

IN THE HIGH COURT OF FIJI
AT LAUTOKA
WESTERN DIVISION

Civil Action No. HBC 27 of 2009

- BETWEEN** : **GYAN SATYA NARAYAN** son of Gangaiya of Kara Punja Road, Waiyavi, Lautoka, Electrician.
Plaintiff
- AND** : **AKTAR ALI** of Lautoka, Medical Surgeon.
1st Defendant
- AND** : **ATUL JAWALE** of Lautoka, Medical Surgeon.
2nd Defendant
- AND** : **THE MINISTER OF HEALTH** of Dinem House, 88, Amy Street, Toorak, Suva.
3rd Defendant
- AND** : **THE ATTORNEY GENERAL OF FIJI**, Government Buildings, Suva.
4th Defendant

Counsel: Mr. Shalen Krishna & Co. for the Plaintiff
Mr. Joseva Mainavola for the Defendants

R U L I N G

INTRODUCTION

1. I have to decide now whether or not to strike out the defendant's statement of defence on account of their failure to discover Medical Folder 320103899 which they have listed in schedule 1 of their list of documents.
2. This is a medical negligence claim. Medical Folder 320103899 relates to the plaintiff. The document contains records which is decisive to both the plaintiff's and the defendant's cases.
3. The background to the issues surrounding this document is set out in my ruling in **Narayan v Ali** [2016] FJHC 867; HBC27.2009 (28 September 2016). In that ruling, I had refused an application by the Plaintiff under Order 24 Rule 16(1)(b) of the High Court Rules 1988 to strike out the

defendants' Statement of Defence on account of their failure to discover the same medical folder.

4. Under section 15(2) of the 2013 Constitution, a defendant in a civil proceeding is given a right to access the Court to defend himself.

Access to courts or tribunals

15.—(2) Every party to a civil dispute has the right to have the matter determined by a court of law or if appropriate, by an independent and impartial tribunal.

5. To strike out a defence is tantamount to a denial of the section 15(2) right.
6. Accordingly, the power to strike out a defence under Order 24 Rule 16(1) (b) for want of compliance with discovery orders is exercised rather cautiously and only if the defendant's conduct was sufficiently unsatisfactory to warrant a denial of his right under section 15(2).
7. Non-discovery of a peremptory discovery order is conduct which is sufficiently unsatisfactory to warrant a court exercising its Order 24 Rule 16(1)(b) discretion.
8. Non-discovery of a non-peremptory order, on the other hand, will only amount to conduct "*sufficiently unsatisfactory to warrant a court exercising its discretion to strike out the statement of defence*" if the act of non-discovery (or the omission to discover) was deliberate and contumacious.

UNLESS ORDER

9. Following my Ruling of 28 September 2016, the Plaintiff then sought an unless order to the effect that if the defendants did not discover the medical folder within 35 days, their statement of defence would be struck out.
10. I did not think that there was anything wrong with the defendant seeking a peremptory order as such. After all, the said Medical Folder was still on Schedule 1 Part 1 of the Defendants' List of Documents.
11. Accordingly, on 05 October 2016, I ordered that if the defendants do not discover the said Medical Folder in thirty-five days, their Statement of

Defence will be struck out with costs to the Plaintiff and the Plaintiff will thereafter be allowed to proceed with formal proof of their case.

12. At the end of the said 35 days, on 11 November 2016, the Defendants still had not discovered the said Medical Folder. Mr. Mainavolau said in Court that the folder "*has gone missing*". I then granted the Office of the Attorney-General time to file an affidavit to explain the circumstances surrounding the missing Medical Folder.

AFFIDAVIT OF MISSING MEDICAL FOLDER

13. On 18 November 2016, an affidavit of Vinod Raj Goundar sworn on 17 November 2016 was filed. Goundar is the Assistant Statistician at the Lautoka Hospital. He is in charge of the Medical Records. Part of his duties entails record keeping of the medical folders for all patients admitted at the Lautoka Hospital.
14. Goundar deposes that the medical folders are kept with close guard at the Medical Records Section of the Hospital and are uplifted only upon the request of the Medical Superintendent and/or her authorised assignees.
15. Goundar further deposes as follows at paragraphs 4 to 15:
 4. That on 7 November 2016 or thereabout, I received instructions from the Medical Superintendent at Lautoka Hospital, Dr Rigamoto Taito to retrieve the Medical folder No: 320103899.
 5. That the above mentioned medical folder contain the medical records of one Lautoka Hospital patient, namely Gyan Satya Narayan of Kanja, Punja Road, Lautoka, Fiji.
 6. That I am verily informed by the Fourth Defendant and the First Defendant, that Mr. Narayan was an appendicitis patient at Lautoka Hospital in 2006.
 7. That I conducted an extensive search for said medical folder in the Records Section but was unable to locate said folder.
 8. That I also enquired about said medical folder with other staff members including doctors at Lautoka hospital, who were all very helpful and co-operative, but I did not receive any useful information on the whereabouts of said folder.
 9. That in as far as I am aware, the location of said medical folder is unknown; however attempts are still being carried out by Lautoka Hospital to locate said medical folder.
 10. **That said medical folder contains important information relating to the treatment of the plaintiff in terms of his**

