow. This would take several treatments of course.....I would appreciate you getting this approved, so we can proceed with correcting this nice woman's problems and get her functioning in a normal capacity again." In his report of the 21st July 2006 he has stated that the surgical fee for correction of the lid retraction and poor apposition of the lower lid will cost **CI$12,000.00.** He has further stated: "She would require surgery under general anesthesia at George Town Hospital. The fees for this I cannot comment on, but there would be outpatient fees as well as anesthesia fees....."

8. Dr. Van Putten examined her again in 2006 and issued a medical report dated 21st July 2006.

There were other medical reports from:

- Dr. Kaushik Bhagat (Radiologist) dated 22nd January 2003
- Dr. B. Davis (General Surgeon) dated 30th January 2003.
- Cayman Island Health Services department (3rd February 2003 and 11th March 2003)
- Dr. Hal Shaw (ENT Specialist) dated 3rd February 2003

9. Cathy Alberga, a psychologist, had also seen the plaintiff and stated in her report that she was suffering from post traumatic stress disorder which was due to the trauma she sustained in 2003. She saw her on seven (7) occasions and had charged her CI$125.00 per session.

The Rules of Court

10. Order 29 Rule 10(1) of the Grand Court Rules provide that an application for interim payment may be made at any time after the writ has been served on a defendant and the time limited for him to acknowledge service has expired. Rule 10 (2) (3) (4) and (5) respectively, set out the procedure for making an application. Sub-rule (4) in particular, states that the summons and a copy of the affidavit in support and any documents exhibited thereto shall be served on the defendant against whom the order is sought not less than 10 clear days before the return day.

11. Order 29 rule 11(1)(2) states inter alia:

> "(1) If, on the hearing of an application under rule 10 in an action for damages, the Court is satisfied:
>
> (a) that the defendant against whom the order is sought (in this paragraph referred to as "the respondent") has admitted liability for the plaintiff's damages; or
>
> (b) that the plaintiff has obtained judgment against the respondent for damages to be assessed; or
>
> (c) that if the action proceeded to trial, the plaintiff would obtain judgment for substantial damages against the respondent.....

12. The court may, if it thinks fit and subject to paragraph (2), order the respondent to make an interim payment of such amount as it thinks just, not exceeding a reasonable proportion of the damages which in the opinion of the Court are likely to be recovered by the plaintiff after taking into account any relevant contributory negligence and any set-off, cross claim or counterclaim on which the respondent may be entitled to rely.

(2) No order shall be made under paragraph (1), in an action for personal injuries if it appears to the court that the defendant is not a person falling within one of the following categories, namely:

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

(b) a public authority; or

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

The submissions

13. The application for interim payment came on for hearing before me on the 9th August 2006. The plaintiff's summons and affidavit in support were filed on the 27th June 2006. Mrs. Brooks for the defendant objected to the plaintiff using an affidavit filed 7th August 2006, exhibiting documents in support of her application. She submitted that Order 29 of the Rules of Court requires the affidavit to be served within ten (10) clear days before the return day of the summons. This affidavit was served on her on the 7th August. In the circumstances, she submitted that she was only given one (1) clear day notice.

14. Secondly, Mrs. Brooks submitted that pursuant to rule 11(1)(c) the defendant was prepared to use the sum of $13,283.69 due to him in the matrimonial proceedings, as a set off against the amount claimed in the plaintiff's schedule.

15. Thirdly, she further submitted that if the court were minded to order that the defendant pays an additional sum then such order would be subject to the provisions laid down in Order 29 rule 11(2)(c) which provides:

"29.11(2) (c): No order shall be made under paragraph (1), in an action for personal injuries if it appears to the Court that the defendant is not a person falling within one of the following categories, namely-

(a).....

(b)....

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

16. Mrs. Brooks argued that the defendant was without means and on the basis of Rule 11(2)(c), he was prepared to give evidence on oath in Chambers, regarding his means.

17. Mr. McCann for the plaintiff, submitted firstly that although the defendant was served with additional documents in support of the plaintiff's affidavit on the 7th August 2006, the defendant would not be prejudiced whatsoever. He submitted that in any event, the experts whose evidence the plaintiff would be relying on would have to attend the trial in order to give evidence.

