IN THE HIGH COURT OF FIJI

WESTERN DIVISION

AT LAUTOKA

[CIVIL JURISDICTION]

Civil Action No: HBC 215 of 2012

BETWEEN	:	ANN ELIZABETH of Lexington, Texas *Plaintiff*
AND	:	STARWOOD PROPERTIES LIMITED *1st Defendant*
AND	:	DUBBO LIMITED trading as WESTIN RESORT & SPA LIMITED *2nd Defendant*
AND	:	MR SHANE CUNNING of WESTIN RESORT & SPA, Nadi, Fiji Islands, General Manager *3rd Defendant*
Before	:	Hon. Mr. Justice R. S. S. Sapuvida
Counsel	:	Mr Eroni Maopa for the Plaintiff No Appearance for the 1st Defendant Mr John Apted for the 2nd Defendant Mr Josefa Cati for the 3rd Defendant
Date of Ruling	:	30th January 2017

RULING

(On preliminary issue of admissibility of plaintiff's supplementary list of documents)

Background to the Issue

[1]. On 6 November 2015, the plaintiff's solicitors filed a supplementary affidavit verifying list of documents. They did so without leave or notice to the defendants. The supplementary affidavit is not sworn by the plaintiff, but rather by a law clerk in the plaintiff's solicitors. The plaintiff's solicitors did not serve it on the defendants until late on Thursday, 12 November 2015 and then only did so by facsimile. Except for one document dated 3 September 2015, the other documents are more than a year old. The defendants object to the filing of this affidavit, and to the production of any documents listed therein.

[2]. The trial had been fixed for 17th November 2015.

The Defendants' Objections

[3]. When the matter was taken up for trial on 17th November 2015, the defendants raised several preliminary objections on the following:

(i) The plaintiff's supplementary affidavit verifying list of documents;
(ii) The filing of plaintiff's bundle of documents; and
(iii) Hearsay notice under the Civil Evidence Act, 2002

The submissions of the Defendants

[4]. The defendants heavily resisted the plaintiff's supplementary list of documents and counsel for the defendants orally submitted that the time for the filing of the plaintiff's lists of documents has long expired. The defendants have consistently pointed out the deficiency in the plaintiff's documents for many months. The majority of the documents are more than a year old, and could and should have been discovered earlier.

[5]. In addition to the oral submissions, the parties wanted to file written submissions as directed by the Court on the same since the matter is deeply contested by both the parties.

[6]. The defendants submit that the plaintiff's solicitors' earlier default in relation to serving her affidavit verifying list of documents. Although O.25 r.8 (1) (a) of

the High Court Rules 1988 provides for automatic discovery, this did not take place.

[7]. On 17 March 2014, the Court ordered discovery within 14 days, subject to seeking further time. On 17 April 2014, a further 14 days was given to the parties. The defendants filed and served their affidavit on 15 April 2014.

[8]. The plaintiff's solicitors filed an affidavit for the plaintiff on 17 April 2014. However, it was not served on the defendants until 29 April 2014, and even this required a specific order of the Master on 28 April 2014.

[9]. The supplementary affidavit filed on 6 November 2015 also does not comply with the requirements in that it is sworn by an employee of the plaintiff's solicitors' firm. [Form 14 of the High Court Rules and the White Book paragraph 24/5/3]

[10]. The late discovery of these documents only a few days before the trial and after withholding the supplementary affidavit for nearly 1 week and greatly prejudices the defendants, the Counsel for defendants submitted. The defendants point out that inadequate time to request copies, consider and take instructions on these documents, and call any evidence that may be required to deal with these documents.

[11]. O.24 r.16 of the High Court Rules 1988 states –

> *"Failure to comply with requirement for discovery, etc.*
>
> 16.–(1) If any party who is required by any of the foregoing rules, or by any order made thereunder, to make discovery of documents or to produce any documents for the purpose of inspection or any other purpose, fails to comply with any provision of that rule or with that order, as the case may be, then, without prejudice, in the case of a failure to comply with any such provision, to rules 3(2) and 11(1), -
>
> (a) that party shall not be entitled subsequently to produce a document in respect of which default was made without the leave of the Court, and
>
> (b) the Court may make such order as it thinks just including, in particular, an order that the action be dismissed or, as the case may be, an order that the defence be struck out and judgment be entered accordingly."

[12]. The defendants seek an order under O.24 r.16 (1) (a) that the Plaintiff is not entitled to produce in evidence any of the listed documents in the supplementary affidavit verifying list of documents.

Plaintiff's Bundle of Documents

[13]. On Friday, 13 November 2015, the defendants had received service of a filed "Plaintiff's Bundle of Documents". The defendants submit that this also was filed and issued on 6 November 2015 but plaintiff deliberately withheld for a week.

[14]. The defendants argue that there is no provision in the Rules or any Practice Direction for any such bundle. Instead Practice Direction No. 3/86 required parties to file an Agreed Bundle of Documents at least 7 days before the hearing. Although there was sufficient time for the plaintiff to comply with that requirement, no attempt was made by the plaintiff to get the defendants' agreement to any bundle of documents.

[15]. The plaintiff's bundle is prejudicial as it contains documents, the authenticity of which, and the admissibility of which, the defendants have not agreed to. It does contain a large number of documents which were not previously discovered. The defendants had neither seen, nor had the chance to consider those documents before.

[16]. It also contains "without prejudice" correspondence between the parties' solicitors, which, under well-known rules of evidence, are not to be disclosed to the Court. These documents had been listed in the plaintiff's initial list of documents in the plaintiff's affidavit verifying list of documents. The defendants' solicitors at that time had pointed out in Court that these documents were privileged and could not be disclosed. The defendants submit that it is completely improper to disclose their contents to the Court by way of a "Plaintiff's bundle of documents".

