IN THE COURT OF APPEAL, FIJI
On Appeal from the High Court

CIVIL APPEAL NO. ABU 093 OF 2023
[Lautoka High Court Case Number HBC 117 of 2014]

BETWEEN	:	**RAJESH CHANDRA** as Administrator of the **ESTATE OF VINAY VIKASH CHAND,** and in his personal capacity. ***Appellant***
AND	:	**1. THE PERMANENT SECRETARY OF HEALTH** **2. THE MINISTRY OF HEALTH** **3. THE ATTORNEY GENERAL OF FIJI** ***Respondents***
Coram	:	**Prematilaka, RJA** **Andrews, JA** **Clark, JA**
Counsel	:	**Mr N R Padarath, on behalf of the Appellant** **Mr J Mainavolau, on behalf of the Respondents**
Date of Hearing	:	**7 November 2024**
Date of Judgment	:	**28 November 2024**

JUDGMENT

Prematilaka, RJA

[1] I agree with reasons and orders in the judgment of Andrews, JA.

Andrews, JA

Introduction

[2] The appellant has appealed against the judgment delivered in the High Court at Lautoka on 28 August 2023, in which the Judge dismissed the appellant's claim for damages under the Compensation for Relatives Act 1920 and the Law Reform (Miscellaneous Provisions) (Death and Interest) Act 1935.[1] The appellant's claim was filed following the death of his son, Vinay Vikash Chand ("Mr Chand"). The appellant alleged that Mr Chand's death was caused by the negligence of doctors who attended to his care.

[3] The Public Hospitals and Dispensaries Act 1955 (the "PHD Act") includes provisions as to the obligations of persons attending at or being admitted to public health facilities to pay fees and charges. Section 5 of the PHD Act creates certain exemptions from those obligations for urgent admissions and for those people who are, by reason of poverty, not able to pay. The crux of the appellant's claim was that treatment of Mr Chand by way of haemodialysis was wrongly denied him on the grounds that he could not pay for it.

Background

[4] Between January and July 2010 Mr Chand was seen at the Ba Health Centre, Lautoka Hospital and CWM Hospital in Suva, after complaining of headaches, weakness, nausea and vomiting, and significant weight loss. He was admitted to CWM Hospital on 13 March 2010, where he was diagnosed as suffering from renal tubular acidosis ("RTA") and renal impairment. He was discharged on 20 April 2010. Dr Mei Ling Perman, a Consultant Physician, attended to his treatment at CWM Hospital. In a report dated 19 July 2010, Dr Perman recorded that Mr Chand had moderate chronic kidney disease ("CKD"). Dr Perman said that the cause of Mr Chand's renal disease was not clear and that while a biopsy could be done locally (that is, at CWM Hospital), a complete evaluation of the biopsy was not possible without electron microscopy and immunostaining, neither of which

[1] *Chandra v The Permanent Secretary for Health* [2023] FJHC 619; HBC117.2014 (28 August 2023) ("the High Court judgment).

was available in Fiji. Dr Perman recommended that Mr Chand "goes abroad for further work-up with renal biopsy to help guide further management of his renal disease and also to confirm the RTA". The Ministry of Health was prepared to pay Mr Chand's return airfares, but his family was required to meet the costs of his treatment in India. The appellant began fundraising efforts for the costs of Mr Chand's treatment.

[5] Around June 2011, Mr Chand developed symptoms of swelling on his face and leg. He was taken first to Ba Mission Hospital, then to Lautoka Hospital, where he was admitted on 15 June 2011. Dr Deo Narayan, a Consultant Physician at Lautoka Hospital, attended to the treatment of Mr Chand after he was admitted there. He prepared a report as to Mr Chand's illness and treatment, dated 9 September 2014. Dr Narayan concluded his report as follows:

> *In summary, [Mr Chand] was admitted in CWMH on 31/03/2010 and he was diagnosed with [RTA] and [CKD] (stage 3). [Dr Perman] had recommended for further investigation and treatment abroad. Ministry of Health made an arrangement for him to travel to Batra Hospital in India and had agreed to pay for the Airfare and had asked the patient to pay for his treatment costs from June 2010 till 15/06/2011.*
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> *[Mr Chand's] father failed to arrange funds to evacuate [Mr Chand] to India. On admission to Lautoka Hospital on 15/06/2010, [Mr Chand] was in a critical condition with end stage CKD, severe acidosis, septicaemia and Anaemia. Short term haemodialysis would not have solved the problem as he needed to be on life-time haemodialysis or kidney transplant, both of which he could not afford.*

[6] Mr Chand died on 20 July 2011. His death certificate recorded the cause of his death as being "septicaemia, acute pulmonary odeamia, end stage kidney disease, upper gastro bleed, pneumonia/anaemia H/D renal tubular acidosis".