18. Secondly, Mr. McCann submitted that the matrimonial proceedings between the parties were irrelevant to this application and that whatever sum was due to the defendant in those proceedings ought not to be used as a set off.

19. Mr. McCann also referred to the nature of the injuries set out at paragraph 7 of the plaintiff's affidavit as well as the documents in support of the application. In the circumstances, he submitted that the Court should make an order for the payment of CI$22,710.82 in respect of special damages in order to facilitate the plaintiff paying her medical bills.

20. In relation to the possible award for general damages, Mr. McCann relied on the English cases of **Re Delziel** decided July 13, 2000 and **Re Dewhurst** decided April 4 1995. These cases are reported in Sweet & Maxwell Personal Injury Practice 2004. He submitted that the Court at trial could make an award ranging between CI$18,000.00 and CI$15,000.00 in respect of general damages.

21. Mr. McCann further submitted that under Order 29 rule 11 (2) (c) the defendant must establish that he is a person without means and resources. He submitted that the defendant had filed his affidavit in opposition to the summons on the 31st July 2006 and that he made no mention at all of his inability to pay. In fact, Mr. McCann submitted that he had stated inter alia, at paragraph 17 of this affidavit: "...but that if any order.....I am willing to pay." He argued that it was only during

the submissions of Counsel on the 9th August 2006, that she made mention of his means but he himself had not deposed to his inability to pay. He submitted that it was too late for him now, to attempt to do so and the Court should not allow him to give sworn evidence in Chambers with respect of this issue.

The ruling on the preliminary objection

22. Let me deal first with the preliminary objection that was raised by Mrs. Brooks on the 9th August 2006. I had ruled that the preliminary objection was dismissed and that the application by the plaintiff should proceed. There was indeed non-compliance with the provisions of rule 10(4) in relation the later affidavit. The legal position as I see it is this: the use of the word "shall" in the rule is merely directory. I was of the view that no serious inconvenience or hardship would occur if the matter were to be proceeded with. The plaintiff was therefore allowed to commence her application but at a later stage I adjourned the hearing for another two (2) days when Mrs. Brooks indicated to me that she did not have sufficient time to fully examine the documents exhibited in the further affidavit of the plaintiff. She had also stated that she would need to take further instructions on the documents exhibited. When the matter resumed on the 11th August, no further objection was raised. She made her submissions in opposition to the application and thereafter I reserved judgment.

Is this a proper case for an interim order to be made?

23. Here the plaintiff has obtained judgment against the respondent for damages to be assessed. Liability is therefore no longer in issue. I must now determine whether this is a case where, I should exercise my discretion and make an order for interim payment of damages.

24. The plaintiff has deposed that pending the outcome of the trial she is requesting the court to make the order so as to enable her to:

    (a) attend to payment of outstanding medical invoices;

    (b) reimburse her for monies she has expended.

25. She has also urged the Court to grant such sum (s) as the court thinks fit in relation to her claim for pain, suffering and loss of amenities.

26. In these circumstances, I must now turn to consider what may be regarded as the likely extent of the special and general damages which the plaintiff could expect to recover at the trial and then go on to determine, what would be a "reasonable proportion" of those likely damages which it would be just to award now.

27. Counsel for the Plaintiff has not been able to refer me to any local authority in relation to general damages and has referred me to two English decisions. These cases may be of assistance but they need to be examined with care, because the level of damages awarded is not only affected by inflationary factors, but also by being awarded in a different currency and with an eye to overseas living conditions. I am of the view that of the two cases cited, **Re Dalziel** is the most helpful. The facts of that case are as follows:

> The claimant, male, aged 24 at the date of the incident and 32 at the hearing, was the victim of an unprovoked assault. He was punched repeatedly about the head and face. He suffered a fracture of the left infra-orbital margin together with a depressed fracture of the malar bone and an undisplaced nasal fracture. He underwent an operation seven days after the incident to elevate the depressed fracture. His left eye became more sunken in its orbit and he was left with facial numbness over the cheek bone. Thereafter he suffered from blurred vision in the left eye and his driving licence withdrawn. From the date of the incident he suffered sleep disturbance and flashbacks, began to suffer anxiety attacks and depression. He became socially withdrawn and isolated and was unable to cope with any stress. He was diagnosed as suffering from post-traumatic stress disorder about two years after the assault. He was awarded £12,000 for general damages on July 13, 2000.

