

**EDLIN MANI v DHARMENDRA KUMAR AND YEES COLD STORAGE
SEAFOOD LTD (HBC0215 of 2005L)**

HIGH COURT — CIVIL JURISDICTION

5 TUILEVUKA M

30, 31 January 2012

10 **Damages — personal injuries — application for interim payment — admitted
liability — urgency — settlement of debt — medical treatment abroad —
hospitalisation — High Court Rules O 29 rr 10, 11(1)(a), 11(2)(a)**15 The petitioner sought an order for interim payment pursuant to O 29 Rules 10 and 11
of the High Court Rules 1988. The petitioner sustained personal injuries in a motor vehicle
accident and was hospitalised for eight weeks. The petitioner's substantive claim was
based on an allegation of negligence against the first defendant and vicarious liability
against the second defendant for personal injuries. The second defendant's insurer
admitted his liability. The plaintiff asked for interim payment in order to settle an urgent
debt to finance her medical treatment abroad.20 **Held —**25 Where liability is admitted by an insurer who is in a position to pay damages, there is
absolutely nothing wrong with a plaintiff asking for interim payment in order to settle
some urgent debt. It is irrelevant whether or not the urgency claimed even remotely relates
to the plaintiff's cause of action. So long as the interim award does not exceed 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.

Shearson Lehman Bros Inc v Maclaine Watson & Co [1987] 1 WLR 480,
considered.

30 Interim payment awarded.

Case referred to

Chandra v City Auto Trimmers Ltd (2011) FJHC 760; HBC270.2008 (22 November
2011), followed.

35 *Roopesh Singh* for the Plaintiff.

Sudhaker for the Defendant.

Tuilevuka M.40 **INTRODUCTION**45 [1] Ms Edlin Mani seeks an Order for interim payment of the sum of \$150,000
pursuant to O 29 r 10 and 11 of the High Court Rules 1988. She wants the interim
payment to be assessed on the strength of her special damages claim. Her
substantive claim is based on an allegation of negligence against the 1st
defendant and vicarious liability against the 2nd defendant for personal injuries
she sustained in a motor vehicle accident. The second defendant's third party
insurer, New India Assurance Co, has admitted liability.50 [2] Ms Mani's application is supported by an affidavit she swore on 01
December 2011. New India Assurance Co opposes the application by the affidavit
of Avinesh Chand Rai, Insurance Officer, sworn on 19 January 2012.

THE ACCIDENT

[3] The accident occurred on 10 August 2002. Ms Mani was a front seat passenger in taxi registration number DP 492. The taxi was travelling along the Queens Highway towards Sigatoka. At Solovi in Nadroga - it collided with a truck registration number DV 309. The truck belonged to Yees Cold Storage Seafood Limited, the second defendant and was being driven by Mr Dharmendra Kumar, the 1st defendant.

INJURIES

[4] Various medical reports from local as well as New Zealand doctors are exhibited to Ms Mani's affidavit. A report of Doctor Taalunga is annexed to Avinesh Chand Rai's affidavit. It is undeniable that Ms Mani suffered some injuries as a result of the accident. She was admitted at Lautoka Hospital from 10 August 2002 to 11 October 2002 – a period of eight weeks exactly.

[5] In any given case, the duration of hospitalization of any sufferer of personal injuries is usually a window into the seriousness of the injuries sustained. And quite often, a longer period of hospitalization will inspire a finding that the injuries sustained were of greater severity. These will usually then set the stage for a finding of, and an award for, pain and suffering.

[6] Suffice it to say for the purpose of this assessment for an interim award that eight (8) weeks is a fairly long period of hospitalization for anyone - whatever their sickness or medical condition is. A medical report from Dr Joeli Mareko exhibited to Ms Mani's affidavit states that she was on crutches during and after her hospitalization here in Fiji. Dr Mareko further reported that Ms Mani did receive therapeutic massages and was given pain killers during this time¹.

[7] Avinesh Chand Rai denies that Ms Mani suffered serious injuries as a result of the accident and asserts that this is a triable issue. He relies on a report of Dr Taalunga.

DAMAGES CLAIMED

[8] The heads of general damages that Ms Mani claims are: *pain and suffering*, *loss of amenities of life* and *loss of earning capacity*. These relate to the injuries to the face and to the left hip (left pelvic bone fractured and nasal bone) that she allegedly suffered as a result of the accident. The amount she claims for special damages are \$FJD\$4,298-25 for expenses she incurred relating to her medical treatment in Fiji and also the sum of \$NZD\$75,220.25 which relates to her expenses for medical treatment in New Zealand.