[17]. The defendants had received the bundle on the trial date with inadequate time to consider, take instructions and respond appropriately on its contents.

[18]. The defendants seek a direction that the plaintiff's bundle of documents should be removed from the Court file and will not be considered by the Court.

Hearsay Notice under Civil Evidence Act, 2002

[19]. Late Thursday, 12 November 2015, the plaintiff's solicitors purported to give notice under section 4 of the Civil Evidence Act 2002 (the Act) of plaintiff's intention to rely on two specific medical reports as hearsay evidence.

[20]. There are two separate aspects to the admissibility of the documents. First there is their status as hearsay, if produced by anyone other than the maker of the report. Second, and separately there is their status as opinion evidence.

[21]. In respect of their status as hearsay, section 4(1) of the Act states –

> *"Notice of proposal to adduce hearsay evidence*
>
> 4.–(1) A party proposing to adduce hearsay evidence in civil proceedings must, subject to the following provisions of this section, give to the other party or parties to the proceedings –
>
> (a) a notice of that fact; and
>
> (b) on request, the particulars of or relating to the evidence,
>
> as is reasonable and practicable in the circumstances for the purpose of enabling the other party or parties to deal with any matters arising from its being hearsay."

[22]. Section 5 of the Act preserves the other party's right to call the person whose hearsay statement is produced to be cross-examined as if the hearsay statement had been given in evidence-in-chief.

[23]. Section 6 of the Act deals with the weight of hearsay statements as follows:

> *"Considerations relevant to weighing of hearsay evidence*
>
> 6. In estimating any weight to be given to hearsay evidence in civil proceedings, the court must have regard to any circumstances from which any inference can reasonably be drawn as to the reliability or otherwise of the evidence, and in particular to the following-
>
> *(a)* whether it would have been reasonable and practicable for the party by whom the evidence was adduced to have produced the maker of the original statement as a witness;
>
> *(b)* whether the original statement was made contemporaneously with the occurrence or existence of the matters stated;
>
> *(c)* whether the evidence involves multiple hearsay;
>
> *(d)* whether any person involved had any motive to conceal or misrepresent matters;
>
> *(e)* whether the original statement was an edited account, or was made in collaboration with another or for a particular purpose;

(f) whether the circumstances in which the evidence is adduced as hearsay are such as to suggest an attempt to prevent proper evaluation of its weight."

[24]. In view of the short time to trial, the plaintiff's notice does not comply with the requirements of section 4, as the defendants have no time at all to deal with the matters arising, specifically with arranging to cross-examine the makers of the hearsay statements.

[25]. The Civil Evidence Act in section 15 provides –

"*Admissibility of expert opinion and certain expressions of non-expert opinion*

15.–(1) Subject to any rules of court under this Act, if a person is called as a witness in any civil proceedings, the person's opinion on any relevant matter on which he or she is qualified to give expert evidence is admissible in evidence.

(2) Where a person is called as a witness in any civil proceedings, a statement of opinion by the person on any relevant matter on which he or she is not qualified to give expert evidence, if made as a way of conveying relevant facts personally perceived by the person, is admissible as evidence of what he or she perceived.

(3) In this section "relevant matter" includes an issue in the proceedings in question."

[26]. The defendants submit that this section does not alter the common law but merely reaffirms the same rule.

[27]. Expert medical evidence in personal injury cases is also subject to a special rule in the High Court Rules Annotated O.25 r.8 provides as follows –

"Automatic directions in personal injury actions (O.25, r.8)

8.–(1) When the pleadings in any action to which this rule applies are deemed to be closed the following directions shall take effect automatically:

(a) there shall be discovery of documents within 14 days in accordance with Order 24, rule 2, and inspection within seven days thereafter, save that where liability is admitted, or where the action arises out of a road accident, discovery shall be limited to disclosure by the plaintiff of any documents relating to special damages;

(b) subject to paragraph (2), where any party intends to place reliance at the trial on expert evidence, he shall, within 10 weeks, disclose the substance of that evidence to the other parties in the form of a written report, which shall be agreed if possible;

(c) unless such reports are agreed, the parties shall be at liberty to call as expert witnesses those witnesses the substance of whose evidence has been disclosed in accordance with the preceding sub-paragraph, except that the number of expert witnesses shall be limited in any case to two medical experts and one expert of any other kind;

(d) photographs, a sketch plan and the contents of any police accident report book shall be receivable in evidence at the trial, and shall be agreed if possible.

(2) Where paragraph 1(b) applies to more than one party the reports shall be disclosed by mutual exchange, medical for medical and non-medical for non-medical, within the time provided or as soon thereafter as the reports on each side are available.

(3) Nothing in paragraph (1) shall prevent any party to an action to which this rule applies from applying to the Court for such further or different directions or orders as may, in the circumstances, be appropriate.

(4) For the purposes of this rule –

"a road accident" means an accident on land due to a collision or apprehended collision involving a vehicle; and "documents relating to special damages" include documents relating to any industrial injury, industrial disablement or sickness benefit rights.

(5) This rule applies to any action for personal injuries except any action where the pleadings contain an allegation of a negligent act or omission in the course of medical treatment."

[28]. O.25 r.8 (1) (b) requires a special report on the expert evidence to be prepared for the purposes of a personal injury action, failing which expert witnesses may not be called. This is to be prepared after discovery. It does not refer to a previously discovered medical report. It is to be available early so that the other party can take necessary steps, including obtaining their own expert commentary/evidence. Where an expert report is not agreed, this rule requires the parties to call their own expert witnesses and they would be subject to cross-examination.

