# LIABILITY OF TRADITIONAL HEALERS

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Traditional healers are an integral part of Pacific societies and have been giving traditional and herbal medicines to these societies for centuries. In South Pacific countries like the Federated States of Micronesia, Fiji, Kiribati, Marshall Islands, Samoa, Solomon Islands, Tonga and Vanuatu, people have been going to these so-called healers or village doctors with their ailments and have been given traditional medicines or told to perform certain acts by the traditional healers in order to get better or cure their diseases. These traditional healers do not have medical degrees or certificates and are not versed in the use of sterilised instruments or wearing gloves when dealing with their patients.

Nevertheless, the people of the Pacific have strong faith in these traditional healers and their medicines as their forefathers have been using them for ages.[1] Usually these patients do recover from their ailments, but at times they do not recover or get worse and eventually die, in which case there is hardly any action taken against the traditional healer. In most societies people take it as natural death. However, if a medical practitioner's medication or operation fails, people usually come to court with negligence suits against the doctor and the hospital. Why is it that qualified doctors have liability attached for their actions but not traditional healers? In this article I will consider various countries in the South Pacific region and how the law in each country treats traditional healers and their practices. I will also discuss how countries like Australia and England have addressed the practices of medical practitioners and herbal healers.

First let us understand what traditional healing is all about. In some countries, traditional doctors are also known as 'witch doctors' due to their strange ways and powers of healing people. They are usually known to use plants, roots, bark, seaweed and even other practices, such as putting needles on people to heal them.[2] These traditional healers have also been known to operate on people by using ordinary instruments. At times the tactics employed by traditional healers can be seen as very dangerous and risky to the life of the patient or sick person. According to Mr. Bismarck Tamati, whose grandmother was a Samoan traditional healer, people came to her from all over Samoa with their ailments for her to heal. He states that his grandmother used to tell the sick people what to do and what not to do and they had to follow the instructions very carefully. One time a patient who failed to follow the instructions of the traditional healer died; people believed that this failure caused the death. However no legal action was taken against the traditional healer and people accepted the death as being from natural causes. In the Solomon Islands people practice traditional healing and firmly believe in getting better if they are treated by traditional healers. In Vanuatu, people also go to traditional healers for their herbs and traditional medicine which they have been using over the years according to custom practices.

People know that these traditional healers do not have any formal qualifications and most of them do not even speak any other languages apart from their native language. However, it is observed that people still prefer to go to traditional healers for their ailments than medical practitioners, and belief in traditional medicine is strong amongst Pacific societies. These

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[1] WA Whistler, *Tongan Herbal Medicine* (1992).
[2] Ibid.

traditional practices are embedded so strongly in societies that even the legislatures in many countries have given recognition to traditional healers. Even if these practices were banned, according to Mr. Tamati, the common belief is that the people would still consult these traditional healers, so it is better for the law to give them recognition and regulate their practices rather than banning them altogether and risk people being exposed to unsterile equipment and practices.

I will now discuss how some Pacific island countries have recognised and tried to regulate these traditional healing practices. In the Federated States of Micronesia (FSM), traditional healing is part of the culture. FSM law regulates health and medical practitioners specifically and requires every medical practitioner to have a license to practice. Also, the *Public Health, Safety and Welfare Act* provides under s 101 that the Director of the Health Services must ensure that health and sanitary conditions are improved and that proper standards are adhered to by all government-owned hospitals. Section 207 of the *Public, Health, Safety and Welfare Act* exempts traditional healers from medical health care licenses. Therefore, the law in FSM clearly states that traditional healers who are customarily employed by the citizens of FSM do not require medical health care licenses to operate as traditional healers.[3] The law gives traditional healers all the leverage they need to operate in their customary environment and treat patients.

