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

CIVIL CASE NO. HBC 85 OF 2014

[IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPEAL THE INTERLOCUTORY RULING OF THE MASTER OF THE HIGH COURT DATED 02 OCTOBER 2015 CONCERNING THE DISCOVERY OF ROOT CAUSE ANALYSIS REPORT]

BETWEEN : **VIKASHNI NANDANI PHILLIP** of 149 Sukanaivalu Road, Lautoka Housewife.

PLAINTIFF/RESPONDENT

AND : **THE PERMANENT SECRETARY FOR HEALTH**

1ST DEFENDANT/1ST APPELLANT

AND : **THE ATTORNEY GENERAL OF FIJI**

2ND DEFENDANT/2ND APPELLANT

Before	:	Hon Mr. Justice R.S.S. Sapuvida
Appearances	:	Mr. Rajendra P.S Chaudhary for Plaintiff/Respondent
	:	Ms. Mary Lee for Defendants/Appellants
Date of Hearing	:	8th February 2016
Date of Written Submissions:		13th April 2016
Date of Oral Judgment	:	7th June 2016
Date of Written Judgment	:	9th June 2016

JUDGMENT

[1] This is an application filed by the defendants/appellants [appellants] by way of summons dated 16th October, 2015 pursuant to Order 59 Rule 11 of the High Court Rules [HCR] 1988 and under the Inherent jurisdiction of the High Court seeking leave to appeal the Interlocutory Ruling pronounced by the Master dated 02nd October, 2015.

[2] The Master by the said ruling ordered the appellants to disclose the Root Cause Analysis report [RCA report] to the plaintiff/respondent [respondent] in terms of the respondent's summons for specific discovery dated 09th April 2015.

[3] The appellants in the meantime filed inter parte summons dated 20th January 2016 for stay of the interlocutory ruling made by the Master.

[4] The summons for leave to appeal and the inter parte summons for stay of the Master's ruling had been listed for hearing on 08th February 2016.

[5] On the day of the hearing the appellants urged the court to list a separate date for hearing of the stay application.

[6] The respondent's counsel submitted that the respondent does not wish to object the stay being granted till the determination of the leave application and the same to be concluded by way of written submissions.

[7] On the agreement of both parties the stay was granted till the determination of this leave application.

[8] Then the time frame was given for the parties to file their respective written submissions.

[9] The appellants caused to file the written submissions, and yet the respondent has not filed the written submissions.

[10] However, the following materials and submissions were taken into consideration in settling the ruling.

- Appellants' affidavit in support of Mr. John Pickering Senior Legal Officer Office of the Attorney General's Department, sworn on 16th October 2015
- Appellants' written submissions dated 12th April 2016 and filed on 13th April 2016
- The respondent's affidavit sworn on 12th November 2015
- The Order 59, Rule 8(2), 9 and 11 of the HCR 1988
- The ruling made by the Master of the High Court dated 02nd October, 2015
- The relevant case law authorities
- Text Books of Academics.

[11] First and far most, before diverging into the merits or demerits of the Master's ruling based on the very simple but heavily contested issue of "disclosure of the

RCA report" against which the appellants strongly resisted over on the basis that it would be detrimental to the public interest under the Health Ministry's policy on Unusual Occurrence Reporting (UOR), I prefer to look at the procedure on the making of an application for leave to appeal against an interlocutory order or judgment of the Master of the High Court.

[12] It is simply explained under Order 59, Rule 11 of the HCR 1988 that:

> *"Any application for leave to appeal an interlocutory order or judgment* ***shall be*** *made by summons with supporting affidavit* ***filed and served*** *within* ***14 days*** *of the delivery of the order or judgment."*

[13] There is no issue between the parties that the ruling made by the Master is an interlocutory ruling and the proper way of pursuing an appeal is to come by way of an application for leave to appeal.

[14] It is submitted by the counsel for the appellants' in the written submissions that the summons and affidavit in support deposed by Mr. John Pickering were filed in court on 16th October 2015 and that it is strictly within 14 day time period stipulated in Order 59, Rule 11 of the HCR for filing of same and duly served on counsel for the respondent.

[15] I do not agree with these submissions because the Order 59, Rule 11 stipulates an exact and mandatory time frame for a party to file and serve the application for leave to appeal an interlocutory order or judgment of the Master and that it is just 14 days.

[16] The party who files the application shall have to file it and serve within the 14 day period.

[17] The Master delivered his ruling on 02 October 2015 and the summons for Leave of the appellants was **filed** on 16th October 2015.

[18] The **service** of the summons along with the affidavit in support had not been done by 16th October 2016. There is no proof for service. Notice of acknowledgement of service is not filed of record.