[29]. The plaintiff has not complied with this requirement.

[30]. In Wati v Kumar **[2004] FJHC 358; HBC0214.2003 (26 March 2004)** Winter J allowed hearsay expert evidence to be given in a personal injury matter. The Plaintiff made a special application well in advance of trial. Mr Justice Winter, without specifically addressing either the common law rule regarding opinion

evidence or section 15, granted an order allowing an expert report to be prepared and tendered as hearsay, subject to the following –

"Accordingly for these reasons I grant the application made by notice of motion in respect of the doctor's evidence. However, I do observe that this statement will have to be presented to Court in the proper form and should:

1. *give details of the doctor's qualifications*
2. *give details of any material he relied on to make the report*
3. *summarise any range of opinion and give reasons for the reporting of the doctor's own opinion*
4. *contain an adequate summary of the conclusions reached*
5. *contain a statement that the doctor understands his duty to the Court and has complied with that duty and*
6. *contain a verification of the statement as truth such as:*

'I believe that the facts I have stated in this report are true and the opinions expressed are professionally responsible and correct."

If the report is not submitted in this form then I reserve leave to debar the evidence from being tendered in the case."

[Italic added]

[31]. In the instance, the reports which the plaintiff seeks to tender do not meet these requirements.

[32]. In Mobil Oil (Australia) Ltd v Digitaki [2010] FJSC 4; CBV0008.2008S (12 October 2010), the Supreme Court constituted by His Lordship Chief Justice Gates, Justice of Appeal Marshall and Justice Calanchini considered the hearsay provisions of the Civil Evidence Act and doubted Winter J's approach. The Court said –

"However if a hearsay statement is that of an interested party it is likely that the attempt to bring it in as hearsay will usually be an indication of unreliability. It will also be usually seen as an attempt to avoid cross examination.

41. Whilst in 1938, when witnesses were abroad or overseas it was difficult and expensive to communicate and to travel. In 2010 all this has changed and places are inter connected by relatively inexpensive air transport networks. In addition video link allows evidence within the first-hand knowledge and experience of the witness to be given directly to the court of trial and for cross examination to take place. It is not our view that peripheral witnesses from abroad whose evidence should be capable of being

agreed should travel or give evidence by video link. The Evidence Act 2002 is obviously a useful innovation in such cases. But where the witness is interested or controversial giving contested testimony at the heart of the dispute it seem to us that if he is not present or giving evidence by video link there must arise serious questions as to the weight to be accorded to his evidence.

42. *In Fiji in a judgment or ruling dated 26th March 2004 in Wati v Kumar and Island Buses Limited [2004] FJHC 358, Mr Justice Gerard Winter had an application for the Plaintiff's doctor to give hearsay evidence in the form of a statement. It was a personal injury case of modest proportions. Justice Winter allowed the Plaintiff leave to adduce the report of her doctor.*

43. *At page 6 Justice Winter said:*

'Although wide reaching in its implications the revision of the rules of evidence provided by the Civil Evidence Act of 2002 must be welcomed and embraced. Economies of scale and proportionality particularly in countries like Fiji with a limited ability to allocate scarce Court resources must inevitably lead to a design of systems that encourage efficiency and even handedness in civil litigation. Constructing and arguing cases by ambush and winning them by virtue of economic power alone should no longer be acceptable.'

44. *This court certainly agrees that trial by ambush should become a thing of the past. However in the present case, with no service of Kamal Singh's evidence the 2002 Evidence Act became an engine for surprise and ambush.*

45. *In the view of the Court the Evidence Act 2002 should be amended either to make it inadmissible if hearsay notice if not served timeously, or to allow, as happens in Hong Kong, a trial judge to have power to exclude hearsay evidence. In addition exchange of witness statements generally as is now mostly the norm in common law countries would all but eliminate surprise and ambush from civil litigation in Fiji.*

46. *We prefer the guidance given above generally to that of Mr Justice Winter. At page 5 Justice Winter said:*

'Where the reason for the witnesses absence is that he is unavailable by being overseas however it is likely that a judge would give "full weight" to the evidence.'

This Court does not agree. The position is that judges should be very wary where a key or controversial witness is said to be abroad or overseas.

47. *This Court now answers the question certified by the Court of Appeal to be of significant public importance. We have set out this at paragraph 14 above. The answer is that what the trial judge should do will vary with the circumstances.*

If it is uncontroversial framework of fact evidence the trial judge should admit it and give it weight. He should not give reasons because in the context the reasons for his decision will be obvious.

48. *Where on the other hand the hearsay evidence is at the centre of the dispute and is obviously controversial the trial judge will not require elaborate reasoning to dismiss the evidence as having little or no weight. However if in such a case, as happened here with Mr Justice Coventry, he gives full or substantial weight to the hearsay, he would be well advised to try to justify the decision by the terms of the statutory criteria as applied to the facts of the case. Even then the justification may tend to confirm that no weight should have been given to the hearsay evidence."*

[Italic added]

[33]. The Court had referred with approval to the approach in *Amrol* v *Rivera* [2008] HKEC 494, where hearsay evidence tendered two days before the hearing was excluded (although it considered that Fiji rules did not allow exclusion of hearsay). In both *Wati* and *Mobil Oil* the Court emphasised the opposing party's right to cross-examine the maker of the hearsay statement.

