

**IN THE HIGH COURT OF FIJI**  
**AT SUVA**  
**CIVIL JURISDICTION**

**Civil Action No. HBC 258 of 2012**

**BETWEEN:** **TEVITA SAQABOBO** of Veiwawa Road, Nakaulevu, Navua, Diver

**PLAINTIFF**

**AND:** **DR. SEMESA MATANAICAKE JNR** of CWM Hospital, Waimanu Road. Suva in the Republic of Fiji, Medical Doctor.

**FIRST DEFENDANT**

**AND:** **DR. IFEREIMI WAQAINABETE** of CWM Hospital, Waimanu Road, Suva in the Republic of Fiji, Medical Doctor.

**SECOND DEFENDANT**

**AND:** **MINISTRY OF HEALTH** a Government ministry being sued for vicarious liability as an employer of the First Defendant and duly responsible for the administration of Public Health at various hospitals in Fiji.

**THIRD DEFENDANT**

**AND:** **THE ATTORNEY-GENERAL OF FIJI** is joined as a party pursuant to the State Proceedings Act 1951.

**FOURTH DEFENDANT**

**Before:** Mr. Justice Deepthi Amaratunga

**Counsel:** Mr. Vosorogo F for Plaintiff  
Mr. Prakash A for Defendants

**Date of Judgment:** 09<sup>th</sup> February 2024

# **JUDGMENT**

## **INTRODUCTION**

- [1] Plaintiff who suffered from a pain in his lower abdomen and scrotal swelling was referred from the local medical centre for diagnosis and treatment from CWM Hospital (CWM). When at CWM he had undergone several preliminary investigations including x ray without any specific diagnosis. He was advised to undergo a surgical procedure for exploration of his abdomen in order to examine his appendix.
- [2] The consent was given for it and exploratory laparotomy was conducted with midline incision.
- [3] There was no pathology identified (P1) from that exploratory laparotomy. According to Plaintiff he gave consent only for minor surgery which was exploratory laparotomy for examination of his appendix for inflammation.
- [4] As a result of this surgical intervention, incisional hernia was developed and Plaintiff was advised to corrective surgery, but he refused to do so.
- [5] According to first Defendant's evidence Plaintiff suffered from severe pneumonia and treated in intensive care for eight days.
- [6] First Defendant in evidence stated that incisional hernia a result of mid line incision can be treated later and the condition of the Plaintiff was critical as his condition deteriorated rapidly.
- [7] Plaintiff was diagnosed with incisional hernia shortly after surgery. Defendants decided to deal with that later though another surgery which Plaintiff refused when he was advised to do so.
- [8] According to defence a corrective surgery can be done to cure incisional hernia. According to defence in laparotomy midline incision is normal. It is common to have incisional hernia in midline incision due to several factors. According to undisputed evidence, incisional hernia may result in 3%-20%. So according to defence the risk of hernia in laparotomy is high.

- [9] Incisional hernia is due to tissues or organs of abdominal cavity protruding from pressure from inside when healing the wound which happens commonly.
- [10] Defendants Contend that Plaintiff had not adduced any medical evidence to disprove the evidence of defence hence there was no proof of Plaintiff's case for medical negligence.
- [11] According to evidence of defence correct procedure was followed during the surgery and incisional hernia is a risk to patient in midline exploratory laparotomy.
- [12] Plaintiff is not consenting to any corrective surgical intervention by Defendants and this had not mitigated his condition, and aggravated his condition.
- [13] Plaintiff's claim is based on negligence by first and second Defendants in failing to follow correct procedure, but Defendants had produced Plaintiff's medical folder and also adduced evidence of first Defendant and Anesthetist who performed the surgery.

## **FACTS**

- [14] Following facts are admitted by the parties at the pretrial conference.

“

1. The Plaintiff is a resident of Davuilevu Housing, Nausori in the Republic of Fiji. At all material times the Plaintiff was a driver, 26 years of age and permanently residing in Veiwawa Road, Nakaulevu, Navua and engaged in a business of sea diving to earn his daily living.
2. The First Defendant was at all material times a licensed practicing medical practitioner practicing as a surgical registrar at the Colonial War Memorial Hospital (“CWM Hospital”), Suva.
3. The Second Defendant was at all material times a licensed practicing medical practitioner practicing as the Medical Superintendent of the CWM Hospital.

4. The Third Defendant is a Government ministry and was the employer of the First and Second Defendants at the material time.
5. The Fourth Defendants is joined pursuant to the State Proceedings Act 1951.
6. On 12 February 2010 the First and Second Defendants as employees of the Third Defendant and acting within the scope of their employment provided medical services to the Plaintiff at the CWM Hospital in the form of an operation known as exploratory laparotomy.
7. The First and Second Defendants owed a duty to the Plaintiff to perform the said operation within acceptable standards of medical care within the medical community. “

[15] Plaintiff's claim is based on the medical negligence by first and second Defendants and it is an admitted fact that first and second Defendants as employees of CWM within the scope of their employment provided medical services to Plaintiff on 12.2.2010.

