

IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

[CIVIL JURISDICTION]

Civil Action No. HBC 93 of 2015

BETWEEN: **SATELITE RENTALS LIMITED** a limited liability company having its registered office at West Point Arcade, Main Street, Nadi Town, Nadi.

Plaintiffs

AND: **DANIEL CHANDRA NATH** of 7960 Yeager Way, Sacramento, CA 95828, USA.

1st Defendant

AND: **SIMON SWAMY** of Field 40, Lautoka, in the Republic of Fiji Islands.

2nd Defendant

Before : Master U.L. Mohamed Azhar

Appearance: Ms. Arthi Bandhanna Swamy for the Plaintiff
Both Defendants are absent and unrepresented

Date of Ruling: 24th August 2018

RULING

01. Before me is the Notice of Assessment of Damages, Interest and Cost, filed by the plaintiffs pursuant to Order 37 rule 1 of the High Court Rules, following the Interlocutory Judgment sealed by the plaintiff on 19th of September 2016 against the first defendant in this case. The factual background of this case is that, the plaintiff is a rental car company and the first defendant, who is permanently domiciled in United States of America and had been in Fiji at all material times, entered into a Rental Agreement with the plaintiff for renting out of the vehicle registration number LR 580 belonged to the plaintiff, for a period of 13 days from the 4th to 16th day of June, 2015. It was alleged that, the first defendant, in breach of the said Rental Agreement, permitted the second defendant to take control and drive the said vehicle. The plaintiff claimed that, the second defendant on 14th June 2015 negligently and recklessly drove the said vehicle and caused the accident resulting in the vehicle being written-off. The plaintiff therefore claimed the pre-

accident value of the vehicle, being \$ 48,500.00, as the special damages, loss of income and profit in sum of \$ 170.00 per day, general and exemplary damages with the cost on Solicitor/Client indemnity basis. The following are the prayers sought by the plaintiff in the statement of claim;

- a. *The sum of \$ 48,500.00 (FORTY EIGHT THOUSAND FIVE HUNDRED DOLLARS) as special damages.*
- b. *Loss of income & profit (\$170 per day)*
- c. *General and Exemplary Damages.*
- d. *Costs on a Solicitor/Client indemnity basis.*
- e. *Any other Order that this Honourable Court deems just and expedient in the circumstances.*

02. The plaintiff on the same day it took out the writ against both the defendant, i.e. on 16.06.2015 filed an Ex-Parte Notice of Motion, supported by an affidavit sworn by its sales supervisor, pursuant to Order 54 of the High Court Rules and sought the following orders;

- a) *That before being allowed to depart from the Jurisdiction of this Honourable Court the 1st Defendant be ordered to provide the Plaintiff with a list of his assets whether within or without the Jurisdiction of this Honourable Court.*
- b) *That the 1st Defendant be restrained from removing from the Jurisdiction of this Honourable Court or otherwise dissipating, charging or dealing with any of his assets in the same Jurisdiction.*
- c) *That the 1st Defendant deliver his passport and all passenger tickets and travel documents held by him to this Honourable Court save and unless the Defendant can provide free and unencumbered assets belonging to him and having a total value of not less than F\$50,000.00 (FIFTY THOUSAND DOLLARS) and costs.*
- d) *That a Writ Ne Exeat Civitate be issued and directed to the Sheriff of this Honourable Court and his Deputy and all the Constables and other peace officers and all Customs Officers commanding them that in the event that Defendant should seek or attempt to depart from the Jurisdiction of this Honourable Court they should arrest DANIEL CHANDRA NATH of 7960 Yeager Way, Sacramento, CA 95828, USA*

and bring him before a Judge of the High Court as soon as practicable.

03. Though the court granted the above orders against the first defendant on the same day, the plaintiff could not execute the same, as the first defendant had already left the country. The plaintiff thereafter, with leave of the court, severed the writ on the first defendant out of jurisdiction, and on the second defendant as usual. However, none of them filed the acknowledgment or the defence. The plaintiff then sealed the judgement for default on 18.08.2015 against the second defendant, who was alleged to have negligently and recklessly driven the said vehicle. The said default judgment is as follow;

DEFAULT JUDGMENT

NO ACKNOWLEDGEMENT OF SERVICE OF WRIT OF SUMMONS
having been filed by the 2nd named Defendant herein, IT IS THIS DAY
ADJUDGED that:-