[34]. In **G.P. Reddy & Company Ltd v New India Assurance Company Ltd [2011] FJHC 680; HBC48.2008L (31 October 2011)** Dias Wickramasinghe J in a non-personal injury case, held that an expert report should have been previously disclosed or made the subject of an application to the Court. She also declined to accept certain evidence provided by an "expert" witness orally, as he had failed to establish his qualifications and the basis of his findings. She said –

"121. *However, in the present case I am unable to make a similar assessment, as his report is not before court. At the hearing, he did not give evidence whether he prepared any contemporaneous notes when he investigated the fire. I do not know the methodology used by him at the time he carried out the investigations and draw inferences whether his examination was indicative, and his conclusions are logical and fact based. I must state that I am bound to assess the facts relevant to this case on the evidence adduced before me. A court cannot take judicial notice of an expert. The expertise of an expert must be assessed on the facts in hand. Each case is unique and must be proved with credible evidence in support of that case. The defence had a duty to prove its defences with adequate evidence and satisfy court that the investigations were carried out in accordance with acceptable skills, and the opinions were formed based on the facts on the matter in issue.*

122. ...

123. To me just oral evidence of Mr. Luff stating that he has hands on experience with over 2300 investigation will not suffice to determine whether he in fact possessed sufficient skills and knowledge to have excluded 'electrical fault' as a possible cause of the fire. His pertinacity that he is an expert to determine origin of fires does not qualify him automatically to be an expert on 'electrical' causes. Nor has Mr. Luff supported his conclusions with acceptable evidence. The fact that Mr Luff is an expert by itself does not make his evidence reliable on the specific subject. Even if court accepts a witness as an expert, the expert is still required to substantiate his findings, by demonstrating the methodology followed, the evidence supporting his conclusions etc. Mr. Luff has failed to substantiate his findings before court. In the circumstances, I conclude that Mr. Luff had not submitted adequate evidence before this court to determine his skills and knowledge as an expert to express an opinion that the fire did not originate from an electrical fault."

[Italic added]

[35]. On appeal to the Court of Appeal in **New India Assurance Company Ltd v G P Reddy & Company Ltd [2014] FJCA 24; ABU0059.2011 (5 March 2014)** the Court of Appeal held:

"25. *Although the learned Judge did not consider the evidence of Mr. Luff as expert evidence, she nevertheless considered his evidence in detail and concluded that she was unable to accept his opinions given at the hearing which she reasoned out in the judgment from paragraphs [111] to [124] and it would be sufficient to quote the concluding paragraphs:*

'[123] To me just oral evidence of Mr. Luff stating that he has hands on experience with over 2300 investigations will not suffice to determine whether he in fact possessed sufficient skills and knowledge to have excluded 'electrical fault' as a possible cause of the fire. His pertinacity that he is an expert to determine origin of fire does not qualify him automatically to be an expert on 'electrical' causes. Nor has Mr. Luff supported his conclusions with acceptable evidence. The fact that Mr. Luff is an expert by itself does not make his evidence reliable on the specific subject. Even if court accepts a witness as an expert, the expert is still required to substantiate his findings, by demonstrating the methodology followed, the evidence supporting his conclusions etc. Mr. Luff has failed to substantiate his findings before court. In the circumstances, I conclude that Mr. Luff had not submitted adequate evidence before this court to determine his skills and knowledge as an expert to express an opinion that the fire did not originate from an electrical fault.

[124] Mr. Luff at the hearing confirmed that he handed over the report to Mr. Narayan's office. The defendant did not handover a copy to the plaintiff. I am of the view that it is safe for me to infer that the report contained

material that was adverse to the defendant's case or favourable to the plaintiff and therefore the defendant did not produce it in court.'

26. Having concluded that Mr. Luff's evidence could not be accepted as expert evidence, the learned Judge then went on to consider whether his evidence could be admitted under section 15(2) of the Civil Evidence Act 2002. The learned Judge arrived at the conclusion that Mr. Luff's conclusion amounted to a statement which was bordering on inference, unsubstantiated by facts. This conclusion of the learned Judge cannot be faulted as all relevant material regarding the evidence of Mr. Luff had been considered in arriving at that conclusion."

[Italic added]

[36]. Based on the foregoing, the defendants submit that the Court should rule that the plaintiff may not tender any expert medical evidence through anyone but an expert who is available to give evidence of his expertise and his methodology and who is available to be cross-examined. Alternatively, if any expert evidence is allowed as hearsay, if it contains evidence as to the issues of liability and quantum which are central issues, no weight should be given to it.

The Plaintiff's Submissions

[37]. The plaintiff's counsel submits that the filing of the supplementary affidavit is a necessary as the plaintiff was continuing her review and check with relevant medical doctors in USA prior to her flying over for the trial on 17th November 2015. As per a file note dated 16th April 2014 the counsel submits that the application to file supplementary affidavit was made to Court in the presence of the agent for the solicitor's for the defendant appearing in Court on that day and on such basis and upon receiving the document sent from the plaintiff the supplementary affidavit was filed, served and accepted by the defendant.

[38]. It is undenied that the Law Clerk has deposed the supplementary affidavit verifying list of documents. This affidavit of documents contains only the list of documents that are in the plaintiff's possession to be disclosed and nothing of substantive.