In Fiji, the practice of seeking cure for ailments from traditional healers is an integral part of society. Both the Fijian and Indian communities have faith in traditional healing practices and traditional medicine, especially in the rural areas, which is now spreading to urban areas. Many times people consult traditional healers before certified medical practitioners. The Women's Association for Natural Medicinal Therapy, an NGO founded in 1993 which promotes the use of traditional medicine, conducted a survey and found that there were over 2,000 practising providers of traditional medicine in 13 of the 14 provinces in Fiji.[4] These surveys and interviews with the locals show great faith in modern medicine but they find traditional medicine to be more effective and cost-efficient. This survey also showed that many people use traditional medicine and seek treatment from traditional healers but do not disclose it, as traditional healing is seen to be associated with witchcraft. There is no provision in the laws of Fiji to recognise or regulate traditional healers.

Kiribati recognises traditional healers and their practices under s 37 of the *Medical and Dental Practitioners (Amendment) Act 1981*, which states that nothing in the ordinance will affect

> the right of any I-Kiribati to practice in a responsible manner Kiribati traditional healing by means of herbal therapy, bone-setting, massage, and to demand and recover reasonable charges in respect of such practice provided that a person so practising shall not take or use any name, title, addition or description likely to induce anyone to believe that he is qualified to practice medicine or surgery according to modern scientific methods.[5]

This shows that Kiribati gives legal recognition to traditional healing and makes sure that the traditional healer does not impersonate a medical practitioner or claim to have any title or any

[3] *Public, Health, Safety and Welfare Act* (Federated States of Micronesia) s 207.
[4] Wainimate, 'Save The Plants That Save Lives' (Women's Association for Natural Medicinal Therapy, Fiji) (1993) http://www.highbeam.com/doc/1G1-63636704.html.
[5] *Medical and Dental Practitioners (Amendment) Act 1981* (Kiribati).

medical qualification. This section also provides that the traditional healer can charge a reasonable fee for his medication and treatment. However, it has to be noted that the provision does not impose any liability upon the traditional healer if his medication does not work or worsens the condition of the patient, or even if the patient dies. The law is reluctant to interfere with custom healing practices; this encourages the traditional healers to continue practicing their treatments, as they know they will not be liable under the law if a treatment goes wrong. They do not bear any duty of care or legal responsibility towards the people they treat.

The Marshall Islands has gone a step further from merely recognising traditional healing practices. Section 103 of the *Public Health, Safety and Welfare Act* provides that traditional doctors should conduct their healing practices in a sanitary manner. This shows that traditional healers need to use a good sanitary and hygienic environment and have clean instruments.[6] This would also imply that they need to wear gloves when inspecting patients. The legislature allows for traditional healers and does not impose any liability upon them but does require them to operate in sanitary and hygienic facilities and use sanitary measures. A higher standard of care is imposed upon traditional healers to carry out their treatment in a hygienic manner.

Moving on, let us now consider what the law in Samoa assert about traditional healers. Traditional healers are recognised by the laws of Samoa. Under the interpretation section of the *Healthcare Professions Registration and Standards Act 2007*, 'healthcare professional' means any person who is registered or entitled to be registered under that *Act* and any allied healthcare professional regulated by any of the *Professional Acts*. Section 21 of the *Act* defines allied health professions as including traditional healers. The *Healthcare Professions Registration and Standards Act 2007* gives traditional healers the same recognition as medical practitioners.

These traditional healers share the medical liability of qualified medical practitioners or doctors. This was illustrated in Samoa in the case of *Police v Lavasi'i*.[7] The facts of the case as stated by the judge were that the deceased was sick with green discharge from a lump in her breast. She was bedridden and her mother-in-law contacted a traditional healer to see her. This was the family's first attempt to engage Sela, a traditional healer, seeking help for the deceased's illness. Sela, as noted by the judge in his judgment, had inherited her traditional healing skills from her ancestors. Sela succeeded in treating the deceased for the first two days; the patient found comfort and could sleep well. On the third day of the treatment Sela requested that the family boil water and put it in a container so that the deceased could sit on it. Sela was assisted by her husband Felaiai, who brought in leaves and herbs for the treatment. The water was boiled with herbs and leaves and placed in a container and the deceased was made to sit on it. The deceased complained about the heat and was then removed from the container. That night her condition worsened and she was taken to the hospital for the first time. She died that night at the hospital.