[7] The appellant issued this proceeding on 18 July 2014, against the Permanent Secretary of Health, the Ministry of Health, and the Attorney-General.[2] The statement of claim alleged (at paragraph 10) that the first and second respondents (in the persons of the doctors, practitioners, nurses and staff of CWM Hospital) owed Mr Chand and his family a duty of care to act properly and professionally and with due care and skill, and had breached that

[2] The third respondent was named in the proceeding pursuant to s 12 of the State Proceedings Act 1951.

duty in several respects. The alleged particulars of negligence (set out at paragraph 16 of the statement of claim) included failing to diagnose Mr Chand's medical condition at the earliest stage, failing to provide adequate advice and give proper medication to treat him, and failing to inform Mr Chand that he needed overseas treatment.

[8] No further steps were taken at that time, by either party. On 23 September 2016, the High Court, on its own motion, directed the appellant to show cause why his claim should not be struck out for want of prosecution or as an abuse of process of the Court. Ultimately, the appellant was granted leave to proceed pursuant to a judgment issued on 30 October 2018.

[9] The respondents filed a statement of defence to the statement of claim on 15 November 2019. The appellant filed an amended statement of claim on 21 April 2021. This extended the appellant's claim to the Lautoka Hospital, and introduced a reference to s 5 of the PHD Act, by adding pleadings that (underlining as in the original):

> *11 The doctors, practitioners, nurses and staff at the time of [Mr Chand's] admittance at the Lautoka Hospital and for the duration of [Mr Chand's] admittance at the Lautoka Hospital undertook to provide and did provide for [Mr Chand's] medical treatment, attendance and advice and held themselves out to have the proper equipment to properly diagnose and treat [Mr Chand] and also to give proper and sound advice to the [appellant] for the welfare of [Mr Chand].*
>
> *...*
>
> *17 The doctors, practitioners, nurses and staff at Lautoka Hospital were bound by the provisions of section 5 of the [PHD Act]*
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> *18 [Mr Chand] at the time of his admittance at Lautoka Hospital was suffering from a disease threatening a speedy death.*
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> ***Particulars of Breach and Negligence***
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> *a. Failure to administer the required medical care and prompt treatment.*
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> *b. Failure to administer haemodialysis treatment when such treatment was available at the time*

[10] The Respondents filed a statement of defence to the amended statement of claim, in which they stated that Mr Chand was given all due and proper care, and that his death was not in any way the result of the negligence of the respondents.

[11] The trial was held in the High Court at Lautoka on 6 and 7 July 2023. Counsel for the appellant and the respondents were Mr Padarath and Mr Mainavolau, as for the appeal to this Court. The appellant, Dr Perman and Dr Narayan gave evidence and were cross-examined and re-examined.

[12] Written submissions were filed after the hearing. Mr Padarath submitted for the appellant that s 5 of the PHD Act had been enacted "to save the lives of poor people like [Mr Chand]", that the Ministry of Health's policy to provide dialysis to patients who could afford it and were able to go overseas was a clear breach of s 5, and that it was that policy that caused the speedy death of Mr Chand. The High Court Record does not contain any submissions filed on behalf of the respondents.

[13] Because the appellant's claim is in respect of the decisions made and actions taken by various clinicians and management at the CWM and Lautoka hospitals I will refer in this judgment to the respondents as "the hospitals", unless it is necessary to refer to them individually.