[39]. The Courts on numerous occasions commented as follows:

Affidavit sworn by Solicitors law clerks on contested matters should be a rare exception and the reason why a party is unable to depose ought to be explained. [***Vatukoula Gold Miners Ltd vs Dev Anand Ltd (2010)*** Civil Action 218 of 2008 quoting from ***Deo Singh [2005]FJHC 23;HBC 0423.2004***)10 February 2005]

Affidavits sworn through Solicitor's clerk was improper and the court cannot give it any weight whatsoever.[***Varani vs Aanuka Island Resort Ltd*** [2015] FJHC 73; HBC 161.2012 (6 February 2015)

[40]. The comment by Winter J is pertinent; in ***REPENI SULIMUANA MONOIVALU vs TELECOM FIJI LIMITED*** [03 March [2006] (unrep) Suva High Court Civil Action No. 527 of 1997, regarding the affidavits by law clerks at page 3 in the Judgment as follows:

"The habit of supporting or opposing applications to decide the rights of parties based on the information and belief of law clerks is an embarrassment to the clerk, her firm and the court file. Justice Madraiwiwi (as he then was) had this to say about the practice of using law clerks in this way:

" It is being made clear to counsel that affidavits by law clerks were not being entertained other than in non-contentious matters such as service of documents where not disputed. The most appropriate person to have sworn the affidavit in these proceedings was Mr. Joji Boseiwaqa who appeared on instructions from the Plaintiff at the relevant time. The court respectfully endorses the general thrust of dicta by Lyons J in Michael Harvey v Michael Kelly & Ray McGill, Civil Action No. HBC 323 of 1977 about the propriety of law clerks deposing affidavits".

[Cited in *Naidu v Gounder* [2015] FJHC 778; HBC225.2013 (15 October 2015); *Panache Investment Ltd vs New India Assurance* [2015]FHJC 056 of 2014]

[41]. The plaintiff's counsel is of the view that in the present objection the supplementary affidavit does not oppose or support the rights of the parties. It is just disclosing the additional list of documents available to the plaintiff hence non contentious and the authority above is distinguishable from the present case.

[42]. The assertion by the learned counsel for the second and third defendant submitted that *he consistently pointed out the deficiency in the plaintiff's document for many months* is misleading and has no basis. The documents were filed on 06th November 2015.

[43]. Firstly, the objection by the counsel for the defendants rely on the default in failing to comply with the automatic discovery in personal injury actions under Order 25 r8(1)(a) of the High Court Rules 1988-

[44]. Order 25 r 8(1)(a) provides for mandatory discovery of document within 14 days in accordance with Order 24 r 2 and inspection within 7 days thereafter. Order 24 r 2 (1) provides:

"... the parties to an action between whom pleadings are closed must make discovery by exchanging list of documents and accordingly, each party must, within 14 days after pleadings are deemed to be closed as between him and the other party, make and serve on that other party a list of documents which are or have been in his possession, custody or power relating to any matter in question between them in the action".

[45]. The counsel for plaintiff argues that the provision of the above rule does not apply to the present case due to the nature of the pleadings filed by the parties. The objection under the above Order is to be dismissed. The present action is not personal injury but, one based on negligence. The plaintiff's case here is that the defendant owes a duty of care towards the plaintiff but they failed to maintain such duty of care that caused her injury. In this regard the counsel points out Order 25 r 8(5) which provides:

"This rule applies to any action for personal injuries except any action where the pleadings contain an allegation of a negligent act..."

[46]. He further asserts that the writ of summons reads that the plaintiff alleges negligence and particularized the alleged negligent act. Therefore, automatic discovery of documents under Order 25 r8 does not apply. He cites the case of *G.P. Reddy & Company Ltd v New India Assurance Company Ltd* [2011] FJHC 680; HBC48.2008L (31 October 2011) sub heading – *Automatic Direction in Personal Injury]*

[47]. The plaintiff relies on ***Mati v Govind*** [2015] FJHC 379; HBC387.2011 (26 May 2015) C. KOTIGALAGE J; applied the well-known principle *if it's not forbidden it is allowed.*

[48]. In ***Govind*** (supra) the Court held;

1) *The Plaintiff is granted leave to adduce HD Forensic Experts Report as per paragraph of the Notice of Motion dated 21 January 2015.*
2) *The Defendant is granted 3 months' time to obtain a HD Forensic Experts Report and to produce the said Report through the Defendant, Chandra Sen Govind.*
3) *Costs of this application is costs in suit.*

[49]. In the above case the plaintiff applied to court by way of notice of motion before the trial commenced distinguishable from the present case. Therefore Order 25 r 8 does not apply in this instant.

[50]. However, in the present case, the parties followed the order by the Master of the High Court on the summons for direction dated 17th March 2014 (on p32-34 of the Copy Pleading) to advance the matter to enter for trial.

[51]. The plaintiff submits that the alleged withholding and delay, if any, on service of the supplementary affidavit is unintended due to the weekend and public holiday (Diwali) on 11th November 2015. Secondly, the defendants have more than sufficient opportunities to request documents referred to in the pleadings and affidavit. Order 24 r10 entitles the defendants at any time to serve notice to the plaintiff requesting for copies of document, although being disclosed, available or in her possession. Failing to apply under Order 24 r 10 and as the

defendants' insurer was involved; most medical examination reports and payment receipts were available to the insurer which were sent to the defendants solicitor. It is assumed that they have similar copies of document available to the plaintiff. Since nothing was heard from the defendants until 2 weeks prior to the trial, the plaintiff filed its bundle of document and served to and accepted by the defendants. There is no prejudice caused to them than to the plaintiff who had to pay for her and her counsel airfares from America to Fiji to attend trial.

Order 24 of the High Court Rules

[52]. They defendant objected under Order 24 r 16 for failure to comply with requirement of discovery.

[53]. Order 24 r16 (1) refers to noncompliance of the rules 1 to 15 by references to *any of the foregoing rules* and *fails to comply with any provision of that rule* without prejudice, *in the case of a failure to comply with any such provisions –*

(a) The party shall not be entitled to produce a document in respect of which default was made without the leave of the court, and

(b) the Court may make such order as it thinks just including, in particular, an order that the action be dismissed or, as the case may be...