The family of the deceased complained and manslaughter charges were laid against Sela and her husband for the death; upon post mortem, one of the causes of death was first-degree burns on the deceased. The judge noted that the 'not guilty' verdict for manslaughter by the assessors was a reflection of total rejection by the assessors of the attempt by the family of

[6] *Public Health, Safety and Welfare Act* (Marshall Islands).
[7] *Police v Lavasi'i* [2010] WSSC 20 http://www.paclii.org.

the deceased to place total blame on the two defendants for the death. However, it has to be noted that the judge found the two guilty on lesser charges.[8]

The judge also noted that

> [w]hen the defendant Sela was requested to treat the deceased, the family knew she was a recognised traditional healer. Indeed she had treated and taken care of the deceased's mother in law in her own home free of charge for a whole week before she was requested to attend to the deceased. Those who normally come before this court charged with assault causing actual bodily harm, usually have the malicious intent to cause injury at the time they assault or force is applied. This was not the case here. For three days the two defendants paid for their own transport to travel to Faleasiu and back to Saleimoa, to treat free of charge the deceased. The traditional treatment was done in the open, in the presence of family members. For the first two days of treatments, the deceased found comfort and her family expressed appreciation to the defendants. After the third treatment which led to the death, total blame was placed on the two defendants. The kindness displayed by the two defendants on two previous occasions was promptly forgotten.[9]

It seems the judge gave recognition to the efforts of the two accused to try to heal the deceased. However, the judge then proceeded to work out the penalty of the two accused. The judge found that Felaiai, Sela's husband, was not a traditional healer but had simply accompanied his wife to see the sick people and assisted her in collecting herbs and preparing the traditional medicine. The judge went on to note that the post mortem report indirectly revealed the failure and negligence of the deceased's family to seek medical help and care for her ulcerated breast, and that the defendants, who were the only ones to help, had been charged with causing her death.

When considering the sentence Justice Vaai noted that it would be against the interests of justice to impose custodial sentences upon the accused persons. The judge discharged Felaiai Lavasii without conviction and convicted Sela Felaiai and placed her on probation for 18 months with special conditions that she attend any programme recommended by the probation service and that she perform 50 hours of community work.

This shows that despite the recognition given by the court to the traditional healer for trying to assist, she is still liable under the law for causing or contributing to the patient's death. According to the *Lavasi'i* case the Samoan courts have shown that consent by the patient or her family does not excuse the traditional healer from any liability. This decision takes away the risk foreseen by the person when consulting a traditional healer for help. However, there was no restriction placed upon Sela to stop her from carrying on her practice as a traditional healer.

Traditional healers are also found in the Solomon Islands, who use custom medicine to treat their patients. However there is no legislation to give them formal recognition or regulation. Apparently, under the Constitution, custom is recognised and traditional healing forms part of the customary practices in the Solomon Islands. Traditional or herbal doctors are known to be

[8] Ibid.
[9] Ibid.

very popular in the Solomon Islands and they regard their practice as private and personal.[10] There are different herbal or custom doctors who specialize in different forms of healing and use of different plants to heal with. The use of plants sometimes goes together with rituals and custom blessing to please the gods to help in the healing process. For example, a custom doctor might squeeze the liquid from leaves of a certain plant to give to the sick person and, while giving the herbal medicine, say some chants or blessings. Seeking assistance from traditional healers or custom medicine is not a substitute for modern medicine and is usually used as first aid or supplementing modern medications in the Solomon Islands.[11] Nevertheless, in cases where doctors fail to diagnose a disease or ailment in a patient, the patient might go to traditional or custom healers, which works at times but not always. A number of cases have gone to court in the Solomon Islands where the judges have made reference to traditional or custom healers. In the case of *Tahinao v Regina*,[12] a case where the use of custom medicine by traditional healer went wrong, Justice Kabui stated:

> Traditional medicine is part of the cultures in Melanesia, including Solomon Islands. There are custom or traditional healers in many cultures in the world. In Melanesia, there are two types of custom treatment for ills that befall people in society. The first is the treatment for magical spells that affect people and are sick because of bewitchment by other people. The second is the treatment for ordinary sickness which may respond readily to treatment by medical herbs administered by custom practitioners who do not have any form of recognised formal qualification. Some custom medicine practitioners do combine the ability to administer treatment for magical spells as well as treatment for ordinary sickness, depending on the diagnosis prevailing at a particular time in a particular case. This case is about the practice of custom medicine which allegedly went wrong.[13]