The High Court judgment

[14] The High Court Judge summarised the chronology of Mr Chand's illness and his attendances at the Ba Health Centre, CWM Hospital, and Lautoka Hospital. He referred to Dr Perman's report recommending that Mr Chand travel to India, and to Dr Narayan's report. The Judge said he would apply the test for determination of claims of medical negligence set out in the judgment of the High Court of Australia in *Rogers v Whitaker*,[3] which he expressed as being:[4]

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3 *Rogers v Whitaker* [1992] NCA 58; (1992) 109 ALR 625.
4 High Court judgment, at [17].

... the question is not whether the conduct accords with the practice of the medical profession or some part of it, but whether it conforms to the standard of reasonable care demanded by the law. That is a question for the Court, and the duty of deciding it cannot be delegated to any profession or group in the community.

[15] The Judge found against the appellant. He set out his reasons for doing so at paragraphs [18] to [20] of the judgment:

> *[18] The [appellant] in this matter solely relied on his evidence. He could only say what transpired from the day [Mr Chand] was taken to the Ba Health Centre until his death, the [appellant] did not call any expert witness to counter the evidence of the doctors who [were] called to testify by the [hospitals]. From the evidence of the two doctors who testified at the trial it is clear that both Hospitals, CWM and Lautoka, [have] taken good care of [Mr Chand] and also the doctors who attended him had diagnosed the illnesses correctly although there was a slight delay which cannot be construed as negligence on their part.*
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> *[19] Section 38 of the Constitution provides:*
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> > *(1) The State must take reasonable measures within its available resources to achieve the progressive realisation of the right of every person to health, and to the conditions and facilities necessary to good health, and to health care services, including reproductive health care.*
> >
> > *(2) A person must not be denied emergency medical treatment.*
> >
> > *(3) In applying any right under this section, if the State claims that it does not have the resources to implement the right, it is the responsibility of the State to show that the resources are not available.*
>
> *[20] The evidence of Dr Perman, as stated earlier in this judgment, is that she informed [Mr Chand] that electron microscope and immunostaining were not available in Fiji and advised him to go abroad for treatment. Hence there is no breach of section 38 of the Constitution.*

Grounds of appeal

[16] The appellant's grounds of appeal may be summarised as being that the High Court Judge erred in law and fact in:

> [a] failing to consider the amended statement of claim (in particular the pleading that the hospitals breached s 5 of the PHD Act), which led the Judge to consider

provisions which were not pleaded, and to fail to make any finding as to the alleged breach of s 5 of the PHD Act;

[b] failing to consider Dr Narayan's evidence that Mr Chand was not given treatment which was available at the time, because he could not afford it;

[c] concluding that the appellant was required to, and failed, to lead expert evidence of his own; and

[d] misapplying *Rogers v Whitaker* by not properly considering the meaning of the test.

Appellant's submissions

[17] Mr Padarath relied on the evidence of Dr Narayan, the specialist physician at Lautoka Hospital. As noted earlier, the High Court Judge referred to Dr Narayan's evidence to the extent only of quoting from his report. Mr Padarath submitted that Dr Narayan's report and oral evidence confirmed that the respondents breached s 5 of the PHD Act. Dr Narayan said in examination in chief that on admission to Lautoka Hospital Mr Chand:

> *... was in a critical condition with end stage CKD, severe acidosis, septicaemia and anaemia. Short term haemodialysis would not have solved the problem as he needed to be on lifetime haemodialysis or kidney transplant, both of which he could not afford.*

[18] Mr Padarath further submitted that while maintaining that short term dialysis was given to patients with acute kidney injury (which is totally reversible), and that life time dialysis would not have reversed Mr Chand's underlying problem, Dr Narayan said in answer to a series of questions in cross examination (confirmed on re-examination) that dialysis could have prolonged Mr Chand's life long enough for him to go to India for treatment. He agreed with Dr Perman's evidence that dialysis was available in 2010 and 2011 at CWM Hospital, and he agreed with the proposition put to him by counsel for the appellant that if Mr Chand did not receive dialysis treatment, his kidney disease would eventually cause

him to die quickly. He further agreed with the proposition that the only issue with providing Mr Chand with dialysis while raising funds for treatment in India was that the hospital required a guarantee that his family had enough funding to continue the dialysis, and the family could not give such a guarantee.