- a) *Therefore be Default Judgment against the 2nd named Defendant in the sum of \$48,500.00 (FORTY EIGHT THOUSAND AND FIVE HUNDRED DOLLARS).*
- b) *Loss of income and profit, general and exemplary damages, interest and costs be assessed.*
04. The plaintiff thereafter filed the Notice of Assessment of Damages against the second defendant on 11.04.2016 and it was fixed for hearing on 08.08.2016. On the hearing day, the counsel for the plaintiff sought the adjournment on two grounds, namely, (a) the main witness was abroad, and (b) the plaintiff wanted to seal the default judgement against the first defendant too. The court allowed the application and vacated the hearing. On the next date (05.09.2016) the counsel moved to amend the default judgment entered and the court, having directed to make formal application, adjourned the matter for 19.09.2016. On that date, further time was sought by the plaintiff's counsel and the court directed that the matter to take normal cause. The plaintiff thereafter sealed the interlocutory judgment, on 19.09.2016 against the first defendant, who hired the said vehicle, though he was not within the jurisdiction. The said judgment is as follows;

INTERLOCUTORY JUDGMENT

*NO ACKNOWLEDGEMENT OF SERVICE OF WRIT OF SUMMONS
having been filed by the 1st named Defendant herein, IT IS THIS DAY
ADJUDGED that:-*

- a) There be Interlocutory Judgment against the 1st named Defendant on liabilities.*
- b) Loss of income and profit, special, general and exemplary damages, interest and costs be assessed.*

05. Following the above said interlocutory judgment, the plaintiff filed the instant Notice of Assessment of Damages on 21.10.2016. At the beginning of the hearing the counsel for the plaintiff informed the court that, though the plaintiff entered the default judgment against the second defendant, it could not execute it as the second defendant has been bed-ridding and devoid of properties to satisfy the judgment amount. Therefore, the assessment of damages was based only on the Interlocutory Judgment entered by the plaintiff on 19.09.2016 against the first defendant. The plaintiff called its Senior Sales Representative, one Rajiv Lalit Chand to give evidence and also adopted his affidavit filed on 16.06.2015 in support of the Ex-Pate Motion filed seeking certain injunctive orders as mentioned in preceding paragraph 02.
06. The witness in his very short evidence stated that, the vehicle was hired by the first defendant on 04.07.2015. Though the witness could not remember the name of the first defendant, he was able to refresh his memory by looking at the copy of Rental Agreement bearing No. 3742, which is attached with his affidavit marked as Exhibit 2. The witness further stated that, the vehicle was Hyundai, bearing registration number LR 580, silver in colour and the hiring was for 13 days at the rate of \$ 190.00 per day. According to the witness, the additional driver, who was allowed to drive the said vehicle was the wife of the hirer, Josephine Anita Narayan, whose name had been mentioned in the said Rental Agreement. The witness continued to say that, they received a call from Tavua Police Station that the said vehicle had some damages and was in Tavua Police Station. The witness went to Tavua Police Station and found the vehicle was badly damaged and burnt. It was a complete write-off, according to him.
07. The witness then referred to the Exhibit 5 of his affidavit, which is a letter issued by Carpenters Motors, and stated that, the value of the said vehicle was \$ 48,500.00. He also claimed a sum of \$ 190.00 per day from the date of accident till today, for the loss of income due to this accident which caused total loss to the said vehicle, together with the interest.

08. As stated above, none of the defendants appeared in this case and the witness was not subject to cross examination. It does not mean that, the court can accept his evidence without evaluating it and assessing the credibility of the witness. The credibility of any witness in any suit is vital as it is directly connected with the discharge of burden of proof. It must be noted at the outset that, the witness throughout of his evidence claimed a sum of \$ 190 per day for the loss of income. However, the Rental Agreement, which is the Exhibit 2 attached with his affidavit filed on 16.06.2015, clearly states that the rental rate per day was a sum of \$ 170.00. The total amount of rental for 13 days in the said agreement is \$ 2,210.00 based on the calculation of \$ 170.00 per day. The plaintiff also claimed a sum of \$ 170.00 per day in prayer (b) of the statement of claim as mentioned in paragraph 01 above in this ruling. The witness did not explain in his evidence as to why he deviated from the pleadings and especially from Exhibit 2 - the documentary evidence, which is the core document in this case. The inconsistency between the oral and documentary evidence is not cleared by the witness. This is because of the lack of knowledge he has on this matter and Rental Agreement between the parties. It seems that, this witness came to give evidence without full and proper knowledge on this matter. As a result, it is not safe to totally rely on his evidence alone, as he obviously contradicts his own document.
09. When the counsel asked him about the status of the vehicle, which involved in accident, he stated that it was a complete write-off and further stated that, Carpenters Motors valued it and it was a write-off. The witness relied on the Exhibits 4 and 5 attached with his affidavit. The Exhibit 4 is the photocopy of two photographs of the vehicle LR 580. The Exhibit 5 is the photocopy of a letter issued by Carpenters Motors on 15th June 2015. It is prudent to consider what is meant by “write-off” before evaluating the both oral and documentary evidence before the court in this case.
10. A vehicle is considered as “written-off”, if it has been determined to be a total loss by an assessor or a technician as a result of (a) damages induced by a collision, fire, water inundation, other weather event, malicious action, or (b) dismantling or stripping. There are two types of “write-off”. One is the Statutory Write-off and the other is the Repairable Write-off. If a vehicle has been classified as statutory write-off, it may be sold subject to a statutory restriction that may be used only for parts or scrap metal. On the other hand, a vehicle classified as Repairable Write-off may be repaired and re-registered subject to the vehicle passing special safety requirements. Generally, the Regulations made under the Land Transport Act or the relevant statute provide for the procedure to be adopted in case of any vehicle declared to be written-off.
11. The Road Safety (Vehicle) Regulations 2009 of Victoria in Australia is very comprehensive and specific on matters relating to writing-off a vehicle and other

