26/4/02

IN THE GRAND COURT OF THE CAYMAN ISLANDS

Cause No. 154 of 2001

Between:

DARIC EBANKS (suing by his mother and next friend WILMA CLAIRE EBANKS)

Plaintiff

- and -

(1) CAYMAN NATIONAL CULTURAL FOUNDATION

(2) THE MINISTRY OF COMMUNITY AFFAIRS, SPORT, WOMEN, YOUTH & CULTURE

(3) THE ATTORNEY-GENERAL OF THE CAYMAN ISLANDS

Defendants

BEFORE: The Honourable Mr. Justice Kellock

Shaun T. McCann of Campbells for the plaintiff.
H. Delroy Murray of Samson Murray Jackson, for the defendants.

Heard: April 16, 2002

REASONS FOR JUDGMENT

On Monday, April 13, 1998 the plaintiff Daric Ebanks, who was 12 years old at the time, was seriously injured.

The circumstances were as follows.

Daric, together with many other people attended the launch from the beach into the ocean of an old time Caymanian boat which is a traditional part of the Cayfest festival held each year.

The boat was to be hauled by a group of men pulling a yellow polypropylene rope which was attached to the boat thus dragging the boat across the beach and into the ocean. The rope, being pulled, was attached to two ropes which in turn were attached to the boat (one on each side). These two ropes and the rope being pulled were joined in front of the bow of the boat by what is described in the statement of claim as "a shackle".

It is not clear to me from the evidence presently available (which includes photographs) whether an attempt had been made to splice all three ropes together and/or to employ knots. It is clear that a piece of duct tape was used in part, at least, to effect the attachment of the ropes fastened to the boat to the rope upon which the men were pulling.

The evidence is that some (at least) of the people in charge of the boat launch were becoming concerned that the spectators were crowding in too close to the boat hauling operation.

On June 11, 1998, Sergeant Brad Ebanks authored a memorandum to Mr. Carson K. Ebanks (then Permanent Secretary of the Ministry of Community Affairs, Sport, Women, Youth and Culture) in which he described the critical events.

Shortly before the accident Sergeant Brad Ebanks discussed the "danger of where people were standing" with another man and said "we then began to advise them to stand back from the ropes".

Sergeant Ebanks provides a graphic account of what happened next. He said:

> "Suddenly I saw the rope and shackle give way from the bow of the boat and travel through the air at a tremendous speed towards the sea and the crowds standing on the north side of the ropes. The shackle struck a young man whom I now know as Derrick Ebanks (sic) in his forehead and knocked him to the ground on his back. Immediately I could see the injuries were serious."

Sergeant Ebanks went on to say that he "examined the rope at the bow of the boat were the shackle was fastened. I saw the way it was, that it was not appropriate to accommodate the amount of tension applied to the ropes".

Sadly, Sergeant Ebanks was correct in his assessment of Daric's injuries. He was air lifted to hospital in Miami. In non-technical terms Daric sustained fractures of the skull, significant haemorrhaging, severe lacerations to the head, eye injuries and brain damage.

In April 1998, Daric was in his last year at middle school (i.e. grade 9). As a result of his injuries his reading ability dropped back to the level expected of a grade 6 or 7 student. He has been enrolled in a special school and is not expected to complete grade 12 until 2003.

That will be two years later than he would have graduated had he not been injured. His future earning capacity is in doubt but it is clear that his career choices have being limited and that will have a significant and adverse impact upon his earning capacity.

The defendants are all emanations of the Cayman Islands Government. Accordingly, the defendant in this case is in reality Her Majesty the Queen in right of the Government of the Cayman Islands.

In these circumstances the plaintiff seeks an interim payment pursuant to order 29. The application is resisted by the defendant.

The relevant portions of Order 29 provide as follows:

"10 (1) - The plaintiff may, at any time after the writ has been served on a defendant and the time limited for him to acknowledge service has expired, apply to the Court for an order requiring that defendant to make an interim payment.

