

IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
ON MONTSERRAT
CASE MNIHCV2019/0021

In the matter of a claim by a minor for damages
for personal injury;
And in the matter of oversight by the Court of
expenditure of the monies awarded, per rule 23
CPR 2000

BETWEEN

ANTHONY RILEY FRANCIS, a child by FIONA RILEY his litigation/next friend	Claimant
AND	
DAVID OSBORNE	Defendant

APPEARANCES

Mr Jean Kelsick for the Claimants.

Mr Rushaine Cunningham for the Defendant.

2021: JULY 23

RULING

On court oversight of monies awarded for the benefit of a minor

- 1 **Morley J:** On 18.06.21, Counsel Cunningham suggested a cheque for \$9,778.54ec for personal injury damages should be paid into trust account 1011567 opened at St. Patrick's Cooperative Credit Union in the name of claimant Antony Riley, a minor aged 9, where the monies can be the subject of judicial oversight. Counsel Kelsick countered it should be payable into his client account. Quite an argument followed, with submissions dated 23.06.21 by Counsel Cunningham and 07.07.21 by Counsel Kelsick, with then hearing on 08.07.21.

- 2 The argument has been about securing legal fees.
- 3 From what has been said in court on 08.07.21 in some emotion by Fiona Riley, who is Antony's mother, in Counsel Kelsick's submissions, and from reading the case papers, it appears on 13.12.16 Anthony (dob 04.09.11) when aged 5 was injured by a car driven by David Osborne, who pleaded guilty to dangerous driving on 15.08.17. Anthony's right femur was broken, with injury particularly to his heel; he was in hospital until 22.01.17, daily attended by his mother, and off school for 3.5 months.
- 4 Osborne's insurer was Massey United Insurance who resisted paying out, so litigation followed. Eventually \$25000ec was paid into court, and in due course in 2021 Master Drysdale (as she then was) enlarged the award, with prescribed costs, so that a further \$9778.54ec in damages and \$3067.40ec in costs were ordered, and later settled as cheques.
- 5 There is a lingering unhappiness the award and costs were too low, about which no more can be said as the matter is functus.
- 6 The case having largely concluded, it was supposed to be listed before the Master in May, but the Registrar forgot. Complaint being made, on 04.06.21 it was listed before the High Court Judge to ensure the \$25000ec was paid out by the Registrar and to conclude how much interest should be paid. On 18.06.21, the interest was agreed, while it was further agreed the \$25000ec should go into the trust account and Counsel Kelsick could bank the costs. Row then emerged over the final sum of \$9778.54ec.
- 7 Counsel Kelsick has calculated in four years of litigation his fees have been \$13373.50ec, and deducting the \$3067.40ec he remains owed \$10316.10ec, set off against a retainer of \$5000ec originally paid by Fiona. He expects the \$9778.54ec to go toward his remaining fees of \$10316.10ec, allowing him to repay Fiona the \$5000ec retainer, with then \$538.56ec left outstanding.
- 8 The fees are not unreasonable, for all the work done, over so long, agreed in court by Fiona. However they are payable from a child's modest award, begging whether the court should have oversight.

- 9 Believing it wrong of Counsel Cunningham to expect the final sum paid into the trust fund, so that further argument has followed, Counsel Kelsick now wants a further \$2500ec in costs if he wins this point, namely that the final sum is payable without oversight to his client account.
- 10 When discussing matters on 08.07.21 the court wondered if there was any need for argument if the final sum was deemed payable into the trust account, but having judicial oversight of the account the court could agree his fees reasonable, so the fees could in principle be deducted from the trust fund, therefore ordering for expediency Counsel Kelsick could cash the \$9778.54ec, return the retainer to Fiona, and receive a further \$538.56ec from the trust account, with no further costs arising. He rejected this course as further costs had now arisen because of Counsel Cunningham raising argument on 18.06.21, which he wants paid by Massey, assuming he will win the point, inviting a written decision to assist local jurisprudence on an area not much adjudicated, which is this ruling.
- 11 Before I analyze how the final sum should be handled, I will mention obiter Counsel Kelsick seems quite upset with Massey, who he has argued with some consternation should have paid out rather than litigate, his having one time been a claims assessor. The litigation has been a strain on Fiona and her family, who are poor, it has raised costs, and has been described playful, by a party in substantial funds, putting impecunious folk to the worry of being ordered to pay costs if an award is less than what has been paid into court, which has the effect of settling cases unfairly and for low sums. It appears he sees the point raised by Counsel Cunningham in the same vein, as being playful and unwarranted, seeming designed to vex him, noting Massey will pay for able counsel but not pay out as insurers. In this context his otherwise usually excellent judgment may have been befogged.
- 12 Concerning awards to minors, in the Eastern Caribbean Supreme Court **rule 23.13 Civil Procedure Rules 2000** reads:
- (1) If, in any proceedings money –
 - (a) is recovered by or on behalf of or for the benefit of a minor...; or
 - (b) paid into court is accepted by or on behalf of a minor...;that money must be dealt with in accordance with directions given by the court under this rule and not otherwise.