[16] Plaintiff gave evidence and explained the circumstances that led him to seek medical treatment at CWM.

[17] Plaintiff had a severe pain in his stomach or lower abdomen for three days and he had gone for local medical centre for treatment but he was referred to CWM by doctor who examined him. This was on the morning on 12.2.2010 and he had gone to CWM around 10 am to outpatient department and met a nurse and also explained his condition to first Defendant.

[18] Plaintiff had a consultation with first Defendant who had recommended some tests including X-ray. After examining the said reports including X-ray. First Defendant had recommended a surgical intervention to diagnose the cause of the abdominal pain Plaintiff was complaining at that time.

- [19] First Defendant had also indicated that a surgical intervention 'Exploratory Laprotomy' was required to examine the abdomen more closely and Plaintiff had consented to said surgical procedure.
- [20] There was no evidence of that Plaintiff informed about the risks associated with mid line exploratory laprotomy. Plaintiff had not pleaded a claim based on his consent to surgical procedure though in evidence he stated that he would not have given consent if the surgery was a 'big' one.
- [21] Plaintiff was prepared for said exploratory laparotomy on the same day and this investigation had come out with negative pathological finding.
- [22] There after Plaintiff was taken to ICU for treatment of severe pneumonia and first Defendant stated that the condition of the Plaintiff deteriorated within a short time period and his condition became critical.
- [23] Plaintiff explained the events up to the time he was taken for surgery and he was unconscious for eight days and when he gain conscience he could not walk properly.
- [24] Plaintiff said that though he could walk he is suffering from incisional hernia and he was asked to come for another surgery by second Defendant. He did not consent to second surgery.
- [25] Due to incisional hernia Plaintiff could not engage in his livelihood of diving and fishing. According to his evidence he earned about \$100 per day for four days a week from diving and fishing.
- [26] Counsel for the Defendants called 2 witnesses to give evidence:
- i. Dr Semesa Matanaicake Jnr - First Defendant, He was the surgeon who conducted the surgery. Second Defendant was the consultant under whom first Defendant did surgery.
  - ii. Dr Kenton Biribo - Anaesthesiologist at the CWM Hospital at the material time. He is not a defendant and there is no claim against his professional judgment or work.
- [27] Both witnesses had given evidence regarding the surgical procedures followed and marked the Medical Record of Plaintiff as D1.

[28] According to Medical Record (D1) Plaintiff was suffering from 'severe pneumonia'. His condition had deteriorated to critical level fast and he was treated for that in Intensive Care Unit (ICU) after obtaining consent from a relative.

## **ANALYSIS**

[29] Plaintiff had a severe lower abdominal pain for three days and on 12.2.2010 was referred to CWM by a medical centre. He had presented to CWM in morning.

[30] Plaintiff had met a nurse and also first Defendant who had recommended initial investigations such as x ray, blood reports, rate of heartbeat, blood pressure etc.

[31] After obtaining these preliminary investigatory reports first Defendant had recommended a surgery on the same day. According to Plaintiff it was a minor surgery and first Defendant had explained it as a 'small' surgical intervention for investigation of his condition further.

[32] According to first Defendant's evidence exploratory laparotomy was conducted on Plaintiff for the investigation and Plaintiff had consented to said surgical procedure.

[33] After surgery Plaintiff had developed incisional hernia and it is admitted fact that this was a direct result of the surgical intervention of exploratory laparotomy.

[34] First Defendant further stated that standard procedure was followed and exploratory laparotomy and midline incision is normal procedure for such surgical intervention.

[35] According to statement of claim:-

“That during the Plaintiff's surgery on 12 February, 2010, Semesa Matanaicake, M.D. lacerated the Plaintiffs stomach for the exploratory laparotomy which laceration did not heal well causing severe physical injury and conscious pain and suffering to the Plaintiff.

further pleaded

“That all of the injuries and damages sustained by the Plaintiff were the direct and proximate result of the negligent actions of the Ministry of Health by itself its servants and/or agents including Semesa Matanaicake M.D. and Ifereimi Waqainabete M.D. without any act or omission on the part of the Plaintiff directly thereunto contributing.

That the Plaintiff did not assume the risk of his injuries. “

[36] In the “informed consent form for surgery” produced by Defendants and signed by Plaintiff, in page 18 of D1, stated:-

“.....The Doctor has told me (Plaintiff) that

\*An Andesitic, Medicine or blood transfusion may be needed and these may have some risks.

\*Additional procedures or treatments may be needed if the doctor finds something unexpected.

\*Complications may occur

\*The procedure/treatment may not give the expected results. I have had the opportunity to ask questions. I am satisfied with professional care.