The judge went on to say that methods used by traditional healers in treatment of patients by custom medicine are standard and there is no touching of the genitalia or private parts of the patient except by a person of the same sex in cases where it is absolutely necessary.[14] Justice Kabui went on to state that massaging, smoking the affected parts of the body, drinking a prepared solution from a cup or receptacle or washing the external parts of the body with the medicine solution are the standard methods of treatment for men and women alike in the Solomon Islands.[15]

Justice Kabui also stressed the traditional healer (doctor) and patient relationship in this case. In a traditional healer (doctor)/patient relationship, the traditional healer occupies a dominant position and any treatment the traditional healer administers is accepted without question by the patient, due to the simple reason that the patient wants to recover as soon as possible. The patient does not investigate the professional background of the traditional healer (doctor) or his or her credibility as a practising healer of sickness.[16] The traditional healer (doctor) is taken for granted to do right to his patients. The judge stated that the patient believed the healer and the belief created confidence. That confidence created the willingness to submit to

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[10] World Health Organization, *Legal Status of Traditional Medicine and Complementary/Alternative Medicine: A Worldwide Review* (2001).
[11] *Tahinao v Regina* [2005] SBHC 27 http://www.paclii.org.
[12] Ibid.
[13] Ibid.
[14] Ibid.
[15] Ibid.
[16] Ibid.

whatever treatment the healer was to administer. The submission to treatment in this case was in fact consent in the belief that the treatment received was genuine, and in custom medicine, correct.[17]

Thus, in the Solomon Islands traditional healers are given recognition; however, if they do commit any indecent acts with the patient, the law deals with them in the same way as any ordinary person in an indecent assault or rape case. However, consent may be an issue here as the patient usually consents to whatever treatment the healer administers. So the question that would arise is why should the traditional healer bear the liability when the victim took the risk?

Should the traditional healer be liable under the law of negligence? What standard of care would be fit for the traditional healer to comply with? In the case of healers who have no formal qualifications, should they be held liable if a treatment backfires? They do not advertise themselves as healers but people still go to them for healing and custom medicine. They do not perform the traditional healing methods unless they are invited to do so. The patient goes to them and wants them to perform rituals or treatment knowing very well that this person is not a qualified medical practitioner. So the patient carries the risk of the result as they can foresee the risks involved in the treatment. The issue that arises is whether a traditional healer in Solomon Islands will be liable under the law if his or her medicine makes the patient's condition worse or even in a case where the patient dies as illustrated in the *Livasi'i* case from Samoa.

Two of the cases in the Solomon Islands in which a person pretended to be a traditional healer resulted in the imposter being prosecuted for false pretences. In the cases of *Regina v Tebounapa* and *Regina v Sisiolo*, the accused pretended to be a traditional healer and sexually abused the patients. The accused portrayed himself as a traditional healer, when people heard about it, they went to him.[18] The accused was charged with rape under the *Penal Code* and the court sentenced him to a term of imprisonment, as the sexual acts were clearly exceptions to the standard practice in custom medicine.[19] Consent of the patient did not relieve the traditional healer of his liability.

Let us now consider how Tonga deals with traditional healers. Traditional healing is known as *faito'o fakatonga* (Tongan medicine) and has been in practice in Tonga for generations.[20] In Tonga the title *kau faito'o* (traditional healers) in custom is passed from one generation to the next and such practices of healing are sacred as a family asset; individuals inherit these titles in the family.[21] Most of the villages in Tonga have their own healer who specialises in different healing aspects. For example a village might have a healer who is called *kau fota* (those who massage). *Kau fota* is known to massage the muscles in cases of fractured bones so that the muscles get strong and the bone heals quickly.[22] Then there are those healers who brew herbal medicines called *vai Tonga* (Tongan herbal healers). People go to these healers to assist them in recovery as an alternative to hospitals.