11 (1) - If, on the hearing of an application under rule 10 in an action for damages, the Court is satisfied –

(c) - that if the action proceeded to trial, the plaintiff would obtain judgment for substantial damages against the respondent or, where there are two or more defendants, against any one of them,

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.

It is clear that in order for me to grant the relief requested I must find that if this action proceeds to trial the plaintiff would obtain judgment for substantial damages against the defendant.

There is no doubt in my mind that the damages will be substantial. The real question then is whether the plaintiff will succeed in establishing liability. A likelihood of success is insufficient. Indeed the English authorities indicate that if the plaintiff applied for summary judgment on the question of liability the Court would, if summary judgment were refused, impose conditions on the defendant. That is to say that the Court would not give the defendants unconditional leave to defend. The "conditions" the Courts have in mind are conditions calling for a payment into Court or an interim payment. (See *British and Commonwealth Holdings PLC v. Quadrex Holding Inc.* [1989] 3 All ER 492)

A condition of paying some or all of the money or damages claimed into Court or giving security is imposed where there is a good ground in the evidence for believing that the defence set up is a sham defence or the master is prepared "very nearly" to give judgment for the plaintiff under

order 14 (See *Wing v. Thurlow* (1893) 10 TLR. 53 and *MV Yorke Motors v. Edwards* (1982) 1 WLR 444 at 450).

While this seems to me to be an inappropriately stringent test for interim payments I will nonetheless apply it to the case at bar.

I will begin by noting that the application before me is to be decided upon the evidence before me, and no evidence was provided on behalf of the defendants. Mr. Murray relied on his clients' Defence which denies the plaintiff's allegations of negligence and asserts that the plaintiff Daric Ebanks was contributorily negligent. For example, the Defence alleges that Daric failed "to comply with the numerous announcements by the organisers (of the boat launch) for members of the public to keep clear of the area between the boat and the sea".

This is no evidence that there were numerous announcements or that any such announcement was heard by Daric if such were made. Consequently, I cannot find on the evidence that the Defence has much, if any, potential to reduce, let alone constitute a bar to, the plaintiff's success at trial. For present purposes, the relevant principles of the law of negligence are set forth in the discussion of "Forseeability and Actionability" found in

paragraphs 7–188, 7–189 and 7–191 of Clerk and Lindsell on Torts, 17th Edition. There can be no question on the evidence that the organisers of the boat launch were well aware that the operation presented a risk of injury to the onlookers and the Defence taken as a whole constitutes an admission that such was the case.

No one has suggested that the risk the defendants contemplated did not include the risk that what happened on April 13, 1998 would happen and in the way it happened. Indeed the defendants have not suggested that the risk they were concerned about related to injury to bystanders from any other cause other than the failure of the rope or the "shackle".

I therefore have no difficulty in holding that the conditions precedent to the award of an interim payment have been met. (*See Andrew v. Schooling* [1991] 3 All ER 723)

On this application, Mr. McCann seeks only a payment on account of obligations already incurred e.g. outstanding medical bills, sums required to reimburse Daric's mother and next friend for the care she has provided and similar expenses together with a small amount on account of expenses to be incurred (i.e. US$2,500.00). While interim payments must be limited to "a

reasonable proportion of the damages which in the opinion of the Court are likely to be recovered" I regard the amount sought (which is CI$95,000.00) to be a very small percentage of the likely amount of the award to be made at trial.

In the result, an order will go requiring the defendant to pay CI$95,000.00. As I indicated during argument, the style of cause is hereby amended to describe the plaintiffs as "Daric Ebanks (suing by his mother and next friend Wilma Claire Ebanks) and Wilma Claire Ebanks – Paintiffs".

The CI$95,000.00 is to be paid to the plaintiff Wilma Claire Ebanks.

The plaintiffs will also have their costs of the application to be taxed if not agreed and paid forthwith after the determination of the quantum thereof.

Dated this 26th day of April, 2002.

GRAND COURT – CAYMAN ISLANDS

Kellock, J. (Actg)

Judge of the Grand Court