To understand that undergoing the procedure/treatment carries risks. I have had the opportunity to ask questions. I am satisfied with the explanation and answers to my questions.”

[37] There was no dispute that Plaintiff was informed of the surgical procedure needed and it was exploratory laparotomy. Plaintiff admitted his signature in the ‘Informed Consent’ form.

[38] In UK Supreme Court decision Montgomery v Lanarkshire Health Board (General Medical Council intervening) [2015] 2 All ER 1031 held, (Lord Kerr and Lord Reed with whom Lord Neuberger, Lord Clarke, Lord Wilson and Lord Hodge agreed).

“[87] The correct position, in relation to the risks of injury involved in treatment, can now be seen to be substantially that adopted in *Sidaway*

by Lord Scarman, and by Lord Woolf MR in *Pearce*, subject to the refinement made by the High Court of Australia in *Rogers v Whitaker*, which we have discussed at paras [77]–[73]. An adult person of sound mind is entitled to decide which, if any, of the available forms of treatment to undergo, and her consent must be obtained before treatment interfering with her bodily integrity is undertaken. The doctor is therefore under a duty to take reasonable care to ensure that the patient is aware of any material risks involved in any recommended treatment, and of any reasonable alternative or variant treatments. The test of materiality is whether, in the circumstances of the particular case, a reasonable person in the patient's position would be likely to attach significance to the risk, or the doctor is or should reasonably be aware that the particular patient would be likely to attach significance to it.

[88] The doctor is however entitled to withhold from the patient information as to a risk if he reasonably considers that its disclosure would be seriously detrimental to the patient's health. The doctor is also excused from conferring with the patient in circumstances of necessity, as for example where the patient requires treatment urgently but is unconscious or otherwise unable to make a decision. It is unnecessary for the purposes of this case to consider in detail the scope of those exceptions.”

[39] During the evidence first Defendant stated that incisional hernia is a risk that the patient had to take and according to him the risk can be as high as 20%. This evidence was not challenged.

[40] Plaintiff's cause of action against first and second Defendants as pleaded in the statement of claim states

“That Semesa Matanaicake, M.D. and Ifereimi Waqainabete M.D. **deviated from the acceptable standard of medical care during and after the surgery they severally and/or collectively performed on the Plaintiff** on 12 February 2010 and that this **deviation was the direct and proximate cause of the laceration of the Plaintiff's stomach which laceration did not heal well** causing incision hernia and the direct and proximate cause of all of the Plaintiffs injuries and damages.” (emphasis added)

[41] Plaintiff failed to prove such deviation from the acceptable procedure through his evidence. Defendants through the evidence of first Defendant



and Anesthetist proved that they had followed the procedure but there was an inherent risk in the type of surgical procedure adopted for incisional hernia.

[42] According to the claim against first and second Defendants the deviation of 'acceptable standard of medical care during and after surgery' had direct cause for the 'laceration of Plaintiff's stomach which laceration did not heal well'. So according to Plaintiff both laceration of his stomach as well as incisional hernia which resulted that surgical intervention were due to not following acceptable standards of medical care.

[43] First Defendant gave evidence and stated midline incision for exploratory laparotomy is common medical procedure. This was not denied or contrary was proved. So Plaintiff's first allegation of laceration of his stomach was not done according to acceptable standard was not proved.

[44] Plaintiff also allege that laceration of his stomach did not heal properly due to the failure of first and second Defendant 'deviated' from the acceptable standard of medical care . What was the said 'deviation' and what was not performed or wrongly performed was not proved.

[45] In the circumstances Plaintiff had failed to prove his cause of action against first and second Defendants. With that cause of action on vicarious liability cannot succeed.

[46] So on the balance of probability plaintiff had failed to prove that Defendants were negligent in the conduct of surgery.

## **CONCLUSION**

[47] Plaintiff is suffering from incisional hernia after a surgery. Plaintiff stated that incisional hernia was a result of not following correct procedure in surgery. For defence there were two medical officers who gave evidence. They were engaged in the surgery and first Defendant was the surgeon who performed the surgery and Anesthetist also gave evidence. Both of them were cross examined and the Plaintiff was unable to prove that they had deviated from the normal practice as pleaded in the statement of claim. From medical folder marked D1, there were no evidence of deviation from normal practice. Plaintiff had failed to prove his claim as pleaded.

**FINAL ORDERS**

- a. The statement of claim is struck off.
- b. No cost awarded considering circumstances of the case.



.....  
Deepthi Amaratunga  
Judge

At Suva this 09<sup>th</sup> day of February, 2024.

**Solicitors:**

**Vosarogo Lawyers for the Plaintiff**

**AG's Chambers for the 1<sup>st</sup> 2<sup>nd</sup> 3<sup>rd</sup> & 4<sup>th</sup> Defendant**