[19] Though, the appellants filed the summons on the 14th day, they are time bared by failing to serve the same within 14 days from the date of the Master's ruling which is a mandatory term stipulated in Order 59, Rule 11. There is no option for a party only to file the summons within 14 days and serve it thereafter.

[20] The counsel for appellants has misinterpreted the wordings and the intention of Order 59, Rule 11 when she says in her written submissions that filing of summons on 16th October 2015 is strictly within the 14 day period and filing itself means that it includes service. This is not correct.

[21] The summons for leave to appeal "**shall be filed and served**" within 14 days from the delivery of the ruling.

[22] If the parties can disregard the rules stipulated by the HCR then the intention of having such rules will be of no use.

[23] Therefore, at the very outset I would say that the summons filed by the appellants is out of time.

[24] There is no application by the appellant seeking an extension of time to file the summons.

[25] The court cannot by its own motion extend the mandatory time limits stipulated by the HCR.

[26] When the law is written and clear on any given subject, the court then cannot oversight it and adopts its own mechanism to deal with such applications. The inherent jurisdiction of the court comes into play only when there is no written law on the subject at issue.

[27] Therefore, the summons of the appellants shall fail and should at the very outset be stuck out on the ground that it has not been served to the opposite party within 14 days in terms of the Order 59, Rule 11 of the HCR.

[28] Be that as it may, I now look into the grounds on which the appellants have advanced the summons for leave to appeal the Master's ruling as it is stated in the affidavit in support of Mr. Pickering and as submitted by the appellants' counsel in her written submissions as follows:

(a) *THAT the Plaintiff seeking the disclosure of the RCA report can obtain the same information from her medical folder which has been disclosed to her by the Defendants.*
(b) *THAT the Court in exercising it discretion to order discovery whilst having regard to the fact that the documents are confidential, did not consider that to order disclosure would involve a breach of confidence.*
(c) *THAT disclosure would damage the public interest.*

(d) *THAT the Court erred in law and in fact in holding that the cause of matter would not be disposed fairly if the document is not disclosed without having regard to the medical folder which has already been disclosed.*

(e) *THAT the Court as totally disregarded the policy from 2006 which the Ministry has had in lace till-to-date regarding the use and protection of the RCA report.*

(f) *THAT the Court in its balancing exercise erred in holding that the withholding of the documents might prevent an injustice being carried out without having due regard to the availability of the Plaintiffs medical folder already provided.*

(g) *THAT the Court erred in law and in fact in totally disregarding the Affidavit of the Permanent Secretary as to why the document concerned should not be disclosed.*

(h) *THAT the Court erred in holding that the public immunity or privilege did not apply.*

(i) *THAT the Court erred in holding that the public interest did not apply and totally disregarding the purpose of a RCA report and its effect on public interest.*

[29] The law is very clear on granting leave to appeal as very correctly pointed out by the appellants' counsel in her written submissions with case law authorities relevant to the subject.

[30] In **Sharma v Halabe** [2015] FJHC 1014; HBC 534.2006 (15 December 2015), the Court stated the law on leave to appeal as follows:

> *"[07] The learned counsel in this regard cited the decision in* ***Niemann v Electronic Industries Ltd 1978 B.R. 431 p 441*** *where the Supreme Court of Victoria (Full Court) held as follows:*
> *"... Leave should only be granted to appeal from an interlocutory judgment or order in cases where substantial injustice is done by the judgment or order itself. If the order was correct then it follows that substantial injustice could not follow. If the order is seen to be clearly wrong this is not alone sufficient. It must be shown in addition to affect a substantial injustice by its operation. It appears to me that greater emphasis is therefore must be on the issue of substantial injustice directly consequent on the order accordingly if the effect of the order is to change substantive right or finally to put an end to the action so as to affect a substantial injustice was wrong it may be easily seen to appeal should be given.*
> *[8] In the case of Khan –v- Suva City Counsel (2011) FJHC 272; HBC 406.2008 (13 May 2011). The following observations were made in regard to applications for leave to appeal:*

It is trite law that leave will not be generally granted unless the court sees that substantial injustice will be done to the applicant.
Further in an application for leave to appeal it is incumbent on the application to show that the intended appeal will have some realistic prospect of succeeding.
[9] in Kelton Investment Ltd and Tappo Ltd –v- Civil Aviation Authority of Fiji and Motibhai & Co Ltd Civil Appeal No, ABU 0034 of 1995 the court of Appeal observed as follows:
The courts have thrown their weight against appeals from Interlocutory orders or decisions for very good reason and hence leave to appeal are not readily given. Having read the affidavits filed and considered the submissions made I am not persuaded that this application should be treated as an exception. In my view the intended appeal would have minimal no prospect of success if leave were granted. I am also of the view that an applicants will not suffer an irreparable harm stay is not granted.