connected matters. The Part 2.9 of Chapter 2 of the said Regulations comprehensively deals with this issue. However, the Regulations under the Land Transport Act of Fiji are neither comprehensive nor specific, but they shortly deal with the issue in hand in a different manner. The relevant Regulations in Fiji are The Land Transport (Vehicles Registration and Construction) Regulations 2000. The Regulations 16, 17, 18 and 19 are relevant to this discussion and they are as follows;

Powers to cancel, suspend or refuse registration

16. – (1) *The Authority may cancel or suspend a registration or refuse to renew the registration in respect of a vehicle if –*

- (a) the owner has failed to comply with a notice of demand issued under section 35 (1) (a);*
- (b) the vehicle which has been registered under regulation 6 has been used contrary to any licence or permit;*
- (c) the vehicle has been misused as a public service vehicle as described by regulation 12;*
- (d) the public service vehicle's permit has been cancelled under regulation 12 of the Land Transport (Public Service Vehicles) Regulations 2000;*
- (e) the owner has failed to present the vehicle for inspection under regulation 102 or 105;*
- (f) the owner has failed to present the vehicle within the specified time for clearance of a defect order issued under regulation 106;*
- (g) the vehicle has changed ownership and the new owner has failed to comply with regulation 14;*
- (h) **the registration has been suspended under regulation 19 for a period in excess of 12 months;***
- (i) the cancellation has been ordered by a court; or*
- (j) the owner has failed to comply with the requirement of regulation 22.*

(2) If registration has been suspended under this regulation and expires during the period of suspension, the Authority must –

(a) not renew the registration in the name of the owner or in any other name before the end of the period of suspension; and

(b) after the expiration of the period of suspension, renew the registration from the date of expiry of the previous registration.

(3) The Authority may, when cancelling registration under this regulation specify a period of not less than 6 months within which the vehicle may be re-registered.

(4) The Authority may only consider an application to remove the cancellation of registration of the vehicle if it is satisfied that the reasons for the cancellation no longer exist and any specified period of cancellation has expired.

(5) If the registration of a vehicle has been suspended or cancelled by the Authority, the owner of the vehicle must, within 7 days of receiving a written notice of suspension or cancellation, from a police officer or an authorized officer, deliver the certificate of registration and the number plates of the vehicle to the place or person specified in the notice.

Advice when vehicle ceases to exist

17 – (1) A person who scraps, dismantles or destroys a vehicle or purchases a vehicle as scrap to be dismantled or destroyed must immediately cause the certificate of title to be posted or personally delivered within 7 days to the Authority for cancellation.

(2) A certificate of registration of the vehicle must not again be issued except upon application containing the information the Authority requires, accompanied by a certificate of registration issued by a certifying officer that the registration number of the vehicle has been inspected and found to conform to the description given in the application, or any other proof of the identity of the vehicle the authority reasonably requires.

Owner may cancel registration

18 - (1) The owner of a vehicle may apply for the cancellation of the registration of the vehicle.

(2) On receipt of the application, the registration certificate and the number plates, the Authority must –

(a) cancel the registration;

- (b) record the details in the appropriate record of vehicles;
- (c) refund pro rata the registration fees for an unexpired period of 3 months or more, less 10% administrative charge and any outstanding payment or penalty owing; and
- (d) dispose of or destroy the number plates.

