

**IN THE HIGH COURT OF FIJI**  
**AT SUVA**  
**CIVIL JURISDICTION**

**Civil Action No. HBC 282 of 2013**

**BETWEEN** : **AVINESH KUMAR** of Lot 6, Salala Road, Nasinu, Unemployed.

**PLAINTIFF**

**AND** : **RISHKEN SHANEEL REDDY** of Gailau, Rakiraki, Labourer.

**DEFENDANT**

**BEFORE** : **Acting Master Thushara Rajasinghe**

**COUNSEL** : **Mr. Chand D.** for the Plaintiff  
**Mr. Sharma B.** for the Defendant

**Date of Hearing** : **2<sup>nd</sup> April, 2014**

**Date of Ruling** : **6<sup>th</sup> June, 2014**

**RULING**

**A. INTRODUCTION**

1. The Plaintiff filed this Summons for interim payment pursuant to Order 29 rules 10 and 12(c) seeking following orders inter alia,
  - a. *That an interim payment in the sum of \$25,000 be made herein to the Plaintiff pursuant to Order 29 rule 10 and rule 12(c) of the High Court rules of Fiji,*
  - b. *That this Honorable court give such further direction for the further conduct of the within action pursuant to Order 29 rule 14,*
  - c. *Other relief as this honorable court may deem just,*
2. The Plaintiff filed his affidavit in support with this Summons. The Defendant, upon being served with this Summons, filed his affidavit in opposition. Subsequently, this Summons was set down for hearing on the 2<sup>nd</sup> of April 2014, where the counsel for the Plaintiff and

the Defendant made their oral arguments. Apart from their oral arguments, they submitted their respective written submission at the hearing. Having considered the Summons, respective affidavits, oral arguments and written submissions of the Plaintiff and the Defendant, I now proceed to pronounce my ruling as follows.

**B. BACKGROUND,**

3. The Plaintiff instituted this action by way of a writ of summons against the Defendant seeking following relief inter alia ;
  - a) *Special Damages,*
  - b) *General damages,*
  - c) *Interest pursuant to section 3 law reform (Miscellaneous) ( Interest) Act Cap 27,*
  - d) *Post judgment interest,*
  - e) *Costs,*
  - f) *Such other relief as the court deems just and equitable in the circumstances,*
4. This is an action for the damages for personal injuries. The claim is founded on an accident took place on the 25<sup>th</sup> of May 2013 where the motorbike driven by the Plaintiff was collided with the vehicle driven by the Defendant alone the Queens road, Nakauleve, Navua. The Plaintiff claims that he sustained serious injuries as a result of this accident and the accident was caused by the negligence of the Defendant. He claims Special and General Damages from the Defendant for the injuries and the pain he sustained and subsequent difficulties he suffered as a result of this accident.
5. The Defendant served his acknowledgment of service on the 29<sup>th</sup> of October 2013 and served his statement of defence on the 13<sup>th</sup> of November 2013. Subsequently the Plaintiff filed this Summons for interim payment on the 9<sup>th</sup> of December 2013 together with his affidavit in support.

**The Plaintiff's Submissions,**

6. The Plaintiff stated in his affidavit in support that this accident was occurred due to the negligence of the Defendant. He stated that while he was heading to Pacific Harbour from Suva along the Queen's road on his motorbike, the Defendant who had parked his vehicle on the road, without notice or any signal drove it onto the road and made a sudden U-turn in front of the Plaintiff's motorbike. The motorbike of the Plaintiff collided with the Defendant's vehicle and he sustained serious injuries as a result of that. The Plaintiff tendered a copy of the Motor vehicle accident report dated 24<sup>th</sup> of September 2013 as an annexure to his affidavit.
7. The Plaintiff further deposed that he suffered from open segmental fracture to the right tibia and fibula, lacerations to his back and hip as well as abrasions to his head. He tendered a medical report dated 22<sup>nd</sup> September 2013 as an annexure to his affidavit. He was hospitalised and treated at the Navua Hospital, CWM hospital and then at the Suva Private Hospital. He stated that due to these injuries he was not able to attend to his work and as a result of that, he was terminated. He claimed that he is suffering from ongoing pain and suffering and loss amenities of life along with past and future economic loss due to these injuries.

#### **The Defendant's Submissions,**

8. The Defendant is objecting for this Summons and contended that the injuries are healing as per the medical report tendered by the Plaintiff. The Defendant further claimed that the Plaintiff was not terminated, but he was given a redundant package by his former employer. The Defendant mainly argued that the Plaintiff failed to provide any substantial documentary evidence to substantiate his claim for this interim payment.

#### **C. THE LAW,**

9. Order 29 part II deals with the interim payments, where O 29 r 10 (1) states that;

*“ 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”.*

10. An application for interim payment should be made by Summons together with an affidavit in support. The affidavit must contain with the verified information of the amount of damages, debt or other sum to which the application relates and other grounds of the application. Furthermore, the applicant is required to provide any documentary evidence relied on by him in support of the application.
11. Order 29 rule 11 (1) has provided the grounds to be considered for an application for interim payment in respect of damages, where it states that ;

*“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 “ respondent”) had 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 a judgment for substantial damages against the respondent or, where there are two or more defendants, against any of them,*

*The court may, if it think fit and subject to paragraph (2), order the respondent to make an interim payment of such amount as it think 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 counterclaim on which the respondent may be entitled to reply;”*

12. The court is not allowed to make any order for interim payment under O 29 r11 unless it satisfied that the Defendant is a person who is insured in respect of the Plaintiff’s claim, or a public authority, or a having means and resources which enable him to make such interim payment. (O 289 r11 (2).