[54]. The plaintiff denies any default under the rules in Order 24. The defendants even fail to specify the default under Order 24 that if there is non-compliance of any order of the Court upon application made under those rules then (a) and (b) above is applicable. Subsections (2) to (4) of rule 16 shows if any failure to comply the party is liable to committal.

Hearsay evidence – Section 4 of the Civil Evidence Act 2002

[55]. The Civil Evidence Act 2002 is divided into seven parts. Part 2 (Section 3-9) deals with hearsay evidence. Section 4 specifies what notice is required when a party is to adduce hearsay evidence in civil proceedings. The important sections here are sections 4(1) and (4) as follows:

"4 (1) A party proposing to adduce hearsay evidence in civil proceedings must, subject to the following provisions of this section, give to the other party or parties to the proceedings-

(a) a notice of that fact; and

(b) b) on request, the particulars of or relating to the evidence,

as is reasonable and practicable in the circumstances for the purpose of enabling the other party or parties to deal with any matters arising from its being hearsay.

4) A failure to comply with subsection (1) or rules made under subsection (2)(b) does not affect the admissibility of the evidence but may be taken into account by the court-

(a) in considering the exercise of its powers with respect to the course of proceedings and costs; and

(b) as a matter adversely affecting the weight to be given to the evidence in accordance with section 6."

"6. In estimating any weight to be given to hearsay evidence in civil proceedings, the court must have regard to any circumstances from which any inference can reasonably be drawn as to the reliability or otherwise of the evidence, and in particular to the following-

a) whether it would have been reasonable and practicable for the party by whom the evidence was adduced to have produced the maker of the original statement as a witness;

b) (b) whether the original statement was made contemporaneously with the occurrence or existence of the matters stated;

c) c) whether the evidence involves multiple hearsay;

d) (d) whether any person involved had any motive to conceal or misrepresent matters;

e) e) whether the original statement was an edited account, or was made in collaboration with another or for a particular purpose;

f) (f) whether the circumstances in which the evidence is adduced as hearsay are such as to suggest an attempt to prevent proper evaluation of its weight."

[56]. The issues dealt in the authority (GP Reddy & Company Limited (supra)] stated above was raised during trial where the trial judge had the opportunity of evaluating the witness and the document to adduce hearsay as opposed to the instant case.

[57]. Plaintiff's counsel argues that in any event if the court finds that there is non-compliance of the rules pursuant to the High Court Rules 1988 it is only proper and just that the matter be transferred to the Master of the High Court for further direction. I do not agree with that suggestion since this is not the time for those formalities to be ordered.

Final Analysis

[58]. It is claimed in the plaintiff's answering submissions that it was necessary to file the plaintiff's supplementary affidavit verifying list of documents "because the plaintiff was continuing her review and check with relevant medical doctors in the USA prior to flying over for the trial on 17 November 2015".

[59]. The Court sees this as a poor excuse and is disingenuous and misleading. Except for a couple of documents, the documents covered by the supplementary list appear to have been in plaintiff's possession for years and should have been listed in her original affidavit verifying list of documents. Assuming even those documents with post-dated; the original affidavit could have been discovered well before the trial in sufficient time for the defendants to consider them in their preparations for the trial.

[60]. It should be noted that the plaintiff's original affidavit verifying list of documents should have listed all relevant documents that were or had previously been in her possession, custody or power as at the date that the affidavit was sworn. The necessity to do so is made clear by O.24 r1 of the High Court Rules, which provides –

> *"Mutual discovery of documents*
>
> 1.–(1)After the close of pleadings in an action begun by writ there shall, subject to and in accordance with the provisions of this Order, be discovery by the parties to the action of the documents which are or have been in their possession, custody or power relating to matters in question in the action."

[61]. O.24 r3 further provides –

> *"Order for discovery*
>
> 3.–(1)Subject to the provisions of this rule and of rules 4 and 8, the Court may order any party to a cause or matter (whether begun by writ, originating summons or otherwise) to make and serve on any other party a list of the documents which are or have been in his possession, custody or power relating to any matter in question in the cause or matter, and may at the same time or subsequently also order him to make and file an affidavit verifying such a list and to serve a copy thereof on the other party.
>
> (2) Where a party who is required by rule 2 to make discovery of documents fails to comply with any provision of that rule, the Court, on the application of any party to whom the discovery was required to be made, may make an order against the first-mentioned party under paragraph (1) of this rule or, as the case may be, may order him to make and file an affidavit verifying the list of documents he is required to make under rule 2 and to serve a copy thereof on the applicant.

(3) An order under this rule may be limited to such documents or classes of document only, or to such only of the matters in question in the cause or matter, as may be specified in the order."

[62]. The necessity to discover all relevant documents is also reflected in the various paragraphs in prescribed form of the list of documents (see Forms 13 and 14 in High Court Rules 1988). Paragraph 5 of the list, of which a party must swear as to the truth in the verifying affidavit, relevantly states –

"5. Neither the Plaintiff [or Defendant], nor his Barrister and Solicitor nor any other person on his behalf, have now or has ever had, in his possession, custody or power any document of any description whatever relating to any matter in question in this action, other than the documents enumerated in Schedules 1 and 2 hereto."

