

IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA
CIVIL JURISDICTION

CIVIL ACTION NO. HBC 313 OF 2005

BETWEEN **NATALIE KATZMANN** formerly of Harvester Road, Vitogo,
Lautoka, but now of 74 Adelaide Street, Oxley Park NSW 2760,
Australia, Assistant Manager.

PLAINTIFF

A N D **BARSTOCK INVESTMENTS (FIJI) LIMITED** a limited liability
company having its registered office at Vuda Point, Lautoka.

DEFENDANT

Appearances : Ms V. Lidise for the plaintiff
 : Mr R. Singh for the defendant

Date of Hearing : 03 June 2019

Date of Ruling : 22 August 2019

R U L I N G

[on further directions]

Introduction

[01] This ruling concerns with an application for further directions.

[02] By a summons for further directions supported by an affidavit of Natalie Katzmann (*the plaintiff*), filed on 26 March 2019 (*the application*), the plaintiff seeks the following further directions in the action:-

1. *That at the trial of this action, the plaintiff be given leave to interpose the evidence of the plaintiff which has commenced and remains incomplete, with the evidence of Dr. Jonathan Adams.*
2. *That the plaintiff be granted liberty to call and lead Dr. Jonathan Adam's evidence via Skype;*

3. *That if leave is required, the plaintiff be granted leave to file and serve a further supplementary list of documents;*
4. *That if leave is required, the plaintiff be granted leave to file and serve any further supplementary lists of documents relating to documents that are not currently in the custody, possession and control of the plaintiff but that may subsequently come into her custody possession and control hereon up until the trial of his action;*
5. *That after the close of the defendant's case, the plaintiff be given liberty to call rebuttal evidence on the issue of the alternate defence of contributory negligence and or voluntary assumption of risk;*
6. *That each party be granted liberty to apply for any further directions if required, for the purpose of ensuring the efficient and fair conduct of the trial of this action;*
7. *That the costs of this application be costs in the cause.*

[03] The application is filed under O 25, R 8 of the High Court Rules 1988, as amended ('HCR') and the inherent jurisdiction of this Court.

[04] The defendant opposes the application on points of law without filing an affidavit in opposition.

[05] At hearing both parties made oral submissions, and the plaintiff also relied on the submissions filed previously in relation to filing of further supplementary affidavit.

Background

[06] In 2005, the plaintiff filed a personal injury claim against the defendant. After such a long delay (the delay, according to the plaintiff, was due to the uncertain situation that was prevalent in the country at that time). The trial was taken before me on 11-12 March 2019, when the plaintiff was giving evidence-in-chief. In the middle of her evidence, counsel for the plaintiff made an application seeking leave to file the second and third supplementary affidavit verifying list

of documents. The Court granted leave to file the supplementary affidavits despite the vehement objection raised by counsel for the defendant on the ground that it has been made after the commencement of the trial. However, the trial was vacated to enable the defendant to prepare their case to meet the newly disclosed documents. The date for the continuation of the trial is yet to be fixed. In the meantime, the plaintiff had made the current application.

The law

[07] Order 25, R 8 of the HCR states:

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 7 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 or she 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 subparagraph, **except that the number of expert witnesses shall be limited in any case to 2 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. (Emphasis supplied)*
- (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”.*

Discussion

Direction 1

- [08] The plaintiff seeks leave of the Court **to interpose the evidence** of the plaintiff which has commenced and remains incomplete, with the evidence of Dr. Jonathan Adams.
- [09] This is a strange application. It is not supported either by the law or case authority. The plaintiff’s evidence cannot be interposed with the evidence of an expert witness. The plaintiff has to give her evidence independently in support of her claim, particularly negligence of the defendant. I would, therefore, refuse direction 1.

Direction 2

- [10] The plaintiff seeks **liberty to call and lead Dr. Jonathan Adams’ evidence via Skype.**
- [11] The plaintiff on affidavit says that she would call and lead Dr. Adams’ evidence via Skype because of some reasons she cannot bring him to Fiji and the dates are unsuitable to him, and that it will cost her around \$43,010.55 to bring him here in Fiji for that week.
- [12] It is to be noted that there is no affidavit from Dr. Jonathan Adams confirming the fact that he cannot come to Fiji to give evidence as the dates are unsuitable to him.
- [13] It appears to me that the plaintiff is assuming that Dr. Adams would not come to Fiji as the dates are unsuitable to him.