- admission at the hospital, his surgery and post-surgery care.**
11. That to the best of my knowledge, Lautoka Hospital did not keep any copies of the Plaintiff's Medical Folder.
 12. That I am verily informed by the Fourth Defendant that the only available medical documentation relating to the Plaintiff is in the possession of the Fourth Defendant.
 13. That pursuant to paragraph 12 above, said documentation are medical reports prepared by the First Defendant and one Dr. Wally Paras in the years 2006 and 2009 respectively. Annexed herewith and marked with the letters "A" and "B" are the copies of said medical reports.
 14. **That I am verily informed by the Fourth Defendant that the Defendants will now seek to rely on the abovementioned medical reports for the purposes of disposing documentary evidence.**
 15. That I verily declare that the above information are true to the best of my knowledge and where my knowledge of any fact which I have alluded to is limited, that I rely on the advice and information conveyed to me by the solicitors for the Defendants.

RESPONSE

16. An Affidavit of Gyan Satya Narayan sworn on 05 April 2017 is filed in response to Goundar's Affidavit. Narayan questions whether any real effort has been made to locate the medical folder in question and draws attention to the lack of any specificity in the affidavit of Goundar about what sort of investigations has been carried out, who was the last person on record to have uplifted the said folder, any police report on the matter. Accordingly, Narayan urges the court to draw an inference that the defendants are deliberately not disclosing the said medical folder. Narayan highlights that the said Medical Folder is listed in Schedule 1 Part 1 of the List of Documents of the Defendants. He argues that the Court Records will show that on 11 November 2010, the Defendants' Solicitor told the Court that they cannot release the whole Folder but that if the Plaintiff wished to discover any specific document in the Folder, then they should specify the document.

COMMENTS

17. A medical negligence claim is won or lost on the battle of the respective expert medical opinions for each party's case. In terms of the law of

evidence, clinical records kept in a patient's medical folder is the best and is the primary evidence of patient information and the care rendered. An expert opinion on whether or not that care rendered falls below the standard of care needed is secondary evidence. In essence, the opinion is an interpretation of the clinical records in the medical folder.

18. Accordingly, one expects an expert giving an opinion in a medical negligence case to have reviewed the clinical records beforehand. So, when an expert medical opinion is given as to whether professional and legal standards of care in any given case was met or breached, the primary reference point for that opinion will be the clinical records and notes in the Medical Folder.
19. Without the medical records, an expert cannot be cross-examined effectively on his opinion. Ultimately, this does not augur well for a fair trial.
20. Vinod Goundar underscores the same point when he deposes:

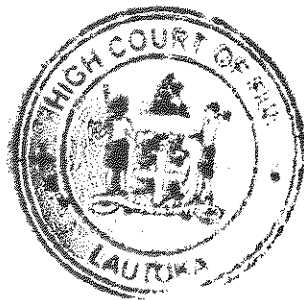
That said medical folder contains important information relating to the treatment of the plaintiff in terms of his admission at the hospital, his surgery and post-surgery care.

21. I have perused the court records. The plaintiff's allegation that the defendants are deliberately withholding the said Medical Folder, appears to be well founded based on what counsel from the Attorney-General have said in Court from time to time. I agree that the only inference to draw is that either the counsel or someone from the Lautoka Hospital has deliberately hidden the said Folder.

SHOULD THE DEFENCE BE STRUCK OUT THEN?

22. Mr. Krishna has pointed me to some cases where the statement of defence the State has been struck out for non-compliance with discovery orders.
23. I have kept in mind that there seems to be a clear consistent policy in the provisions of the High Court Rules that summary judgement or orders against the State should not be readily granted by the Courts in the same way that they are granted against any other ordinary litigant.

24. For example, the High Court Rules make provision under Order 77 Rule 7 that no default judgement can be entered against the State unless the prior leave of the Court is obtained.
25. And even under Order 14 Rule 12, a summary judgement cannot be ordered against the State without the leave of the Court.
26. I have considered the option of exercising my discretion in favour of not striking out the statement of defence in this instance. If were to take that option, I would keep an open mind about how the deliberate non-disclosure of the Medical Folder would prejudice the Plaintiff at trial, whether the maxim *res ipsa loquitur* therefore should apply (which need not be pleaded) to somewhat shift the burden to the defendant, and also the problems that the defendant will face in relying on their expert medical opinion in the absence of the primary clinical notes.
27. I think that, in light of the deliberate and contumacious non-discovery of the said Medical Folder, the better option is to strike out the Statement of Defence.
28. As a sidenote, I have read some legal commentary that, in an appropriate case, a Public Hospital may be civilly liable for failing to maintain proper patient records. That is in recognition of the importance of proper record-keeping as an integral part of patient care management. Flowing from that, it is in recognition of the duty of care that Hospitals have in maintaining proper patient records.
29. Losing a Medical Folder is simply inexcusable. It is appalling.



A handwritten signature in black ink, appearing to be "Anare Tuilevuka", written over a horizontal dotted line.

Anare Tuilevuka
JUDGE
25 May 2018