[31] Therefor it is only in the most exceptional circumstances will leave be granted to appeal from an interlocutory order or a judgment.

[32] In **Totis Inc. Sport (Fiji) Ltd v John Lennard Clerk & Another** Fiji Court of Appeal No. ABU 35 OF 1996S His Lordship Justice Tikaram President Fiji Court of Appeal expressed the following:

> *"It has been long settled law and practice that interlocutory order and decisions will seldom be amendable to appeal. Courts have repeatedly emphasized that appeal against Interlocutory Orders and Decisions will only rarely succeed. The FCA has consistently observed that above principle by granting leave only in the most exceptional circumstances.*

[33] The counsel for Appellants' emphasized in her written submissions that the appellants have a point of law relating to privilege on the ground of public interest and that it is an exceptional ground on which the appellants are seeking leave of this court.

[34] The counsel brings in her submissions that it was discussed the law relating to privilege on the ground of public interest in **Public Service Commission v Korovula** (1989) FJHC 24; [1989] 35 FLR 22 (20 January 1989) that it has been the subject of authoritative decisions not only in England but in Australia and New Zealand as well during the last quarter century.

"The High Court noted that;

> *"The House of Lords' case of* ***Conway v. Rimmer & Another*** *[1969] UKHL 2: [1968] 1 ALL ER 874 can be regarded as the Landmark and break-through in this field.*

"Lord Reid says at page 888:-

> *"I would therefore propose that the house ought now to decide that courts have and are entitled to exercise the power and duty to hold a balance between the public interest as expressed by a Minister to withhold a certain documents or other evidence and the public interest in ensuring the proper administration of justice. That does not mean that a court would reject a minister's view; full weight must be given to it in every case, and if the Minister's reasons are of a character which judicial experience is not competent to way then the Minister's view must prevail; but experience has shown that reasons given for withholding whole classes of documents are often not of that character.*

"Again Lord Reid says at pages 888 -889:

> *" There may be special reasons for withholding some kinds of routine documents, but I think that the proper test to be applied is to ask, in the language of Lord Simon in Duncan's case, where the withholding of a document because it belongs to a particular case is really " necessary for the proper of the functioning of the public serve". ... I can see nothing wrong in the Judge Singh documents without there being shown to the parties"*

[35] Based on those case law authorities the appellants' counsel argues in her written submissions that the instance appeal is against the discovery of the RCA report. The RCA report falls under the Ministry's policy on Unusual Occurrence Reporting (UOR) for the investigation of sentinel events in 2006 which was revised in 2010. This policy is in line with the Ministries' Strategic Health Plan 2011 – 2015 to "**provide high quality health care delivery services by a caring and committed work force with strategic partners, through good governance, appropriate technology and appropriate risk management, facilitating a focus on patient safety and best health status for all the citizens of Fiji.**"

[36] Moreover, the counsel for appellants further asserts that in simple terms this policy is for the better functioning for the public service under the Ministry of Health and that the Master has failed to consider the importance of this policy in terms of medical error and the productiveness of learning from error and quality improvement of services benefiting the public and this is necessary for the proper functioning of the public service.

[37] The appellants' counsel also submits that the Master erred in holding that the public interest did not apply and totally disregarded the appellants' objections and that the effect and purpose of the RCA report is on patients' safety and best health status for all the citizens of Fiji.

[38] The counsel for appellants' states in her written submissions that the Master in exercising the discretion to order discovery whilst having regard to the fact that the documents are confidential did not consider that to order disclosure would involve a breach of confidentiality of the members of the Risk Management Unit/ or RCA Team who prepared the report under confidentiality.

[39] The argument of the appellants' counsel is also based on the following grounds:

- *Confidentiality of RCA reports within the Ministry of health is integral to promoting, reporting collaboration and shared learning for the benefit of the public and it is necessary for the functioning of the public. The court erred in failing to consider this, she asserts.*
- *The RCA report is so confidential and that the disclosure is against the Health Ministry's policy which has been in existence since year 2006 and that it has always been the practice in Fiji.*
- *The Acting Permanent Secretary of the Ministry of Health in his affidavit has confirmed that the function of the policy in place from year 2006 and that the all RCA reports have been deemed confidential and those are only for hospitals use in improving their services to the public.*
- *To order a disclosure after 10 years of this policy being in effect would definitely cause substantial injustice and that the Ministry's confidential documents would be disclosed and the confidentiality of the RCA team in preparing that document is affected.*
- *The disclosure would affect how the policy will be implemented and reviewed and the quality of statements/comments of medical professionals in submitting their views as part of the report as they no longer have that freedom to freely voice or put their opinions/comments on paper*
- *This is detrimental to the Ministry and finally affects the quality of services provided to the public*

[40] Having closely examined the Health Ministry's policy in place from year 2006 in terms of the submissions advanced by the appellants' counsel and the grounds upon which the objection for discovery of the RCA report is based, it is pertinent to look at whether or not the policy and its purported purpose is in line with the views of the judicial decisions of the local jurisdiction and other foreign jurisdictions.