The equivalent of £12,000 in Cayman dollars is approximately $18,000.00.

28. Approaching the medical reports and the affidavit filed by the plaintiff and without detailing any comparison of relevant English decisions, I would agree with Counsel for the Plaintiff that an award for pain and suffering and loss of amenities would fall within the range of CI$18,000 and CI$15,000.

29. What is the extent of the special damages likely to be recovered by the plaintiff at trial? A provisional finding of the facts by the court is called for. Several bills have been exhibited in respect of the expenses that were incurred. In **Baucom v. Ebanks** (1994–95) CILR N–21 the Grand Court of the Cayman Islands held inter alia, that it would be unjust not to order interim payment of undisputed special damages. In the instant case the defendant has stated in his affidavit in response to the plaintiff's affidavit that there is no dispute regarding the following sums:

- CI$3,420.66 payable to the Cayman Islands Government as reimbursement for bills incurred both in Cayman and in Jamaica
- US$100 or CI$82 deposit paid by the plaintiff as a patient of the private wing of the University of the West Indies Hospital.
- US$290.70 paid for the airline ticket for the plaintiff to travel to Jamaica in order to see Dr. Shaw.

30. Dr. Van Putten has stated in his report that the plaintiff would need corrective surgery for the lid retraction and "poor apposition" of her lower lid. His report of the 21st July 2006 states that the cost for this procedure is CI$12,000.00. There would be additional sums he said, for outpatient fees and anesthesia fees.

31. The plaintiff also deposed that whilst she was a patient at the University of the West Indies Hospital, she had used her credit card to pay the hospital bill of $779.27. This sum would have to be strictly proved at the trial in the absence of agreement. It is of interest to note however, that the defendant has stated that he would not object to the expense incurred for plaintiff traveling to Jamaica to see Dr. Shaw and for the payment of the deposit at Tony Thwaites Wing of the University hospital. Certainly, if she was admitted at the hospital as a patient, then certain bills would become payable and it would be for this reason why she had to use her credit card to take care of those expenses.

32. Harvey McGregor in his book on the Law of Damages 13th Edition at page 1128 under the heading "Personal Injury to Plaintiff" sub-head "Medical & Related Expenses" has this to say -

> "Both expenses already incurred at the time of trial, and prospective expenses, are recoverable, and while the rules of procedure require that the expenses already incurred and paid be pleaded as special damage and the prospective expenses as general damage, the division which depends purely on the accident at the time that the case comes up for hearing, implies no substantive differences."

33. An award for corrective surgery could therefore be made either as special or general damages.

34. I now turn to examine the submissions made by Mrs. Brooks relating to the defendant's proposed set-off in the application for interim payment of damages. It is my view, that the amount due to the defendant in the matrimonial proceedings cannot be used as a set-off in this application. Enforcement proceedings are certainly open to him if that is not complied with.

35. Finally, I turn to the issue of the defendant's means and resources. I do agree with the submissions made by Mr. McCann on this issue. I recall Mrs. Brooks mentioning in Chambers on the morning of the 11th August, that an affidavit was prepared on behalf of the defendant but he had left it at home. No application was made by Mrs. Brooks for an adjournment. Instead, she applied to the Court to have the defendant sworn and for him to give evidence as to his means. Of course, this application was vigorously opposed by Mr. McCann. I do agree with Mr. McCann that it was too late in the day for this to be done.

36. The defendant in my view had every opportunity to have presented facts as to his means and resources in the affidavit he filed challenging the plaintiff's application and he failed to do so. It was for these reasons why I ruled that the application was refused.

37. Having reviewed the entire circumstances as set out above, it is my view that an order for interim payment of damages is now appropriate and justified and there will be an order accordingly. The defendant is therefore ordered to pay to the plaintiff the sum of CI$20,000.00 towards special damages in order to facilitate her paying medical bills. The plaintiff will have her costs of this application taxed if not agreed.

Justice K. Harrison (Ag.)
August 24, 2006

GRAND COURT
CAYMAN ISLANDS