Owner may request suspension

- 19- (1) The owner of a vehicle may apply for suspension of the registration if the vehicle is likely to be off the road for more than 30 days.
- (2) On receipt of the application, the registration certificate and the number plates, the Authority must suspend the registration.
- (3) **An application under sub-regulation (1) must be submitted to the Authority within 7 days of the vehicle being taken off the road.**
- (4) The owner of a vehicle may apply to have the suspension of vehicle registration removed.
- (5) Upon receipt of an application under sub-regulation (4), the Authority must remove the suspension of registration and return the registration certificate and number plates.
- (6) If the registration has expired, the application will be subject to regulation 7 except that –
- (a) the registration fee is payable from the date the suspension is removed; and
 - (b) the period of registration commences from that date.
- (7) The Authority may waive or refund any fees for the period that the registration is suspended under the provisions of this regulation.
(Emphasis added).

12. The effect of above regulations can be summarized in the following manner. The Regulation 16 gives the power to the Authority (LTA) to cancel, suspend or refuse registration, and circumstances under which this power may be exercised by the Authority are mentioned in subsection (1) (a) to (j). The relevant regulation to the issue hand is subsection (h) which empowers the Authority to cancel the registration, if the registration has been suspended under Regulation 19 for a period in excess of 12 months. Under Regulation 17, a person who scraps, dismantles or destroys a vehicle or purchases

a vehicle as scrap to be dismantled or destroyed must immediately cause the certificate of title to be posted or personally delivered within 7 days to the Authority for cancellation

13. Under Regulation 18, the owner may apply for cancellation of registration and the Authority must follow the steps as provided in that regulation. The Regulation 19 provides for the owner to request for suspension of the registration if the vehicle is likely to be off the road for more than 30 days. It should be noted that, though the Sub-Regulation 19 (1) used the word "may apply", the Sub-Regulation 19 (3) provides that any such application must be submitted to the Authority within 7 days of the vehicle being taken off the road. The meaning is clear that, if the vehicle is likely to be off the road for more than 30 days, then the owner may apply under sub-regulation (1). On the other hand if the vehicle is being taken off the road, then the application must be made within 07 days from the day on which the vehicle has been taken off the road.
14. In this case, the vehicle LR 580 was involved in the accident on 14.06.2015 at 21.15 hours as per the police report marked as Exhibit 3 and attached with the affidavit of the witness. The witness in his testimony in this court on 03.04.2018 stated that, after said accident the vehicle was a complete write-off. It had been nearly three years from the date of accident and the hearing on assessment of damages. If the vehicle was a complete write-off after accident, the plaintiff should have applied within 7 days as per the requirement of sub-regulation 19 (3) as mentioned above. The witness neither testified nor submitted any document for the steps taken by the plaintiff under the said sub-regulation.
15. The only document submitted by the witness submitted by the witness in support of his testimony on the writing-off of the said vehicle is the letter issued by the Carpenters Motors, which had been exhibited and attached with the affidavit of the witness as Exhibit 5. The said letter is reproduced below for the convenience.

15th June 2015,

*Satellite Rental
Nadi.*

Dear Sir

<u>RE</u>	:	<u>PRE-ACCIDENT VALUATION</u>
<i>Make/Model</i>	:	<i>Hyundai Santa Fe GLS 4WD</i>
<i>Registration No.</i>	:	<i>LR580</i>
<i>Vehicle Condition</i>	:	<i>Accident Unit</i>

We have inspected and carried out valuation for the above mentioned vehicle and in our opinion the market value is \$48,500.00 VIP.

The estimate is based on the vehicles age, odometer reading, physical condition of body, engine and accessories.

Yours faithfully

(Signed)

Shalvindra Narayan

Branch Manager – Nadi

Phone : 672272

Fax: 6722911

Mobile: 9996034

Email: s.snarayan.motors@carpenters.com.fj

16. The above letter gives the pre-accident value of the vehicle and it is \$ 48,500.00. Nowhere in the said letter is it stated that, the vehicle was a complete write-off. Generally, an assessor of an insurance company or motor vehicle dealer including wreckers, hire car companies and auction houses are the persons or the institutions which can declare that a particular vehicle is a write-off. In this case, the Carpenters Motors could have declared the vehicle involved in this case that it was a complete write-off. However, it was not done so. It has only given the pre-accident value of the vehicle. The said letter was issued on 15.06.2015 the following day of the accident, as the accident occurred on 14.06.2015 at 21.15 hours as per the police report. If the plaintiff was satisfied after the said letter that the vehicle was complete write-off, it should have applied to the LTA before 22.06.2015 (within 7 days) as per the mandatory sub-regulation 19 (3), for suspension of registration of the said vehicle. Thereafter, the LTA should have cancelled the registration after the period of 12 months that ended on 22.06.2015 as per the requirement of sub-regulation 16 (1) (h) as highlighted above. However, there is no evidence before the court that, these steps were taken by the plaintiff and the LTA.
17. The witness further attached photocopies of two photographs of the said vehicle as the Exhibit 4 with his affidavit. In the absence of any evidence that, the plaintiff acted upon the sub-regulation 19 (3) and LTA had subsequently cancelled the registration as stated above, and in the absence of any report from a technician to the effect that the said vehicle was written-off, the court cannot decide, based on those photocopies of two photographs, that the vehicle was a complete write-off.
18. It is settled that, the special damages have to be pleaded and proved (Lord Goddard in **British Transport Commission v Gourley** [1956] AC 185). The plaintiff pleaded the special damages claimed in this case; however, the question is whether those damages have been proved. Bowen L.J. in **Ratcliffe v Evans** [1892] 2 Q.B. 524 at pages 532 and 533 held that,