[41] The appellant relies upon the case of **Conway v. Rimmer & Another [supra]** in asserting that the basic principle enunciated in that case is that the disclosure is not permitted when the disclosure affects the public interest and that therefore the RCA report at issue in the instance case is privileged by law to be withheld.

[42] However, in the very same case of **Conway v. Rimmer & Another [supra]**if one look at the various legal principles discussed in that 916 page judgment, it was not the conclusive view of the House of Lords that disclosure is not permitted under any circumstances when it affects the public interest, and yet this is what Lord Upjohn has said at page 912:

"Lord Upjohn.

My Lords, there can be no doubt that the basic principle to be applied in cases where the Crown claims privilege from production of documents is to be found in the following passage in Viscount Simon LC's speech in Duncan v Cammel Laird & Co Ltd when he said([1942] 1 AII ER at p 592; [1942] AC at p 636):

"The principle to be applied in every case is that documents otherwise relevant and liable to production must not be produced if the public interest requires that they should be withheld. The test must be found to be satisfied either (a) by having regard to the contests of the particular document, or (b) by the fact that the document belongs to a class which, on grounds of public interest, must as a class be withheld from production."

And at page 914:

"My Lords, feeling as I do unfettered by any necessity for a strictly textual adherence to Lord Simon's words, I think that the principle to be applied can be very shortly stated. On the one side there is the public interest to be protected; on the other side of the scale is the interest of the subject who legitimately wants production of some documents, which he believes will support his own or defeat his adversary's case. Both are matters of public interest, for it is also in the public interest that justice should be done between litigating parties by production of all documents which are relevant and for which privilege cannot be claimed under the ordinary rules. They must be weighed in the balance one against the other.

Your Lordships have reviewed the earlier authorities which are many and are not easy to reconcile and I shall not discuss them again, but it seems to me that there is sufficient authority to support the view held by your lordships that the claim of privilege by the Crown, while entitled to the greatest weight, is only a claim, and the decision whether the court should accede to the claim lies within the discretion of the judge: and it is a real discretion."

[43] The matter at issue in the former was that the House of Lords considered a claim for public interest immunity from discovery in civil actions of documents and information in the hands of the police. Nonetheless, the House of Lords finally allowed the appeal and held at page 916 that:

> *"On the question of the actual documents in this case I can be very brief. With regard to the routine reports on this probationer constable I would think quite clearly they should be disclosed. With regard to the report to the director of public prosecutions, as one concerning police procedures which might disclose something of value to the criminal underworld--a point which, under the new practice which should be adopted after this decision, should be specifically taken in the Minister's affidavit—I agree that your lordships should inspect this document in the first place and in the circumstances purely as a matter of convenience your lordships should also inspect the routine reports at the same time, before ordering disclosure."*

[44] Therefore, my respectful conclusion on the opinion of the House of Lords as it was decided in 1968 had been that the disclosure of documents in civil litigations is permitted and required over the immunity they enjoy notwithstanding the fact that those are privileged under policy of public interest when the discretion of the court requires to put more weight on the interest of justice of the individual.

[45] I would now take a short passage from the appellants' written submissions in order to have a comparison between the public policy of the Health Ministry and the common law principles accepted in other similar jurisdictions with regard to the facilitation of a patient safety oriented service in the state health care providing authorities to see whether the disclosure of errors to the patient is forming a part in providing a high quality health service to the people.

[46] For this, I take the following passage from appellant's written submissions:

> *It says: "The RCA report falls under the Ministry's policy on Unusual Occurrence Reporting (UOR) for the investigation of sentinel events in 2006 which was revised in 2010. This policy is in line with the Ministries' Strategic Health Plan 2011 – 2015 to* ***"provide high quality health care delivery services by a caring and committed work force with strategic partners, through good governance, appropriate technology and appropriate risk management, facilitating a focus on patient safety and best health status for all the citizens of Fiji"***

[47] The present application for leave to appeal filed by the appellants is to withhold the RCA report relevant to the respondent who is a citizen of Fiji.

[48] The following expressions made on the subject matter at issue in the present case are worthwhile to observe.