[17] Ibid.
[18] *Regina v Sisiolo* [2010] SBHC 35 http://www.paclii.org.
[19] *Regina v Tebounapa* [1999] SBHC 1 http://www.paclii.org.
[20] SF Bloomfield, *Illness and Cure in Tonga: Traditional and Modern Medical Practice* (2002).
[21] Ibid.
[22] Ibid.

These traditional healers do not have any qualifications but practice methods of healing which they have been taught by their ancestors.[23] There is no mention of traditional healers or traditional medicine in the laws of Tonga. Therefore there is no restriction on the consultation of traditional healers as well as nothing to regulate how traditional healers perform their practices. There have been no cases in the courts of Tonga regarding negligence of traditional healers, possibly owing to the fact that Tongans consent to be treated by traditional healers as well as the fact that these healing processes are provided free of charge and bringing a case might humiliate the people who voluntarily go to traditional healers instead of qualified doctors.

Therefore, in Tonga people who go to traditional healers with fractured bones go of their own accord instead of going to the hospital where the standard of care is much higher. Seeking a traditional healer's help and allowing the healer to practice on them is usually consented to by patients. The patient foresees the pain in having the massage done where the bone is fractured as no chloroform is used by the traditional healer.[24] The patient chooses to consult and be treated by the traditional healer in spite of having medical facilities available; therefore, in such cases there is no duty and no liability of the traditional healer if the treatment misfires. We will now consider how Vanuatu treats traditional healers in its jurisdiction.

Traditional medicine is an integral part of Vanuatu custom. Article 95 (3) of the Constitution of Vanuatu provides for custom to continue to have effect as part of the laws of Vanuatu.[25] As in the Solomon Islands, people in Vanuatu go to traditional healers (also known as 'clevers') for magic spells and recovery medicines. The practitioners of traditional medicine believe that diseases are caused by supernatural forces, the displeasure of ancestral gods, evil spirits, black magic or spirit possession. However the use of traditional healing methods is addressed by the law in Vanuatu. In Vanuatu, custom healing or traditional medicine is recognised under s 17 of the *Vanuatu Health Practitioners Act*. It states:

> Nothing in this Act shall extend to or affect the practise in good faith by any person of the traditional medicine of the people of Vanuatu if such person is recognised to be competent to exercise such practise according to custom.[26]

Thus if a traditional healer uses traditional medicine in good faith to heal a person and in accordance to custom practice and the patient gets worse, the patient cannot sue the traditional healer. Or if the traditional healer is sued, then the only defence needed in court is that the healer used the traditional medicine in good faith and according to custom. The risk in treatment of a patient is borne by the patient. Gross negligence can be considered a crime by a qualified doctor and compensation alone is not sufficient in cases of qualified medical practitioners, but traditional doctors can easily get away with proving that they acted in good faith and according to custom. The traditional healer has to show that he or she was competent, possessing knowledge and skills about what he or she is doing. Also, good faith is proven if the traditional practitioner exercised a process and medicine believing that it would heal the patient and that he or she did not administer any healing process which was contrary to custom. About 118 species of plants, some acting as vermifuges, are used in rituals for

[23] Ibid.
[24] Ibid.
[25] *Constitution of the Republic of Vanuatu* art 95(3).
[26] *Health Practitioners Act* [Cap 164] (Vanuatu).

magic or traditional healing.[27] It has been proposed by the Vila Central Hospital to the Director of Medical Services that 'traditional medicine and its Practitioners should be covered by the same health legislation as western medicine'.[28] However, nothing has been done as yet to cover the liability or status of the traditional healers as the liability of medical professionals has been stated under the *Medical Practitioners Act*.