The necessity of alleging and proving actual temporal loss with certainty and precision in all cases of the sort has been insisted upon for centuries: Lowe v.Harewood W.Jones.196; Cane v. Golding Sty.176; Tasburgh v.

Day Cro.Jac. 484; Evans v.Harlow 5 Q.B.624. But it is an ancient and established rule of pleading that the question of generality of pleading must depend on the general subject-matter: Janson v.Stuart 1 T.R.754; Lord Arlington v Merricke 2 Saund. 412, n.4; Grey v. Friar 15 Q.B.907; see Co.litt 303d.Westwood v.Cowne 1 Stark. 172; Iveson v. Moore 1 Ld.Raym. 486. In all actions accordingly on the case where the damage actually done is the gist of the action, the character of the acts themselves which produce the damage, and the circumstances under which these acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry.

19. The court is not insisting on the plaintiff that, it should provide more evidence for his testimony of purported writing-off, but there must be some evidence to show that, writing-off of the said vehicle, under those circumstances, was more probable than not, for the plaintiff to be entitled for the damages claimed in its statement of claim.

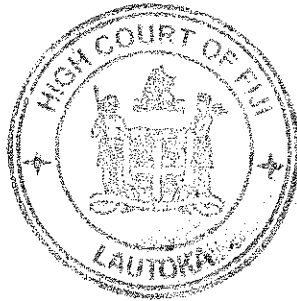
20. DEANE J in **Commonwealth of Australia v Amann Aviation Pty Limited [1991] HCA 54** held at paragraph 4 of his judgment that;

The frequent inability of curial procedures to determine with certainty what has happened in the past, let alone what would have been or what will be, necessarily gives rise to a need for a number of subsidiary rules governing the determination of the loss or injury which a plaintiff has actually sustained by reason of a wrongful act. One such subsidiary rule is that, even in an action for repudiation or breach of contract where damage is not an element of the cause of action, a plaintiff bears the onus of establishing the extent of her loss or injury on the balance of probabilities. To satisfy the requirements of that rule, a plaintiff must, if she is to recover more than a nominal amount in such an action, affirmatively establish assessable damage, that is to say, loss or injury which is capable of being measured in monetary terms (see, e.g, Luna Park (N.S.W.) Ltd. v. Tramways Advertising Pty. Ltd. [1938] HCA 66: (1938) 61 CLR 286, at pp 301, 307, 311, 312). In many cases, proof of the full extent of the loss or injury sustained will involve establishing an evidentiary foundation for positive and detailed ultimate findings by the court upon the balance of probabilities.

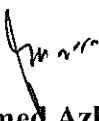
21. As discussed above in paragraph 8, the single witness called by the plaintiff in this hearing had little knowledge on this matter, as it was demonstrated by his clear contradiction with his own document and the court is of the opinion that, it is not safe to rely only on his evidence. It seems that, the plaintiff is in difficulty in adducing the

evidence to the court that, the vehicle was a complete write-off. However, “difficulty of proof does not dispense with the necessity of proof” (Aerial Advertising Co. v. Bachelors Peas [1938] 2 All E.R. 788 at 796, per Atkinson J.).

22. Having considered all the evidence before me and the authorities cited above, I am of the view that, the plaintiff failed to discharge its burden of proving the damages claimed in this case, on balance of probability, though the interlocutory judgment was entered against the first defendant for his failure to give notice of intention to defend and the liability was established in the absence of both defendants.
23. In result, I make the following orders;
- a. The Notice of Assessment of damages filed on 21.10.2016 is dismissed, and
 - b. The plaintiff’s action against both defendants is dismissed.



At Lautoka
24/08/2018


U.L Mohamed Azhar
Master of the High Court