> - In the text book on ***Patient Safety and Quality: An Evidence-Based Handbook for Nurses-*** *by* Zane Robinson Wolf [Ph.D., R.N., F.A.A.N., dean and professor, La Salle University School of Nursing and Health Sciences] and, Ronda G. Hughes [Ph.D., M.H.S., R.N., senior health scientist administrator, Agency for Healthcare Research and Quality]
>
> **Chapter 35 Error Reporting and Disclosure**
> **Ethical Implications of Reporting and Disclosure**
>
> *"Health care providers are typically so devastated and embarrassed by their mistakes that they may attempt to conceal them or defend themselves by shifting the blame to someone or something else. Some attribute failure of honestly acknowledging health care mistakes to providers' personal difficulty with admitting mistakes and incriminating other providers. Ethical frameworks operate when health care mistakes are made. Respect for patient autonomy is paramount, as is the importance of veracity. Fidelity, beneficence, and non-maleficence are all principles that orient reporting and disclosure policies. Providers might benefit from accepting responsibility for errors, reporting and discussing errors with colleagues, and disclosing errors to patients and apologizing to them.*
> *When providers tell the truth, practitioners and patients share trust. The fiduciary responsibility of institutions exists in patients' and families' trust that providers will take care of them. If providers cover up errors and mistakes, they do not necessarily stay hidden and often result in compromising the mission of health care organizations. Consistent with their mission, institutions have an ethical obligation to admit clinical mistakes. Professional and organizational policies and procedures, risk management, and performance improvement initiatives demand prompt reporting. When patients, families, and communities do not trust health care agencies, suspicion and adversarial relationships result. Likewise, the breach of the principle of fidelity or truthfulness by deception damages provider-patient relationships. Fidelity and trust, implicit to the provider-patient relationship, do not coexist with deception.*
> *Physicians, nurses, and other health care providers have legal and ethical obligation to report risks, benefits, and alternative treatments through*

informed consent mandates. Legal self-interest and vulnerability after errors are committed must be tempered by the principle of fidelity (truthfulness and loyalty). Wu AW, Cavanaugh TA, McPhee SJ, et al. Ethical and practical issues in disclosing medical mistakes to patients. JGIM. 1997;12:770–5.
This ethical principle has been reinforced by practical lessons learned from errors; especially when an adverse event causes serious harm or even death, there is an ethical and moral obligation to disclose information. Candid reports and disclosure of errors by physicians as well as other health care providers (or institutional leadership if the physician refuses to disclose) might result in greater patient trust and less litigation. Furthermore, it is essential to act after errors are reported, with interventions aimed at protecting the welfare of patients by targeting iatrogenic problems and documenting the care given."

Disclosure policies

A disclosure policy implemented by the Veterans Affairs (VA) Medical Center in Lexington, Kentucky, resulted in liability payments that were more moderate than such payments at similar facilities. The policy required disclosure to patients of unanticipated outcomes (accidents or medical negligence). This developing, national VA initiative continued its focus on research and policy related to health care error, error-reporting systems and analysis, and feedback methods. Improving systems of care was the target of the ongoing initiative. The VA's disclosure policy included reporting details of incidents, expressing institutional regret, and identifying corrective actions. Comparable liability payments resulted when contrasted with other VA hospitals. Another solution instituted was the granting of a waiver for practitioners who reported errors. Many voluntary adverse event/health care error-reporting systems created for acute care hospitals have built on the VA reporting system. Nonetheless, many health care organizations may not disclose errors to patients, although virtually all have traditionally reported errors through paper incident reports that remained internal and confidential. Error-communication strategies are changing, since several States have mandated that health care institutions notify patients about unanticipated outcomes.

Source: National Center for Biotechnology Information, U.S. National Library of Medicine 8600 Rockville Pike, Bethesda MD, 20894 USA

[49] The action of the respondent in the instance case as per her writ of summons and the statement of claim is based on a claim of damages for medical negligence against the appellants.

[50] In the case of ***British Steel Corporation v Granada Television Ltd; CA 7 May 1980 [1981] 1 AII ER 417***

Lord Denning MR said:

> *"The Norwich Pharmacal case opened 'a new chapter in our law' and 'Mr Irvine suggested this was limited to cases where the injured person desired to sue the wrongdoer. I see no reason why it should be so limited. The same procedure should be available when he desires to obtain redress against the wrongdoer – or to protect himself against further wrongdoing.' Templeman LJ: 'In my judgment the principle of the Norwich Pharmacal case applies whether or not the victim intends to pursue action in the courts against the wrongdoer provided that the existence of a cause of action is established and the victim cannot otherwise obtain justice. The remedy of discovery is intended in the final analysis to enable justice to be done. Justice can be achieved against an erring employee in a variety of ways and a plaintiff may obtain an order for discovery provided he shows that he is genuinely seeking lawful redress of a wrong and cannot otherwise obtain redress. In the present case BSC state that they will not finally determine whether to take legal proceedings or whether to dismiss the employee or whether to obtain redress in some other lawful manner until they have considered the identity, status and excuses of the employee. The disclosure of the identity of the disloyal employee will by itself protect BSC and their innocent employees now and for the future and is essential if B.S.C. are to redress the wrong.'*