Moreover, s 36 of the *Nurses Act* allows the practice in good faith by any person of traditional medicine of the people of Vanuatu if such person is recognised to be competent to exercise such practice according to custom.[29] This approach has been upheld by the courts in Vanuatu and they hold traditional healers liable if they abuse their victims. In the case of *Public Prosecutor v Reynold*, the victim had started seeing the defendant after May 2011 for traditional treatment for a condition she had at the time. According to the judgment she suffered from paralysis down her left side and pain on the backside and womb and was pregnant at the time. She had stated in her evidence that the defendant had used traditional leaves and kava in his treatment of her and also massaged her body using oil and that the accused had on several occasions spat kava on her and had even spoken in foreign tongues. She had paid for her treatment with kava, cigarettes and cash. On the day of the incident she went to the defendant for her usual massage treatment and he raped her. When she questioned him he stated 'Don't panic, don't shout, don't feel bad because I treat every woman in the same manner'.[30]

The Court described the intercourse as being 'sudden, opportunistic and fleeting' act by the defendant. Justice Fatiaki went ahead to note that the act of the accused was a gross violation of the trust of the victim which she had placed in the accused, who was a police officer as well as a traditional healer. Justice Fatiaki also stated that that trust included the victim undressing for the accused in private and allowing him to oil and massage her body not forgetting that at the time of the incident, the complainant was pregnant and suffered from partial paralysis of her body making it difficult for her to resist the his unexpected advances.[31] Justice Fatiaki also noted that the accused had charged a substantial fee to 'treat' the complainant and accepted before the court that 'sexual intercourse was never part of her treatment'.[32] The accused was sentenced to four years' imprisonment by the court. So the courts still interfere where the treatment being administered is abusive and in violation of the patient's trust.

Let us now move from Vanuatu and consider the approach taken by the Australian courts in *Rogers v Whitaker* towards medical practitioners. This case will help us understand the liability of medical practitioners in Australia and whether, if this liability were extended to traditional healers, the criteria would be less severe. This case deals with the issue of consent in relation to surgical procedures. According to the facts of this case, the respondent Maree Whitaker had been almost totally blind in her right eye for almost 40 years since suffering a severe injury to the eye when she was nine years old. However, despite this injury she had lived a comparatively normal life. She had consulted the appellant, Christopher Rogers, who was an ophthalmic surgeon. The appellant advised her that an operation on the right eye

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[27] G Bradacs, J Heilmann, CS Weckerle, 'Medicinal plant use in Vanuatu: a comparative ethnobotanical study of three islands' (2011) http://www.ncbi.nlm.nih.gov/pubmed/21679762.
[28] J.K. Laing, *The Development of Medical and Herbal Services in New Hebrides and Vanuatu.*
[29] *Nurses Act* [Cap 262] (Vanuatu).
[30] *Public Prosecutor v Reynold* [2012] VUSC 193 http://www.paclii.org.
[31] Ibid.
[32] Ibid.

would not only improve its appearance by removing scar tissue but would probably restore significant sight to that eye.[33]

The surgery for her right eye was conducted with the required skill and care. However, following the surgery, Whitaker developed a condition known as 'sympathetic ophthalmia' in her left eye. In the end she lost all sight in her left eye, and as there had been no restoration of sight in her right eye, she was almost totally blind.[34]

Whitaker brought an action in court suing Rogers alleging that he was negligent when he failed to warn her of the risk of sympathetic ophthalmia. She had not specifically asked Rogers whether the operation to her right eye could affect her left eye. However, she had persistently questioned the appellant as to possible complications. Rogers stated in evidence that 'sympathetic ophthalmia was not something that came to my mind to mention to her'. Evidence given at the trial was that the risk of sympathetic ophthalmia was about one in 14,000 and even then not all cases lead to blindness in the affected eye.[35]

The appellant relied on the principle used in the English case of *Bolam v Friern Hospital Management Committee*, known as the 'Bolam test'. The Bolam test states that 'If a doctor reaches the standard of a responsible body of medical opinion, he is not negligent'. Rogers relied on the fact that he as a medical practitioner is not negligent if he acts in accordance with a practice accepted at the time as proper by his peers, even though other medical practitioners adopt a different practice.[36] In other words, the standard of care owed to a patient is determined by medical judgment.[37]

The judges in *Rogers v Whitaker* agreed that except in cases of emergency or necessity, all medical treatment is preceded by the patient's choice to undergo it and that this choice is meaningless unless it is made on the basis of relevant information and advice.