(2) Directions given under this rule may provide that the money must be wholly or partly paid into court and invested or otherwise dealt with.

- 13 Of interest, the **English Civil Procedure Rules** are identical but expanded, reading first at **rule 21.11**:

Rule 21.11 Control of money recovered by or on behalf of a child or protected party

(1) Where in any proceedings –

(a) money is recovered by or on behalf of or for the benefit of a child...; or

(b) money paid into court is accepted by or on behalf of a child...,

the money will be dealt with in accordance with directions given by the court under this rule and not otherwise.

(2) Directions given under this rule may provide that the money shall be wholly or partly paid into court and invested or otherwise dealt with.

- 14 Significantly **rule 21.12** then adds:

Rule 21.12 Expenses incurred by a litigation friend

(1) Subject to paragraph (1A), in proceedings to which rule 21.11 applies, a litigation friend who incurs costs or expenses on behalf of a child or protected party in any proceedings is entitled on application to recover the amount paid or payable out of any money recovered or paid into court to the extent that it –

(a) has been reasonably incurred; and

(b) is reasonable in amount.

(1A) Costs recoverable in respect of a child under this rule are limited to—

(a) costs which have been assessed by way of detailed assessment pursuant to rule 46.4(2); or

(b) costs incurred by way of success fee under a conditional fee agreement or sum payable under a damages based agreement in a claim for damages for personal injury where the damages agreed or ordered to be paid do not exceed £25,000, where such costs have been assessed summarily pursuant to rule 46.4(5).

(2) Expenses may include all or part of –

(a) a premium in respect of a costs insurance policy (as defined by section 58C(5) of the Courts and Legal Services Act 1990); or

(b) interest on a loan taken out to pay a premium in respect of a costs insurance policy or other recoverable disbursement.

(3) No application may be made under this rule for costs or expenses that –

(a) are of a type that may be recoverable on an assessment of costs payable by or out of money belonging to a child or protected party; but

(b) are disallowed in whole or in part on such an assessment.

(Costs and expenses which are also “costs” as defined in rule 44.1(1) are subject to rule 46.4(2) and (3).)

(4) In deciding whether the costs or expenses were reasonably incurred and reasonable in amount, the court will have regard to all the circumstances of the case including the factors set out in rule 44.4(3) and 46.9.

(5) When the court is considering the factors to be taken into account in assessing the reasonableness of the costs or expenses, it will have regard to the facts and circumstances as they reasonably appeared to the litigation friend or to the child’s or protected party’s legal representative when the cost or expense was incurred.

(6) Subject to paragraph (7), where the claim is settled or compromised, or judgment is given, on terms that an amount not exceeding £5,000 is paid to the child or protected party, the total amount the litigation friend may recover under paragraph (1) must not exceed 25% of the sum so agreed or awarded, unless the court directs otherwise. Such total amount must not exceed 50% of the sum so agreed or awarded.

(7) The amount which the litigation friend may recover under paragraph (1) in respect of costs must not (in proceedings at first instance) exceed 25% of the amount of the sum agreed or awarded in respect of—

(a) general damages for pain, suffering and loss of amenity; and

(b) damages for pecuniary loss other than future pecuniary loss,

net of any sums recoverable by the Compensation Recovery Unit of the Department for Work and Pensions.

(8) Except in a case to which Section II, III or IIIA of Part 45 applies, and a claim under rule 45.13 or 45.29J has not been made, no application may be made under this rule for a payment out of the money recovered by the child or protected party until the costs payable to the child or protected party have been assessed or agreed.

15 I will not set out **rules 44-46 English CPR**, but note the detailed attention an English court must pay to assessing legal fees sought from award to a minor.

16 Though there is no equivalent of **rule 21.12 English CPR** in the **ECSC CPR**, nevertheless the rule is helpful in offering an approach from a longstanding sister jurisdiction. What is striking is the indepth control expected of the court over fees claimed out of the award. In my judgment this is persuasive and instructive. While the **ECSC rule 23.13(2)** refers to how the court ‘may’ provide directions on how monies should be handled, the exactly equivalent language is used in **English rule 21.11(2)**, with then control expected by the court over fees immediately following in **rule 21.12**. To my mind, where the ECSC rule says how the money is handled ‘may’ be decided by the court, the question begged is when should it control the handling, and the English rule makes it plain legal fees should be an example of when control should arise.