URGENCY

[9] Ms Mani explains that her need for interim payment is borne out of urgency. She had borrowed money from the Bank of South Pacific and from the Sugar Cane Growers Fund “on the account of friends and family” to finance her medical treatment abroad. She needs to pay these institutions back the money she had borrowed as they have served her with a demand notice

[10] Avinesh Chand Rai questions the alleged “urgency” in Ms Mani's situation. He points out that the demand letters were written quite some time back in 2011.

1. (although neither the dosage nor the frequency with which these were administered is clarified).

[11] I note that the default notice of BSP² is addressed to Ms Mani. It threatens enforcement proceedings such as “power of sale to sell your mortgaged property” if arrears were not settled within the 30 day notice period. I will deal with these later in paragraphs 17 and 18 below.

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OBSERVATIONS

[12] Exhibit 4 of Mani’s affidavit is a bundle of documents (comprising of receipts and invoices). The documents, she says, “illustrates the costs as expended by me in New Zealand”. These documents all relate to expenses incurred during visits to Auckland between November 2007 and July 2008³. I note that these trips are not at all pleaded. All she pleads is that she was admitted at Mercury Hospital in Auckland New Zealand in July and August 2003 and discharged on 12 August 2003 and received treatment during that time. Exhibit 4 contains no documentation relevant to the July and August 2003 trip. There is nothing in the statement of claim about any trip to New Zealand between November 2007 and July 2008, let alone what these trips were for. Although she does set out in detail her alleged expenses (see footnote 3). One gets the impression from the statement of claim that these expenses related to her 2003 trip to New Zealand. But I now get the impression only by reading the documents exhibited in her affidavit that she is not claiming for the 2003 expenses because the costs were borne by her insurers⁴.

[13] I am not keen on making an interim award based on her 2007 and 2008 trips. These are special damages which must be specifically pleaded and strictly proved. Frankly, it is best to postpone them to the hearing proper on assessment of damages. But having said that, I am not deterred from making an interim award as I am of the view that there is still enough material yet before me to make an interim award based on other considerations⁵.

THE LAW

[14] Order 29 r 10 and 11 state as follows:

Application for interim payment (O 29, r 10)

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2. Exhibit 5 of Ms Mani’s Affidavit is a Default Notice to Ms Mani dated 27 May 2011.
3. Eg **Michael Booth**’ Tax Invoice/Receipt relate to professional services performed on 09 January 2008. The medical service performed is stated as Laparoscopic Gastric Bypass. This is not amongst the pleaded injuries in her statement of claim. Copy of Invoice from **Southern Cross Healthcare** relates to accommodation from 04 March 2008 to 7 March 2008. **WiseFood Ltd** Tax Invoice/ Receipt were for services rendered on 20 May 2008. Tax Invoice from **Diagnostic Medlab** is dated 20 January 2008. **Northshore Plastic and Cosmetic Surgery Clinic** Receipt for consultation fee is dated 25 January 2008. The **Orthopaedic Clinic** follow up consultation on 18 March 2008, 27 November 2007. Two Receipts number 00980 and 00975 incurred in Lautoka Fiji (**TropicHealth Laboratories**). **Mercy Radiology Group** – Pelvis & Hips – Visit Date – 27 November 2007. **Auckland Radiology Group** Receipt for consultation visit on 27 May 2008. **Tristan de Chalain** – Cosmetic & Reconstructive Plastic Surgeon - various invoices from 07 December 2007 to 24 July 2008. Various Pharmacy Receipts – from December 2007 to May 2008. **Accommodation** – various motels – accommodation at various times from November 2007 to July 2008. **Food** – receipts/invoices from various outlets, supermarkets, dairies, restaurants, coffee shop etc for the same period as Accommodation, as far as I can gather. **Taxi** – for same period as Accommodation. **Bus Fares** – For same period as Accommodation. **Laundry** – Ditto. **Fax** – Ditto. **Internet** – Ditto. **Non Surgical** – Ditto. **Telephone** – Ditto. **Airfares** – Itinerary - 23 July 2008, 26 November 2007, Air Pacific – Pacific Sun Ticket – from Suva to Nadi – 23 November 2007.
4. See Dr Joeli Mareko’s Report dated 16 October 2008.
5. See paragraphs 4 to 7 above.

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.

(2) An application under this rule shall be made by summons but may be included in a summons for summary judgment under O 14 or O 86.

(3) An application under this rule shall be supported by an affidavit which shall-

(a) verify the amount of the damages, debtor other sum to which the application relates and the grounds of the application;

(b) exhibit any documentary evidence relied on by the plaintiff in support of the application.

(4) 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.

(5) Notwithstanding the making or refusal of an order for an interim payment, a second or subsequent application may be made upon cause shown.