[19] Mr Padarath submitted on appeal that on the basis of Dr Narayan's evidence, it follows that dialysis was available at the hospitals and would prolong Mr Chand's life, but was not administered because the appellant was not able to guarantee payment. He submitted that the evidence established that Mr Chand was poor and could not afford the treatment he needed (dialysis) in order to prolong his life until he was able to travel to India for the further treatment. However, the hospitals had a policy that dialysis would not be provided to him if he could not guarantee payment for it. He submitted that this constituted negligence by way of a breach of s 5 of the PHD Act, by demanding a guarantee of payment before the necessary treatment was administered.

[20] Mr Padarath submitted that under s 5 of the PHD Act, upon admission to Lautoka Hospital, Mr Chand suffered from a "disease threatening speedy death", he required "prompt treatment" by way of dialysis and he was "unable by reason of poverty to pay" for it. He acknowledged that s 5 did not completely relieve the appellant of the obligation to pay for Mr Chand's medical treatment, but submitted that the hospitals negligently breached s 5 by not providing him dialysis, on the grounds that he could not pay a deposit, or give a guarantee of payment.

[21] Mr Padarath submitted that determining whether long-term dialysis treatment would be made available to a patient on the basis of whether a deposit or guarantee of payment could be provided was not permissible under s 5. He submitted that the correct approach, in order to comply with s 5, would have been to administer dialysis to Mr Chand in order to prolong his life until he could travel to India, and seek payment later on.

Respondents' submissions

[22] Mr Mainavolau submitted that the hospital's obligations under s 5 are capped: that is, while individuals admitted under s 5 do not need to pay a deposit or guarantee for medical care or treatment when they are admitted, they are still responsible for paying fees or charges for their treatment or maintenance later on. That is, they are not exempt from the obligation to pay for the services they receive. He submitted that Mr Chand had not been required to pay a deposit, or give a guarantee, when he was seen at Ba Hospital, or when he was later admitted at CWM Hospital and Lautoka Hospital. He also submitted that the hospitals acted within s 5 when acting in accordance with their policy of administering short term dialysis in cases of acute kidney injury without requiring a deposit or a guarantee of payment from patients who were unable, by reason of poverty, to pay for it, but to administer long-term dialysis to only those patients who were able to pay a deposit or give a guarantee of payment.

[23] Mr Mainavolau submitted that as a public entity funded by the State, the hospitals were required to administer treatment and execute their responsibilities in looking after the people of Fiji to the best of their ability and within their available resources. He also submitted that hospitals had to ensure that their performance of their obligations was in alignment with the State's obligations under s 38 of the Constitution to take reasonable measures to achieve the progressive realisation of the right of every person to health and to health care services, within their available resources. He submitted that the hospitals cannot be held liable for being unable to treat a patient due to limited resources.[5]

[24] Mr Mainavolau submitted that there was no negligence on the part of the hospitals, as they discharged their duties under the relevant legislation and in accordance with their policy as to requiring payment of a deposit or guarantee before dialysis was administered in cases other than short-term dialysis for acute kidney injury.

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[5] As recorded later, at [26], the 2013 Constitution did not come into force until some 18 months after Mr Chand died.

Addressing the issues

Did the High Court Judge err in finding that the appellant had not called expert evidence to counter the evidence of Dr Perman and Dr Narayan?

[25] I accept Mr Padarath's submission that there was no need for expert evidence to be called on behalf of the appellant, because the appellant was relying on the respondents' evidence that dialysis was available at CWM Suva (Dr Perman) and that dialysis could have been administered to Mr Chand and could have prolonged his life until he could travel to India for further treatment, but was not administered because the appellant could not afford to pay a deposit or give a guarantee (Dr Narayan). The appellant's "failure" to call expert evidence did not support or justify the finding against the appellant.

Did the High Court Judge err in referring to and relying of s 38 of the Constitution of the Republic of Fiji?

[26] The Constitution of the Republic of Fiji came into effect on 6 September 2013, some 18 months after Mr Chand died. The effective constitutional provision at the time of Mr Chand's illness and death was the Constitution (Amendment) Act 1997 which contained, at Chapter 4 (ss 21-43), a Bill of Rights. It did not contain a provision equivalent to s 38 of the Constitution. Counsel did not refer this Court to any other statutory or other authority (effective at the time of Mr Chand's illness, treatment, and death) that is equivalent to the provisions of s 38 of the Constitution.

