

2 A brief history of the action follows.

3 The Plaintiff suffered injuries in two motor vehicle accidents in 1992 and these actions were commenced. Liability for the accidents has been admitted. Damages are in issue.

4 The matters were first set for trial to commence on December 4, 1995. There was no judge to hear them and they were adjourned. Five days was the estimated time to complete the trial. They came on before me on May 6 and were heard for five days. The five-day estimate was woefully inaccurate. At the conclusion of the five days, the Plaintiff's case had not closed. The trials are scheduled to resume in mid-September 1996.

5 Causation is a significant issue in these actions. The Plaintiff alleges that he suffered a herniated disc which will prevent him from continuing his long-time occupation of truck driver. The Defendants say if he has a herniated disc, it was not the result of either accident. There is no doubt that the Plaintiff suffered some injury independent of the herniated disc - a fractured rib in the first accident and soft-tissue injuries to his back, neck and shoulders in both of the accidents, causing him to miss two weeks of work in March 1992 and another week in December 1992. Save for these two periods, the Plaintiff has continued his employment as a truck driver, and as I understand his evidence, has no immediate plans to withdraw from that work. There is evidence that he earned more in 1994 than in any other year and he expected to earn as much or more in 1995.

6 The authority for an order sought by the Plaintiff is *Serban v. Casselman* 1995 CanLII 2291 (BC C.A.), (1995), 2 B.C.L.R. (3d) 316 (C.A.). In *Serban* the plaintiff obtained judgment on the issue of liability for damages suffered in a motor vehicle accident. The issue of quantum of damages was fixed for trial. The trial was adjourned because no judge was available. At a pre-trial conference, Wong J. when granting an adjournment, ordered that the defendants pay \$10,000 as an advance against the plaintiff's income loss prior to the date of trial, and \$3,500 monthly thereafter for one year. Judge Wong relied on Rules 1(5), 1(12) and 35(3) of the Rules of Court when making his order. The defendants appealed. The Court dismissed the appeal. Macfarlane J.A. delivering the judgment of the Court, said at p. 319:

I agree that the order made in this case was an exceptional order. The order did not create new substantive law however, but the term imposed was a matter of substance. There is no ambiguity that I can see in R. 1(12) or in R. 35(3). The legislature in giving the force of law to Rules has given the Court the power to make orders which it thinks just or to attain justice. To do so it may be necessary to make orders which are of substance.

7 And at p. 320, he said:

I think it clear that there is jurisdiction under R. 1(12) and R. 35(3) to impose terms in granting an adjournment but the term must be just in all of the circumstances. Since the Rules have the force of law I do not think it matters that the term imposed is one of substance but again I say it must be just. The real question on this appeal is whether an order that payments be made on account of damages prior to the assessment of damages is a just one.

. . .


If the jurisdiction exists to make an order for advance payments it is an extraordinary remedy and should only be made in circumstances in which the defendant's conduct in the litigation demands such an order.

While such orders are often made when the adjournment was brought about through the fault of one party or where the conduct of the

litigation demands such an order, the rule is not restricted to matters of that kind. It is obvious that an order for advance payments should only be made in special circumstances. Obviously such an order should not be made unless the judge who makes it is completely satisfied that there is no possibility that the assessment will be less than the amount of the advance payments. In the circumstances of this case I think Mr. Justice Wong was justified in reaching such a conclusion.

Furthermore given the injuries sustained, the medical condition of the plaintiff, his financial circumstances and his basic economic requirements it would have been unjust not to have made the order.

I would dismiss the appeal.

8 In *Britney v. Barber*  reflex, (1995), 17 B.C.L.R. (3d) 122, Wong J. made a similar order. In that case, liability was admitted. A summary trial application was made by the plaintiff for special damages from the date of the accident to the day of the order, and for partial wage loss, and damages for future expenses to be incurred. The material in support of the application was not in proper order and the application was refused. A trial date was some months hence. The plaintiff applied for an advance payment on the ground that she was suffering difficult financial hardship. Relying on the judgment of the Court of Appeal in *Serban*, Wong J. ordered an interim payment of \$25,000.

9 Clearly, the Court has the power to grant the Plaintiff's application if it finds special circumstances that warrant it. I conclude there are no special circumstances in this case. These are my reasons.

10 But for two brief periods in 1992, the Plaintiff has worked since the accidents and earned good money. He is not suffering "difficult financial hardship" (*Britney v. Barber*).

11 The adjournment of the trial was not caused by any fault of the Defendants. The estimate of the trial time was inadequate. The Plaintiff's case has not concluded.

12 The cause of the disc injury is not resolved.

13 I am not yet satisfied that the Plaintiff's other injuries – fractured rib and soft tissue injuries would result in an award of \$35,000, the sum sought by the Plaintiff. In *Serban*, the Court of Appeal cautioned against making an advance payment where the Court was not completely satisfied that there was no possibility that the assessment would be less than the amount of the advanced payments.

14 The trial will resume next month.

15 I am not prepared to grant the Plaintiff's application on the alternate ground – that the Court grant judgment pursuant to Rule 18 and order a partial payment of damages. I agree with the Defendants' submission that if the "partial judgment" methodology is used to calculate the amount of the advance, the entitlement would still depend on a finding of "special circumstances" of which there are none.

16 The application is dismissed.

"G.R. COULTAS, J."

Vancouver, B.C.
8 August 1996