[63]. The duty to make discovery is a very broad one and extends to all documents in a party's possession, custody or control whether or not they assist that party's case. The meaning the expression 'relating to matters in questions in the action' was given by Brett LJ in *Compagnie Financiére et Commerciale du Pacifique* v *Peruvian Guano Co* (1882) 11 QBD 55 at 63 as follows –

"... It seems to me that every document relates to the matters in question in the action, which would not only be evidence upon any issue, but also which, it is reasonable to suppose, contains information which may – not which must – either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put in the words "either directly or indirectly," because, as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit to either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of inquiry, which may have either of these two consequences [1]"

[64]. Brett LJ's formulation was adopted by the Fiji High Court in *A.B. Anand (Christchurch) Ltd* v *Australia and New Zealand Banking Group Limited* (1997) 43 FLR 22.

Requirements for Personal Injury Claims

[65]. The above rules are the general rules. However, as this is an action for damages for personal injury, the special rule in O.25 r.8(1)(a), which requires automatic discovery, should have applied.

[66]. The defendants referred to this rule in their earlier written submissions and the plaintiff has wrongly interpreted this as a basis of objection. The defendants earlier raised this as an observation only, and not as a ground of objection. This was because, in accordance with general practice, the defendants themselves did not make automatic discovery, and both parties only attended to discovery their documents after orders were made on the summons for directions.

[67]. However, O.25 r.8 is relevant to the defendants' objections on expert evidence.

[68]. The full text of the sub-rule is –

> *"Automatic directions in personal injury actions*
>
> 8.–(1) .....
>
> (5) This rule applies to any action for personal injuries except any action where the pleadings contain an allegation of a negligent act or omission in the course of medical treatment."

[69]. The defendants pointed out that the words "allegation of a negligent act or omission in the course of medical treatment" must be read together. It does not make grammatical or practical sense to read the words "negligent act" disjunctively from the words "or omission in the course of medical treatment". A disjunctive reading would mean that personal injury actions arising from negligent acts are not covered while those alleging negligence by omission (other than in medical treatment) are covered. There is no sensible reason for distinguishing between negligent acts and omissions whether generally or in medical treatment, and claims will often involve a combination of both negligent acts and omission.

[70]. It is to be noted that the requirements of O.25 r8 including that of automatic discovery apply to all personal injury cases except those based on medical negligence (whether arising by act or omission).

[71]. This is a personal injury claim, but there is no claim of medical negligence. O.25 r8 therefore applies.

[72]. In any case, this unfulfilled requirement has been overtaken because the Court made discovery orders under O.25 r3 on 17 March 2014. The Orders, which were sealed on 5 May 2014, included an order –

> "2. THAT the plaintiff within 14 days serve the 1st, 2nd and 3rd Defendants a List of Documents relating to the matters raised in the pleadings herein and file an affidavit verifying the same."

As noted, the order is not limited to any particular class of documents and must be interpreted as covering all documents which the Plaintiff would usually be obliged to list.

[73]. The plaintiff's original affidavit verifying list of documents was sworn on 16 April 2014, so it should have listed all documents that were or ever had been in the plaintiff's possession, custody or power on or before that date that related to the matters raised in the pleadings. That list contained a reference to copies of invoices/receipts and medical expenses, and a certain number of such documents were produced to the defendants.

[74]. Item No.1 of the list in the plaintiff's supplementary affidavit verifying list of documents, also refers to "copy of invoices/receipts and electrocution related medical expenses". Copies of number of documents of that description which had not previously been produced under the plaintiff's first affidavit verifying list of documents are contained in the contested plaintiff's bundle of documents. It is assumed that the general words of item No.1 of the list in the plaintiff's supplementary affidavit, was to cover those previously undisclosed medical receipts etc.

[75]. However, based on the dates shown on the invoices and receipts, most of these documents in the plaintiff's bundle of documents would have been in the plaintiff's possession, custody or power before the date the original Affidavit was sworn i.e. before 16 April 2014. They should all therefore have been listed in, and produced under the plaintiff's original affidavit verifying list of documents.

[76]. Similarly, the documents listed in documents 2 and 3 of the list in the plaintiff's supplementary affidavit verifying list of documents are reports from 2012 which should also have been discovered in the plaintiff's original affidavit verifying list of documents in April 2014.

[77]. The purpose of discovery is to give the other party advance notice of the evidence which is or was in the discovering party's possession, custody or power so that the other party can consider them and prepare their case for trial. It is accepted that sometimes it is not possible to include all relevant documents in the affidavit verifying list of documents. However, a party should notify the other side that their list is incomplete and must include the omitted documents in a supplementary affidavit as soon as possible and well in advance of trial to avoid trial by ambush. In this case, withholding these relevant documents until just 2 working days before trial meant that the defendants were not given a fair opportunity – or indeed any real opportunity – to prepare to respond to them.

[78]. It is conceded by the defendants that documents 4 and 5, being the reports of Dr Ronald Devera dated 16 April 2014 and of Marci A Roy dated 3 September 2015, came into the plaintiff's possession after 16 April 2014. However, again these also should have been included in a supplementary affidavit verifying list of documents as soon as possible i.e. in early September 2015 and well before the trial. In any event, the report of Marci A Roy should have been sent to the defendants as soon as it was received by the plaintiff in view of the imminent trial.

[79]. In summary, all but a few of the documents in the plaintiff's bundle and which it seems were intended to be disclosed by the plaintiff's supplementary affidavit verifying list of documents should have been discovered earlier. More importantly, there appears to be no good reason why the plaintiff's supplementary affidavit verifying list of documents was not filed and served until 2 days before trial.

[80]. The plaintiff's submissions rely on the Diwali public holiday as an excuse for the delayed service. This is again disingenuous and misleading. There is no reason why the affidavit could not have been served on the defendants' solicitors' agents in Lautoka or by facsimile to the defendants' solicitors before the Diwali holiday, indeed on the same day as it was released by the Court registry.