[27] The Judge's finding that there had been no breach of s 38 of the Constitution was an error of law.

Did the High Court Judge err by failing to refer to and consider the appellant's pleading that the hospitals were in breach of s 5 of the PHD Act?

[28] Mr Padarath submitted, and Mr Mainavolau did not contend otherwise, that the High Court Judge did not make any reference to the appellant's amended statement of claim. Nor did he discuss or make any findings as to the appellant's claim that the hospitals were in breach of s 5 of the PHD Act by denying Mr Chand dialysis treatment on the basis that the

appellant could not afford to pay a deposit, or give a guarantee as to payment. While he set out paragraphs from Dr Narayan's report describing Mr Chand's admission to Lautoka Hospital, and the progression of his illness there and his later death, the Judge did not address Dr Narayan's oral evidence as to the availability of dialysis, the use of dialysis to prolong life in order that a patient can obtain other treatment, and the hospitals' policy as to requiring payment of a deposit or a guarantee of payment before long-term dialysis would be administered.

[29] The issue before the High Court was not whether Mr Chand was given proper, professional, care and attention within the constraints of the hospitals' available resources. The question raised for determination by the amended statement of claim was whether the hospitals were in breach of s 5 of the PHD Act by not administering dialysis to Mr Chand on the basis that (as Dr Narayan said) a guarantee was required for long term dialysis, and the appellant could not give one.

[30] The Judge erred in failing to address the central issue as to whether the hospitals had breached their duty under s 5 of the PHD Act. He failed also to address the evidence given, and submissions made, in relation to that issue and the pleadings.

[31] It was clear from the appellant's amended statement of claim, and Mr Padarath's submissions to the High Court, that s 5 of the PHD Act was at the forefront of the appellant's claim. It was focussed on the question whether the hospitals' policy as to the administration of dialysis treatment was lawful and in accordance with s 5. It should have been addressed in the High Court judgment. Because it was not addressed, this Court does not have the benefit of the Judge's consideration of the parties' submissions on the issue. It is open to the Court to remit the proceeding back to the High Court for that consideration to be given.

[32] However, the essential facts were not in issue. There was no dispute that (as stated in the evidence given by Dr Perman and Dr Narayan):

[a] Mr Chand was suffering from end stage CKD, he required treatment (electron microscopy and immunostaining), that was available in India, there was a dialysis machine at CWM Hospital, and while it would not cure his CKD, dialysis could prolong his life until he could travel to India.

[b] The hospitals had a policy that dialysis would be administered to patients with acute kidney injury on a short-term basis (two to five times) where the kidney function was expected to improve, but that patients requiring long-term dialysis would only receive that treatment if they had enough financial means or funding to pay a deposit or guarantee payment for maintenance and treatment; and

[c] Mr Chand's family was not in a position to make such a payment or give such a guarantee.

[33] The above matters not being in dispute, it is open to this Court to consider and determine the legal issue, as to whether the hospitals acted consistently with s 5 of the PHD Act when applying its policy as to the administration of dialysis, and not providing it to Mr Chand in order to prolong his life until such time as he could go to India. Rather than remit the matter back to the High Court, the better course is for this Court to consider and determine the legal issue, in order to avoid further delay and costs for the parties.

The Public Health and Dispensaries Act 1955

Analysis of s 5

[34] For present purposes, the relevant sections of the PHD Act are ss 3, 4, and 5, which provide:

> ***3 Admission to public hospitals***
>
> *The admission of patients to, and the continuance of their stay in, a public hospital shall be in the discretion of the officer in charge of the hospital.*
>
> ***4. Guarantee of payment***
>
> *Every person seeking admission to a public hospital for treatment therein shall, save in the case of those admitted under any of the provisions of section 5, either*

deposit with the officer in charge of the hospital or a person authorised in that behalf by him or her a sum sufficient to cover the cost of his or her maintenance and treatment therein for one week or give to the officer or person aforesaid such guarantee of payment of all charges and fees for maintenance and treatment as to such officer or person may appear satisfactory.