[14] This is a 2005 case. The trial was vacated three times on the applications of the plaintiff. The plaintiff had ample opportunity to make this application prior to the commencement of the trial. The application is made in the middle of the trial, while the plaintiff was giving evidence.

[15] It is a belated application. It will prejudice the defendant if the direction is granted at this late stage of the proceedings. The plaintiff is attempting to take the case back to pre-trial stage. I would, therefore, refuse to grant leave to call and lead Dr. Jonathan Adam's evidence via Skype.

Direction 3

[16] The plaintiff seeks leave to file and serve a **further supplementary list of documents.**

[17] I have already ruled that Court's leave would be needed if a party wants to file further supplementary list of documents. They did not appeal this ruling. I do not find sufficient cause to revoke or vary my previous orders respecting leave to file further supplementary affidavit verifying list of documents under O 24, R 17. Therefore, the question "*if leave is needed*" does not arise. A party is not entitled to file supplementary list of documents as of right. The Court as well as the other side must know what documents are filed in the action and whether it is relevant to the claim.

[18] This leave is sought in the absence of any further supplementary list of documents intended to be filed. Therefore, the plaintiff is not entitled to seek this direction.

Direction 4

[19] The plaintiff **seeks leave, if leave is required, to file and serve any further supplementary list of documents relating to documents that are not currently in the custody, possession and control of the plaintiff but that may subsequently come into her custody, possession and control here on until the trial of this action.**

[20] This is a hypothetical application. The court cannot grant leave for this. If the court grants such leave, it would lead to a never ending process, as counsel for the defendant submitted. I accept the submission made by Mr Singh of counsel for the defendant that: *'it is like a never ending cycle and that has been clear from the*

plaintiff day one; the number of amendments made in this proceeding; the number of adjournments of trial; application after application.'

[21] I would, therefore, refuse to grant leave for this imaginary application.

Direction 5

[22] Under direction 5, the plaintiff seeks a direction that after the close of the defendant's case, the plaintiff be given liberty to call rebuttal evidence on the issue of the alternate defence of contributory negligence and or voluntary assumption of risk.

[23] This is a premature application. I would, therefore, refuse direction 5 as well.

Comments

[24] The HCR, O 25, R 8 (1) speaks of automatic directions in personal injury actions. In terms of this rule, when pleadings in any personal injury action are deemed to be closed the following direction shall take effect automatically:
(a) there shall be discovery of documents within 14 days..., inspection within 7 days...

[25] However, R 8 (3) states:

'(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.'
(Emphasis added).

[26] Automatic directions in personal injury claims take effect immediately after the close of the pleadings. The rule prescribes the time limit within which the automatic directions are to take effect. It must take effect with the time limit set by the rule. It is a pre-trial step.

[27] At this stage, after commencement of the trial, the plaintiff cannot file further supplementary affidavit verifying list of documents automatically. The plaintiff must apply to the court for such further or different directions or orders.

[28] It is not appropriate circumstances for the plaintiff to apply for further or different directions or orders.

Conclusion

[29] For the reasons I have set out above, I would refuse the further directions the plaintiff seeks at this stage of the proceedings. I would order the plaintiff to pay costs, which is summarily assessed at \$1000.00, to the defendant within 21 days of the date of this ruling.

The result

1. Plaintiff's application for further directions is refused.
2. Plaintiff will pay summarily assessed costs of \$1,000.00 to the defendant within 21 days of the date of this ruling.
3. The matter is now adjourned for mention to fix further trial dates at 9.30 am on 26 August 2019.

H.M. Mohamed Ajmeer
22/8/19
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M.H. Mohamed Ajmeer
JUDGE



At Lautoka
22 August 2019

Solicitors:

For the plaintiff/applicant: Young & Associates, Solicitors

For the defendant/respondent: Munro Leys, Solicitors