Order for interim payment in respect of damages (O 29, r 11)

11.-(1) If, on the hearing of an application under r 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 or, where there are two or more defendants, against any 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 plaintiffs claim;

(b) a public authority; or

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

[15] An order for **interim payment** in respect of damages may be made if the Court is satisfied that either of the three conditions set out in O 29 r 11 (1) exists. And if the case is essentially a personal injury claim, the court will only award interim damages if it is satisfied that the defendant falls within either of the three categories set out in r 11(2). In this case, because the second defendant's insurer has taken on the defence of the case and has admitted liability - **O 29 r 11(1)(a)** and **r 11(2) (a)** are both satisfied.

APPLYING THE PRINCIPLES

[16] As stated, the defendant's insurer has admitted liability in this now-subrogated action. Even in the face of questions about her alleged trip to New Zealand in 2007 and 2008 for various medical procedures (for which I will reserve any finding until I have heard arguments at the hearing on assessment of damages) - the glaring undeniable fact remains that Ms Mani was initially hospitalized for some eight weeks in Fiji during which time she was also on a course of pain killers and was on crutches. These are sufficient in my view to

support an interim award under O 29 Rules 10 and 11 – and there is no need for me to consider the special damages claimed at this time.

[17] I am also of the view that Ms Mani has established the urgency which has driven her to seek interim payment.

5 [18] Where liability is admitted by an insurer who of course is in a position to pay damages, there is absolutely nothing wrong – in my view – with a plaintiff asking for interim payment in order to settle some urgent debt. And it is irrelevant whether or not the urgency claimed even remotely relates to the plaintiff’s cause of action. So long as the interim award does not exceed ‘a **reasonable**

10 **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 (see *Shearson Lehman Bros Inc v Maclaine Watson & Co* [1987] 1 WLR 480, 492H as per Nicholls LJ).

15 [19] In *Chandra v City Auto Trimmers Ltd* [2011] FJHC 760; HBC270.2008 (22 November 2011), Master Amratunga cited the following:

15. In the said case of *Schott Kem Ltd v Bentley* [1991] 1 QB 61 at 73 & 74 it was further held that:

20 ‘The first submission was that it is for a plaintiff to satisfy the court of his need for an **interim payment** of that he will suffer prejudice if he does not obtain one and that in the present case Schott Kem had produced no evidence of need or prejudice.

In support of this submission counsel relied on the dictum of Croom Johnson LJ in *Breexe v R McKennon & Son Ltd* (1985) 32 BLR 41, 50, where he said that the plaintiff’s evidence should explain why the order is required and cover ‘the need for the plaintiff to have the money’ In addition reliance was placed on the following passage in the judgment of Nicholls LJ in *Shearson Lehman Bros Inc v Maclaine Watson & Co* [1987] 1 WLR 480, 492 G, where he said:

30 ‘The underlying purpose of [r 11 and 12] is the same: to mitigate hardship or prejudice to a [plaintiff] which may exist during the period from the commencement of an action to the trial.’

Moreover, reference might also have been made to a similar dictum as to the underlying purpose of the rules of Ralph Gibson LJ in *Ricci Burns Ltd v Toole* [1987] 1 WLR 993, 1002b.

35 Counsel for Schott Kem, on the other hand, relied on the fact that in *Shearson Lehman* [1987] 1 WLR 993, Lloyd LJ **rejected an argument on behalf of the defendants that this Part of O 29 was only intended to apply in very special circumstances where the plaintiff can show real hardship.**

40 **As I understand the present practice, it is customary in personal injury actions for interim payments to be limited to sums for which the plaintiff can show a need. This is a sensible course because large interim payment in such case may lead to difficulties is an order of or repayment is subsequently made under O 29 r 17.**

45 **I am not satisfied, however that there is any restriction implicit in the rules which prevent an interim payment order being made in the absence of evidence of need or prejudice.** By the use of the words ‘*if it thinks fit*’ **both rule s 11 and 12 confer discretion on the court whether to order an interim payment at all.** Moreover the amount of the payment is expressed to be ‘*of such amount as [the court] thinks just*’ with that additional limitation in the case of damages the amount is not to exceed ‘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 the matters specified. **For my part I can see no basis for any further limitation on the jurisdiction of the court to order interim payments other than those set out in O 29 itself.**

50 **I would therefore reject the argument that it is necessary for Schott Kem to produce evidence of need or prejudice.’**

CONCLUSION

[20] I am satisfied that an award for interim payment should be made to Ms Mani. After considering all, I award interim payment of \$75,000 (seventy five thousand dollars). This is to be paid within 7 days of the date of this ruling.

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Interim payment awarded.

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