5 Urgent cases and poor persons

(1) Persons seeking admission to a public hospital and suffering from the effect of severe accident or from disease threatening speedy death and requiring prompt treatment shall be admitted thereto as soon as may be.

(2) The manager of any public hospital or, in his or her absence, the officer in charge of such hospital may admit to the hospital any person who requires medical care and treatment but who appears to such officer to be unable by reason of poverty to pay therefore.

(3) Persons admitted under the provisions of this section shall not be required to make a deposit or give a guarantee of payment but nothing in this section shall be deemed to relieve any person admitted thereunder from liability to pay charges and fees for maintenance and treatment.

[35] As recorded by the High Court Judge, the *Rogers v Whitaker* test requires the Court to decide whether the conduct complained of *conforms to the standard of reasonable care demanded by the law*. That must include complying with statutory provisions as to care – in particular, in this case, the provisions of the PHD Act. Section 5 must be interpreted in its statutory context. That approach is orthodox and consistent with the principle that statutes are to be read as a whole.[6]

[36] Together ss 3, 4 and 5 govern the admission of patients into public hospitals (as defined).

[37] Section 3 confers on the officer in charge of a public hospital a broad discretion as to the admission of patients and the continuance of their stay in a public hospital. How that discretion is to be exercised is guided by ss 4 and 5.

[38] By s 4 every person seeking admission for treatment must deposit a sum sufficient to cover the cost of one week's maintenance and treatment or provide a guarantee of payment. In other words, hospital care is not presumed to be free. Section 4 does not however apply to

[6] And in Fiji, see for example the Ruling of Calanchini AP in *Balaggan v State* [2012] FJCA 32; Misc Action 11.2012 (25 May 2012) at p6.

persons admitted to a public hospital under s 5. A person admitted under s 5 is not required to pay a deposit or give a guarantee of payment.

[39] Section 5 provides for two categories of admissions:

[a] Anyone suffering from the effect of a severe accident or suffering from disease threatening speedy death and requiring prompt treatment **shall be admitted** as soon as may be": s 5(1)

[b] By contrast the manager or officer in charge of a public hospital **may admit** persons who require medical care and treatment but who appear to the officer in charge to be unable to pay by reason of poverty: s 5(2)

[40] Subsection (3) reinforces the exception provided in s 4 – that no person admitted under s 5 shall be required to make a deposit or give a guarantee of payment but nothing in s 5 relieves any person from liability to pay charges and fees for "maintenance and treatment".

[41] By virtue of the words **shall be admitted** in s 5(1), it is mandatory for hospitals to admit any persons who are suffering from the effect of severe accident or disease threatening speedy death and requiring prompt treatment. Pursuant to s 5(3), persons admitted under s 5(1) are not required to pay a deposit or give a guarantee on admission.

[42] In s 5(2), by virtue of the words "the … officer in charge of the hospital **may admit** a person who requires medical care or treatment but who appears to such officer to be unable by reason of poverty to pay therefore", the officer in charge is given a discretion as to whether to admit a "poor person".

[43] The effect of s 5(3) is that notwithstanding having been admitted without being required to pay a deposit or give a guarantee under the mandatory provision in s 5(1) as an "urgent" case, or pursuant to the exercise of the manager or officer in charge's discretion under s 5(2) as a "poor person", those persons are not relieved of any liability to pay fees and charges for maintenance and treatment.

Application to the present case

(a) Mr Chand's admission to Lautoka Hospital

[44] The appellant's case is that Mr Chand was admitted to Lautoka Hospital as an "urgent" case, (suffering from a disease threatening speedy death and requiring prompt treatment). There was no dispute that neither a deposit nor a guarantee was required.

(b) Mr Chand's ongoing treatment while waiting to travel to India

[45] Mr Padarath argued on appeal that "the correct thing to do" was to administer dialysis until Mr Chand travelled to India, and ask for payment later. He submitted that "the whole purpose" of s 5 was to ensure that a patient receives required treatment. In other words, his proposition was that s 5 required the hospitals to provide Mr Chand with ongoing treatment for so long as it took for the appellant to raise funds for treatment in India.