[51] It was observed in **Norwich Pharmacal Co and others v Customs and Excise Commissioners; HL** [1974] AC 133, [1973] 3 WLR 164, [1973] 2 All ER 943, [1973] UKHL 6, [1974] RPC 101, [1973] FSR 365
[Lord Reid, Lord Morris of Borth-y-Gest, Viscount Dilhorne, Lord Cross of Chelsea and Lord Kilbrandon]

> *"The plaintiffs sought discovery from the defendants of documents received by them innocently in the exercise of their statutory functions. They sought to identify people who had been importing drugs unlawfully manufactured in breach of their patents.*
> *Held: If someone, even innocently became involved in tortious acts committed by third parties, he became under a duty assist in discovery of the identity of the third party wrongdoers. How the information was acquired was not relevant. Duties of confidence owed by taxation authorities could be overborne if necessary.*

Lord Reid said:

"So discovery to find the identity of a wrongdoer is available against anyone against whom the plaintiff has a cause of action in relation to the same wrong. It is not available against a person who has no other connection with the wrong than that he was a spectator or has some document relating to it in his possession. But the respondents are in an intermediate position. Their conduct was entirely innocent; it was in execution of their statutory duty. But without certain action on their part the infringements could never have been committed. Does this involvement in the matter make a difference?' to which he answered 'Yes'.

Referring to the authorities, he said: "They seem to me to point to a very reasonable principle that if through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrongdoing he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers. I do not thing that it matters whether he became mixed up by voluntary action on his part or because it was his duty to do what he did. It may be that if this causes him expense the person seeking the information ought to reimburse him. But justice requires that he should co-operate in righting the wrong if he unwittingly facilitated its perpetration. I am the more inclined to reach this result because it is clear that if the person mixed up in the affair has to any extent incurred any liability to the person wronged, he must make full disclosure even though the person wronged has no intention of proceeding against him. It would I thing be quite illogical to make his obligation to disclose the identity of the real offenders depend on whether or not he has himself incurred some minor liability. I would therefore hold that the respondents must disclose the information now sought unless there is some consideration of public policy which prevents that.'
Lord Kilbrandon:

'There is no suggestion that in so doing he is pretending to exercise any right of relief against the discoverers.

In my opinion, accordingly, the respondents, in consequence of the relationship in which they stand, arising out of their statutory functions, to the goods imported, can properly be ordered by the court to disclose to the appellants the names of persons whom the appellants bona fide believe to be infringing these rights, this being their only practicable source of information as to whom they should sue, subject to any special right of exception which

the respondents may qualify in respect of their position as a department of state. It has to be conceded that there is no direct precedent for the granting of such an application in the precise circumstances of this case, but such an exercise of the power of the court seems to be well within broad principles authoritatively laid down. That exercise will always be subject to judicial discretion, and it may well be that the reason for the limitation in practice on what may be a wider power to order discovery, to any case in which the defendant has been 'mixed up with the transaction', to use Lord Romilly's words, or 'stands in some relation' to the goods, within the meaning of the decision in Post v Toledo, Cincinnati and St Louis Railroad Co (1887) 11 NER ep 540, is that that is the way in which judicial discretion ought to be exercised.'

[52] It was also discussed In **General Dental Council v Savery and Others; ADMN 16 Nov 2011** [2011] EWHC 3011 (Admin), [2011] WLR (D) 332, that:

Sales J :

"Complaints had been made against certain dentists. Their patients object that they had not been asked about disclosure of their medical records to the tribunals hearing the fitness to practice cases.

Held: The GDC was under no obligation to seek such consent. The obligations to keep medical records confidential was strong, but the intended disclosure was in pursuance of legitimate objectives specified in article 8(2) as being 'in the interests of . . public safety', 'for the protection of health and morals' and 'for the protection of the rights and freedoms of others.' Moreover it was pursuant to law in applying the 1984 Act, and was proportionate because of the high respect given to the duties by the Council and its members.