13. Neill L. J. in Schott Kem v Bently (1991) 1 Q.B 61 ) has outlined an inclusive description of the procedure for the application for interim payment, where he held that;

*“from the wording of the relevant rules and from these authorities it seems clear;*

- (i) *That rules 11 and 12 of Order 29 form part of a single code; see Shearson Lehman (1987) W.L.R. 480, 492 h per Nicholls L.J.,*
- (ii) *That under both rules the court approaches the matter in two stages,*
- (iii) *That at the first stage the court has to consider whether it is “satisfied” of one of the matters set out in sub-paragraph (a),(b) and (c ) of the rules. Thus for example, in a case where rule 11 (1) (c) is relied on the court has to be satisfied “ 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” .....*
- (iv) *That in order for the court to be satisfied that the plaintiff would obtain judgment; “Something more than a prima facie case is clearly required; but not proof beyond reasonable doubt. The burden is high. But it is a civil burden on the balance of probabilities, not a criminal burden” see Shearson Lehman (1987) W.L.R. 480, 489, per Lloyd L.J.....*
- (v) *That at the second stage the court, if satisfied that the plaintiff would recover a substantial sum, may then proceed , if it thinks fit, to order an interim payment “ of such amount as it thinks just”. At this stage under rule 1(1) the payment must 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”.*

#### **D. ANALYSIS,**

14. Having reviewed the relevant laws and legal principles pertaining to interim payment, I now turn to analyse the evidence presented before me with the relevant laws and principles.
15. The onus is on the Plaintiff to satisfy the court that if this action proceeded to trial, he would obtain judgment for substantial damages. As outlined by Neill L. J in **Schott Kem Ltd v Bentley (supra)** the burden is high, though it is a civil burden on the balance of probabilities.
16. The Plaintiff's claim is founded on his allegation that this accident was caused due to the negligence of the defendant and he suffered serious injuries as a result of it. The Plaintiff tendered a copy of the motor vehicle accident report dated 24<sup>th</sup> of September 2013 and a copy of his medical report dated 22<sup>nd</sup> of September 2013 issued by the Suva Private Hospital together with few photographs of his injuries. He further claims that he was terminated from his employment due to his injuries sustained as a result of this accident.
17. The Defendant has not raised any form of a defence rather than a mere denial of the statement of claim in his statement of defence. In his affidavit in opposition to this application, the Defendant contended that the injuries are healing as per the medical report and the defendant was not terminated but offered a redundancy by his employer. Moreover, he contended that the Plaintiff has failed to provide documentary evidence to support his claim as required by O 29 r 10 (3) (b).
18. The motor vehicle accident report made by the Navua police station confirmed the occurrence of this accident involving the Plaintiff and the Defendant on 25<sup>th</sup> of May 2013. The report concurred with the Plaintiff's allegation of negligence and it further confirmed that the Defendant was convicted for the offence of "Dangerous driving occasioning grievous bodily harm" in the Navua Magistrates' court on 22<sup>nd</sup> of July 2013.
19. The Plaintiff claimed in his affidavit in support that he suffered from open segmental fracture to the right tibia and fibula, laceration on his back and hip and abrasions to his head. However, the medical report tendered by the Plaintiff only confirmed that he had



fractures to the right tibia and fibula and no reference to any other injuries. The report confirmed that he is only stable on crutches and his fractures are healing.

20. With the evidence presented before me, I am satisfied that the Plaintiff would be able to satisfy the court that this accident has actually occurred and the Plaintiff had sustained segmental fractures to the right tibia and fibula. Furthermore he would be able to satisfy that he is not able to walk and only stable on crutches.
21. Meantime, I find that the Plaintiff has not properly verified the amount of the damages and failed to provide any documentary evidence to substantiate any claim of special damages which he sought. In respect of the loss of employment, it is not specifically clear that he was offered this redundancy due to his injuries or due to an internal restructuring scheme of the employer. The second paragraph of the letter dated 17<sup>th</sup> of July 2013 of his employer has not clearly specified the abilities referred therein was in respect of his physical inability caused by this injuries or his professional or technical ability.
22. Having considered the evidence presented before me during the hearing of this application, I am satisfied that the Plaintiff would obtain a judgment for substantial damages for the accident and injuries he suffered as a result of this accident if this action proceeded to trial. The Plaintiff has not properly verified the amount he sought in this Summons wherefore; the court is not in a position to properly consider the amount of interim payment sought by the Plaintiff. Nevertheless, I could say that if the Plaintiff receives an award on the lowest scale for the injuries and the pain he suffered as mentioned in paragraph 20 above as a result of this accident, it would probably go above the amount he sought in this Summons, though it is not possible to say that the amount he is seeking in this summons is a reasonable proportion of the award he would obtain at the conclusion of the trial. The Plaintiff is still recovering from the injuries and no permanent disabilities have yet been determined, though the injuries sustained were serious. In view of these reasons, I determine an interim payment of \$ 10,000 is a just and a reasonable proportion of the damages the Plaintiff would obtain if the action proceeded to trial. The defendant is represented by his insurer during the hearing of this Summons, wherefore

this order of interim payment does not fall with the restriction stipulated under O 29 r 11 (2).

23. In conclusion, I make following orders that;

- a. The Plaintiff is granted an interim payment of \$ 10,000 to be paid by the Defendant to the Plaintiff within 21 days of the date of this order,
- b. The Plaintiff is awarded cost of \$ 300 assessed summarily,
- c. The Registry is order to take steps pursuant to Order 29 rule 15 of the High Court in respect of this Summons.

Dated at Suva this 06<sup>th</sup> day of June, 2014.



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**R.D.R. Thushara Rajasinghe**  
**Acting Master of High Court, Suva**