[81]. Given the imminence of the trial, there was indeed no reason why an unfiled affidavit and all of the documents were not sent to the defendants' solicitors to give them as much advance notice.

[82]. It is noted by the Court that the process followed clearly amounted to trial by ambush, and the Court is of the view that the list of documents and the documents themselves were deliberately withheld from the defendants to deprive them of the opportunity of fairly considering the evidence and preparing a case in response.

Affidavit by Law Clerk

[83]. It is contended in the plaintiff's answering submissions that it was permissible for her solicitors' clerk to swear her affidavits verifying list of documents. It is the opinion of the Court that the cases cited in the plaintiff's submissions in support of this contention are not on point. Those authorities deal with other non-contentious interlocutory procedural applications, but not on discovery. An affidavit verifying a list of documents is of a completely different nature and highly contested issue like in the instance.

[84]. As stated above, a list of documents is required to contain all relevant documents that are or have been in a party's possession, and the deponent

verifying the list is required to swear that the list provided is complete. A law clerk has no personal knowledge of a party's records and is unable to do this.

[85]. It is established that in proceedings in which an individual is a party, only that individual can verify the completeness of the list as required. In this regard, paragraph 24/5/3 of the White Book (1999) 1, states –

"By whom affidavit should be made – The prescribed form of affidavit (see Vol.2, Section 1A, para. 1A-25) requires the plaintiff or defendant to be the deponent. The obligation imposed by O.24, r.5(3) is therefore an obligation on the relevant party personally. The obligation must be modified in relation to corporations, and the practice whereby solicitors swear verifying affidavits in their capacity as agents for their clients has escaped criticism, but the obligation cannot otherwise be delegated, for example, to the holder of a power of attorney (Clauss v Pir [1987] 3 WLR 493; [1987] 2 All ER 752)."

[86]. In the circumstances, it was clearly inappropriate for the plaintiff's affidavits verifying list of documents to be sworn by a law clerk.

[87]. The plaintiff contends that it was incumbent on the defendants to request the documents that were discovered belatedly.

[88]. The rules and practice are to the effect that each party is obliged to discover all relevant documents in their possession, custody or power. A party who receives a sworn affidavit verifying list of documents and the documents listed in it, is entitled to assume, in the absence of any information to the contrary, that the other party has complied with its obligation to make full discovery of all relevant documents, and where that duty is breached, the consequences must be suffered by the defaulting party, not the innocent one.

[89]. In practice, where a party becomes aware of relevant documents that have not been discovered by the other side and which it wishes to consider, it can request those undiscovered documents. However, this does not detract from the other side's obligation to discover all relevant documents, and it can only apply to documents that the party applying knows about and wishes to inspect.

[90]. In any case, a party is only interested in documents that assist its case. It never requests further and better discovery of documents that advance the other party's case, because it does not need to produce them in evidence. Furthermore, it would suit the first party to leave the documents undiscovered since, if the second party that needs to rely on the documents fails to discover them, the second party will not be allowed to produce them in evidence, without an order of the Court.

[91]. In this case, the documents in the plaintiff's supplementary affidavit were all documents on which the plaintiff intends to rely for her claim. They were documents that the defendants could not know existed, and which they had no reason to request from the plaintiff. The plaintiff was herself required to discover them well before the trial.

[92]. O.24 r16(1) provides –

> *"Failure to comply with requirement for discovery, etc.*
>
> 16.–(1)If any party who is required by any of the foregoing rules, or by any order made thereunder, to make discovery of documents or to produce any documents for the purpose of inspection or any other purpose, fails to comply with any provision of that rule or with that order, as the case may be, then, without prejudice, in the case of a failure to comply with any such provision, to rules 3(2) and 11(1), -
>
> (a) that party shall not be entitled subsequently to produce a document in respect of which default was made without the leave of the Court, and
>
> (b) the Court may make such order as it thinks just including, in particular, an order that the action be dismissed or, as the case may be, an order that the defence be struck out and judgment be entered accordingly."

[93]. The plaintiff failed to comply properly with the order made on 17 March 2014 to serve on the defendants a list of documents relating to the matters raised in the pleadings herein and filed an affidavit verifying the same in accordance with the requirements of the Rules and practice. When she filed her affidavit verifying list of documents on 17 April 2014, she deliberately withheld a large number of documents from the defendants until 2 working days before the date of the trial. The reasons that have been advanced for the late discovery of the documents are unconvincing. The affidavit has also been improperly sworn and was filed without leave of the Court by a Law Clerk.

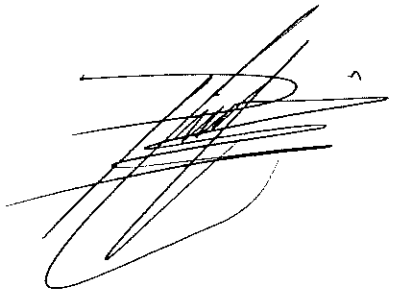
[94]. Hence, in all of the circumstances, it is the opinion of the Court that an order should be made that the plaintiff is not entitled to produce in evidence any document listed in the plaintiff's supplementary affidavit verifying list of documents.

[95]. Final Orders of the Court:

1. Plaintiff's supplementary affidavit verifying list of documents dated 6 November, 2015 is struck out and dismissed.

2. The documents listed in the said affidavit shall not be produced in evidence.

3. Costs shall be the costs in cause.



R. S. S. Sapuvida

[JUDGE]

High Court of Fiji

Delivered At Lautoka

30th January 2017