[53] The following observations and recommendations in **"PATIENT SAFETY. MEDICAL ERROR AND TORT LAW: AN INTERNATIONAL COMPARISON-FINAL REPORT"** by **Joan M. Gilmour**

[Joan M. Gilmour, B.A., LL.B., J.S.M., J.S.D. is an Associate Professor at Osgoode Hall Law School, York University, in Toronto, Canada. She developed and is Director of Osgoode Hall's Master's Program specializing in Health Law, and is past Acting and Associate Director of the York University Center for Health Studies. She is a member of the Bar of Ontario and of British Columbia] are relevant to the present issue before this court.

"1. Qualified Privilege, Error Reporting and Disclosure of Harm to Patients:

How can the civil justice system be changed to promote safer care? Patient safety advocates in all the countries surveyed have argued persuasively first, that there is an urgent need for accurate information about errors that have occurred, so that they can be investigated, their causes determined, and effective strategies developed to prevent or reduce harm in the future, and second, that confidentiality is essential to encourage disclosure. However, empirical evidence that shielding information from disclosure in civil litigation increases error reporting is lacking. Consequently, only limited qualified privilege can be justified.

At the same time, disclosure of harm to patients is both a moral and legal obligation.

Patients are entitled to know what happened and why. Too often, this does not occur. Incentives to encourage disclosure are important. Qualified privilege must be crafted as narrowly as possible to still ensure meaningful disclosure to patients."

[54] Moreover, the issue here in the present application is solely based on the right to access to information which is recognized and guaranteed by the article 25 of the 2013 Constitution of the Republic of Fiji.

Access to information

25.— *(1) Every person has the right of access to—*

(a) information held by any public office; and

(b) information held by another person and required for the exercise or protection of any legal right

(2) Every person has the right to the correction or deletion of false or misleading information that affects that person.

(3) To the extent that it is necessary, a law may limit, or may authorise the limitation of, the rights set out in subsection (1), and may regulate the procedure under which information held by a public office may be made available.

[55] The respondent's case before this court is for the protection of a legal right justly guaranteed by the Constitution.

[56] She must not be deprived of relishing the right to access to information held by the appellants. The information held by the Appellants is the RCA report made by the appellants and that may be a common type of a document for the hospital

authorities that is kept in the custody of the appellants for the benefit of the public in order to achieve the aforesaid goals, and yet it is the RCA report relevant to the respondent on which the final decision of the court in the present litigation has a bearing as far as the cause of action of the respondent's case is concerned. The policy that introduced in the year 2006 cannot anymore be validated for today's context for the reason that the present constitution came into force on 07 September 2013 and that the rights of the citizens guaranteed under the constitution cannot anyway be subjected to a policy that contravene any article in the Constitution. The policies should be molded in line with the Constitution of Fiji which is the supreme law of the land that protects the rights of the citizens.

[57] The respondent's grievance being in this case is that she was not guaranteed with the due protection of her right to health and that she was not duly attended by providing the proper medical treatments.

[58] The respondent's case against the appellants is briefly as follows according to her statement of claim:

Para (4) *THAT on 25th October 2011 the Plaintiff was admitted to the Lautoka Hospital with labour pains at about 8.30am. The Plaintiff was pregnant and her baby's due date was 23rd October 2011. The Plaintiff was kept at the Labour ward for observation for about half an hour and then transferred to the Ante Natal ward. The Plaintiff was seen by doctors at about 9am who told the Plaintiff her paid would be monitored. The Plaintiff state to the doctors that she wanted a Caesarean section birth. Her first child was born by a Caesarean section. The Plaintiff remained in the Ante Natal ward overnight.*

(5) *That on the morning of 26th October 2011 the Plaintiff began to have regular labour pains at intervals of approximately 10 minutes. When the doctor came to do his ward rounds after am he asked the Plaintiff whether she wanted a Caesarean delivery. The doctor refused saying they would try vaginal birth and would do a Caesarean delivery or Vaginal delivery. The Plaintiff stated she wanted a Caesarean delivery. The doctor refused saying they would try vaginal birth and would do a Caesarean if complication arose.*

(6) *That the Plaintiff's labour pains continued starting from the morning of 26th October 2011 and the Plaintiff also started vomited until about 2pm when she was transferred to the Labour Ward after a CTG was done for the baby.*

(7) *That in the Labour Ward the Plaintiff's Blood Pressure was measured. It was rising. She was given an oxygen mask to breathe. The Plaintiff's husband asked the doctor on call to do a Caesarean on the Plaintiff. Both the doctor and the sister on duty refused stating that the baby would be delivered normally. The Plaintiff could not eat or during as she suffered from symptoms of vomiting.*

(8) *That at about 9.30pm the CTG belt was attached to the Plaintiff. The doctor and the sisters went to eat leaving two student nurses in the ward. The Plaintiff was having continuous pain, throbbing pain in the head and the baby was making movements in the womb. There were no qualified nurses' around.*