[46] However, both ss5(1) and 5(2) address the *admission* of patients. Section 5(1) provides for the mandatory admission of urgent cases requiring prompt treatment, and s 5(2) provides for a discretionary admission of non-urgent patients requiring "medical care and treatment". Having been "admitted", whether under s 5(1) or s 5(2), a patient's further maintenance and treatment is governed by s 5(3): that is, they are not relieved of the liability pay charges and fees for that maintenance and treatment.

[47] For Mr Chand, having been admitted to Lautoka hospital (and not having been required to pay a deposit or give a guarantee) he was, pursuant to s 5(3), not relieved from liability to pay charges and fees for that maintenance and treatment. Dr Narayan's evidence was that he was not given dialysis to prolong his life while his family was attempting to raise funds to enable him to obtain treatment in India because he could not afford it. Mr Padarath stressed that this was the only reason why dialysis was not administered.

[48] Section 3 of the PHD Act provides that the admission of patients to, and the continuance of their stay in, a public hospital is "in the discretion of the officer in charge of the hospital".

In Mr Chand's case, having been admitted to Lautoka hospital, his continued stay and treatment was at the discretion of the Medical Superintendent.

[49] It was submitted at the hearing before this Court that the hospitals had a policy that dialysis which was other than short-term "urgent" dialysis (such as for acute kidney injury) would only be administered to those who could afford to pay for it. The "policy" was not before this Court, or the High Court. The appellant's amended statement of claim did not include any pleading concerning any such policy, nor as to the Medical Superintendent's exercise of the discretion concerning the provision of long-term dialysis. Those matters were not properly before the Court.

Summary

[50] Under section 3 both "admission" and "continuance of stay" of a patient are at the discretion of Officers in Charge of the hospitals. However, section 5(1) nullifies the discretion in so far as admission is concerned in respect of *urgent* cases. Section 5(2) retains the discretion for admission of a *poor person* with the managers or Officers In Charge of the hospitals.

[51] Under section 5(3), in both situations – s5(1) and s 5(2) – on *admission*, a patient shall not be required to deposit or give a guarantee of payment for "maintenance and treatment". However, the patient is not exempt from paying charges and fees for such maintenance and treatment. Section 5(3) does not restrict the Officer in Charge's discretion under s 3 when it comes to *continuance of the stay* of the patient; it only restricts that discretion with respect to *admission*.

[52] The question arising from the respondent's submissions is whether the hospitals were justified in requiring payment or a guarantee from the appellant in this case before transferring Mr Chand to CWM hospital for dialysis treatment and maintenance.

[53] The answer to that question must be "yes". This is because the discretion under section 3 to admit a patient is not qualified by section 5. The requirement for payment was not for

admission, as Mr Chand had already been admitted and was in hospital without having been required to make any payment or give a guarantee. The requirement for payment or a guarantee was for *continuance of the stay* and *maintenance and treatment* at CWM hospital until Mr Chand could travel to India.

[54] Thus, the hospitals exercised the discretion to insist upon the payment for "continuance of the stay" and "maintenance and treatment", as permitted by section 3. Whether that discretion was exercised properly is not a matter for us to decide, as the cause of action was based on the contention that the hospitals had no discretion to insist on a prepayment. Thus, the action fails.

[55] In every appeal, the appellant has the onus of establishing that the lower Court erred. While, in this case, the High Court Judge erred in not addressing the appellant's claim of a breach of s 5 of the PHD Act, and in other respects, the appellant has not established that his claim under s 5 could succeed.

Disposition of the appeal

[56] Notwithstanding this Court's finding that the Judge erred, the appellant cannot succeed on the substantive issue as to whether the hospitals were in breach of s 5 of the PHD Act. The appellant's appeal must, therefore, be dismissed. However, as neither side can be said to have succeeded, I would not make any order as to costs, and I would order that costs should lie where they fall.

Clark, JA

[57] I agree with the judgment of the Honourable Justice Andrews including the orders proposed.

ORDERS

(1) The appellant's appeal is dismissed.

(2) No order is made as to costs.

Hon. Mr. Justice Chandana Prematilaka
RESIDENT JUSTICE OF APPEAL

Hon. Madam Justice Pamela Andrews
JUSTICE OF APPEAL

Hon. Madam. Justice Karen Clark
JUSTICE OF APPEAL