- 17 There is good reason for court control over fees extracted from an award to a minor. There is a need to ensure the fees are not unreasonable when obviously incapable of being agreed by a child. Any amount of mischief might arise, though I make it plain has not done so here. Specifically a lawyer might overcharge, claiming the bulk of an award, the fee being wrongly agreed with a litigation friend, who either may not know how better to negotiate fees (being for example as here an impecunious mother not used to dealing with lawyers), or who litigates unreasonably unrestrained by the lawyer, or where there may even be arrangement between both to claim the bulk of the money which is then split between them, each inflatedly claiming to have incurred costs, where the interests of the litigation friend may not be the same as the child.
- 18 In discussing the point, on which there is little local jurisprudence, reference has been made to the helpful judgment of Stephenson J in **Caliyah James v AG Dominica 2018** case DOMHCV2018/0137. In that case there was an award of at least \$200000ec to a child, Caliyah, and the court approved \$100000ec would go to the lawyer and mother as next friend in fees and costs and other expenses said to help the child, with the remaining \$100000ec being placed on deposit with interest. The mother then wanted the interest paid to her. This was refused. Of interest, the learned judge observed at para 20:
- I am compelled to express my concern as to the prudence exercised by the applicant as it regards the monies already disbursed to her. It is noted that the applicant received the sum of \$100000 in July 2017. I am concerned that she now comes to the court seeking access to the interest on the amount ordered invested on behalf of the child. This court is also concerned that there has been no attempt by the applicant to account for the monies already disbursed to her which amount was substantial.
- 19 While it can be seen in the *Caliyah* case the good sense in the court exercising oversight, it can further be noted the initial distribution of the award was made by the court, and no award money was paid to the lawyer without court sanction, which seems the opposite of what Counsel Kelsick seeks and squarely supports the argument of Counsel Cunningham.
- 20 Counsel Kelsick raises argument lawyers must be assured they can be paid from an award, so that folk with little means can have representation. However, judicial oversight of the fees is no

encumbrance to being paid. All that is contemplated is the final fee from the award needs to be agreed with the court, not the litigation friend, to ensure the costs are not excessive.

- 21 The short point is I am satisfied the court should have oversight of settling legal fees out of awards made to minors, and adopt in spirit the approach in **rule 21.12 English CPR**. As to adopting the English CPR, Counsel Kelsick appears to agree, encouraging the court looks to English rule 21.12, as he says in para 15 of his submissions of 07.07.21, '*It is submitted the High Court is authorized to import the English CPR where our CPR is silent. The Court of Appeal said so in **Marlon Ho-Tack v British American Insurance 2010** and in **Ignors, Kippers v Stanford International Bank 2012***', as reported.
- 22 The effect of this analysis is that I have decided under **ECSC rule 23.13** the \$9778.54ec must be treated as payable into Antony's trust account, not to Counsel Kelsick's client account. However, Counsel Kelsick having made a proper case for fees of \$10316.10ec being outstanding, I will therefore allow the cheque to be set off against his fees, so that he can cash it, rather than have to pay it into the trust account, only then to request the money to come back out. As regards the \$538.56ec which remains owing, I will grant permission for it to come from the trust account, if sought.
- 23 I turn now to costs. The invitation raised by Counsel Cunningham on 18.06.21 has proved correct. Counsel Kelsick has been ruled wrong to expect the final sum payable to his client account without judicial oversight, to allow him separately to settle his fees with the litigation friend. In theory Counsel Cunningham is entitled to costs for winning the point. However, I will not award costs, as these would come from Antony's trust account, diminishing the modest award, which it may be said took too long to arrive. Massy is of huge means, Antony is not, and in my judgment costs on this point would be unfair on Antony, it not being an argument raised to his benefit, as it only ever concerned Counsel Kelsick.
- 24 In theory I might award the costs as wasted by Counsel Kelsick, as the point concerned him, but I will not, as the point raised is of public importance. The ratio in this case is that any award of damages to a minor, not being 'costs' separately awarded, must be overseen by the court; no

such awarded damages should be paid directly to the lawyer; and on application to the court, legal fees must be agreed by the Bench if to come from oversight of the award.

- 25 Finally, if Counsel Kelsick wishes to argue a fee for raising the point should further come from the trust account, said to be perhaps \$2500ec, diminishing Antony's award further, or from the retainer, it will be disallowed. This is because he could have settled the point, as per para 10 above, there was no need for this argument to secure his money, and while he may have done a public service to have taken the point, in the fine tradition of being a senior at the Bar his effort will have to be gratis.

The Hon. Mr. Justice Iain Morley QC

High Court Judge

23 July 2021