(9) *That at about 9.45pm the baby moved vigorously in the womb. There was a very sharp pain and then the pains stopped. The Plaintiff called out but the nursed could not hear.*

(10) *The doctor, Dr Vasitia, came at about 9.50pm and enquired of the Plaintiff as to what had happened. The Plaintiff informed the doctor that her labour pains had ceased and the baby was no longer moving. The Plaintiff was also bleeding. The doctor then started to prepare the Plaintiff for emergency Caesar and the Plaintiff was rushed to the Operation theatre.*

(11) *The Plaintiff was anaesthetized half body down and operated upon. An emergency Caesarean section was done. Doctor Rani was also called and was present in the theatre. By the end of the operation the Plaintiff was conscious enough to see the needle thread going up and down as was being stitched. At about 12.10am the Plaintiff was taken to the labour ward, was given injections and went to sleep. She was not told what had happened.*

(12) *That on the morning of 27th October 2011 the Plaintiff was advised by her husband that her baby had died in the womb. Dr Rani advised the Plaintiff that she needed another operation urgently because of the internal bleeding. The Plaintiff was taken to the operation theatre at about 10am and brought out of the theatre at about 3pm.*

(13) *That on the morning of 28th October 2011 the Plaintiff was informed by Dr Rani that they had to remove the Plaintiff's uterus.*

The Plaintiff was transferred to the Ante Natal ward on 29th October 2011. The Plaintiff was wetting her bed with urine despite having an indwelling catheter in place. That on 15th November 2011 a cystoscopy was performed on the Plaintiff by a visiting urologist. As a result a fistula was noted between the vagina and the urinary bladder and granulation tissue. The Plaintiff was advised that the repair of the fistula could be done in January or February 2012. On 15th February 2012 the Plaintiff was advised she would be operated on 16th March 2012.

(18) The Plaintiff decided to seek further treatment overseas (in Australia) as the doctors and/or the sisters, nurses of the Lautoka Hospital being the servants and/or agents of the said Hospital, and the Government of the Fiji who treated the Plaintiff were and each of them was, or alternatively one or other of them was, guilty of negligence and failed to use reasonable care, skill and diligence and exercised proper judgment in and about the treatment, attendance, care and advice given to the Plaintiff as aforesaid resulting in her present condition.

[59] Let alone, the final outcome of the present litigation between the parties but the respondent shall have the right to duly prosecute her case before a court of law which is also guaranteed by the constitution.

[60] The Article 38 speaks of the right to health.

Right to health

38.— (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 resource to implement the right, it is the responsibility of the State to show that the resources are not available.

[61] The article 38 (1) protects the reproductive health care that has been the very route cause of this litigation of the respondent against the appellants.

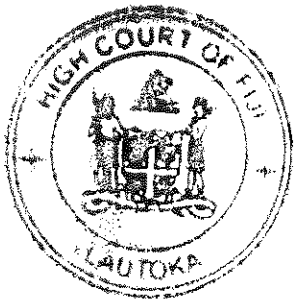
[62] Hence, in view of the underpinning of this litigation the respondent must be given the opportunity to bring the relevant evidence in proof of her case as she alleged that she was deprived and denied the emergency medical treatment for which she is constitutionally protected yet not attended to at the Lautoka Hospital.

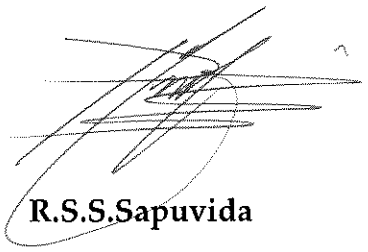
[63] Having given the due regard to what emphasized in the case law authorities mostly referred above the remedy of discovery is intended in the final analysis to enable justice to be done. When the balance between the qualified privilege and the real necessity in the administration of justice is measured, I have no option but to employ the real discretion in directing the appellants to disclose to the respondent the Root Cause Analysis report relevant to the respondent which is more fully revealed in the letter of the Acting Medical Superintendent, Lautoka Hospital dated 28 April 2014.

[64] Hence, I see no reason to interfere with the findings in the ruling made by the Master dated 02 October 2015 which deals with the subject very broadly and that I endorse it quite an exhaustive piece of work against which I would not even think of granting leave to appeal.

[65] The summons for leave to appeal and summons for stay of proceedings filed by the appellants are struck out and dismissed with costs summarily assessed at $500.00 payable to the respondent by the appellants within 21 days from this judgment.

[66] Leave is refused.





R.S.S.Sapuvida

JUDGE

High Court Of Fiji

On the 9th day of June 2016
At Lautoka