> The Law should recognise that a medical practitioner has a duty to warn a patient of a material risk inherent in the proposed treatment; a risk is material if, in the circumstances of the particular case, a reasonable person in the patient's position, if warned of the risk, would be likely to attach significance to it or if the medical practitioner is or should reasonably be aware that the particular patient, if warned of the risk, would be likely to attach significance to it.[38]

The Court drew a clear distinction between the test to be applied as to whether the operation was conducted with the necessary skill (the 'Bolam' principle) and the duty to warn a patient of material risks. The Court held that Rogers had a duty to inform Whitaker of the likely consequences of the operation and had failed to do so. The Court noted that Whitaker was even concerned that her left eye should be covered with a bandage during the operation so that there can be no confusion on the eye to be operated. The Court dismissed the appeal and upheld the duty of care upon the doctor to inform the patient of the likely consequences of the

[33] *Rogers v Whitaker* (1992) 175 CLR 479.
[34] Ibid.
[35] Ibid.
[36] *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582.
[37] Ibid.
[38] *Rogers v Whitaker* (1992) 175 CLR 479, 490.

surgery and that the patient can only consent if he or she is fully informed of the consequences.[39]

It was discussed by the judges that while evidence of acceptable medical practice is a useful guide for the courts, it is for the courts to adjudicate on what is the appropriate standard of care after giving weight to 'the paramount consideration that a person is entitled to make his own decisions about his life'.[40]

The issue under consideration in this case was a different issue from that involved where the question is whether the doctor carried out his professional activities by applicable professional standards. The issue under consideration in this case was the patient's right to know the risks involved in undergoing or foregoing certain surgery or other treatment.[41]

The Court also considered that consent was relevant to actions framed in trespass, not in negligence. They referred to Anglo-Australian law and commented that it had rightly taken the view that an allegation that the risks inherent in a medical procedure have not been disclosed to the patient can only found an action in negligence and not in trespass.[42]

The decision in this case clarifies the issue that medical practitioners should inform their patients about what is best in the matter of choice to undergo surgery. It also puts the responsibility for taking the risks (once they have been explained) with the patient.[43]

This can be differentiated in relation to liabilities of traditional healers, where the patient consents to the treatment and carries the risk of any consequences following the treatment as well. The attitude taken by courts and law in the region in relation to traditional healers is seen to be very relaxed in terms of liability. That is, if the patient chooses to see the traditional healer, then he or she bears the risk as well. If the patient consents to treatment by the traditional healer, he or she also bears the risk of any consequences arising. According to the *Whitaker* case, individuals can be held responsible for the risks they take if they are informed of the consequences of the risk. However, for traditional healers being informed is not at all relevant, because the patient bears the full responsibility and risk of the treatment rendered upon them by the traditional healer. It is also a caution to professionals, outside the medical profession, that a vital part of their duty is to advise their patient properly and the patient can decide to listen to the advice or not. It provides the balance mentioned by the court in *Whitaker* between the duty of the medical practitioner to disclose material facts and the patient's right and responsibility to make a decision based on the information provided and bear the non-negligent risks arising from that decision.[44]

Having seen Australia's approach to medical practitioner's liability, we will now consider how England has looked into the area of liability of herbal healers. England's approach towards herbal healers is very similar to regional approach towards liability of traditional healers. This is illustrated very well in the case of *Shakoor v Situ (t/a Eternal Health Co.)*. The plaintiff got sick after using a Chinese herbal medicine supplied by the defendant, who was a qualified private practitioner. The plaintiff had decided to go and see the herbal healer

[39] Ibid.
[40] Ibid 479.
[41] Ibid 490.
[42] Ibid.
[43] Ibid.
[44] Ibid.

instead of a qualified medical practitioner. The court noted that qualified medical practitioners were available in England and the plaintiff opted not to see them but consult the herbal healer.[45] The Court held in this case that the defendant was not negligent when supplying the plaintiff with the herbal medication. Moreover, there was implied consent by the plaintiff to take the herbal medicine and a lower standard of care imposed upon the herbal healer.[46] The standard of care would have been higher for a qualified medical practitioner but was lower for the herbal healer. This can be compared with the approach taken by Australia in relation to qualified medical practitioners where the patient would bear the risk if fully informed of the likely consequences of the surgery. Medical practitioners fulfil their duty as long as they have fully informed the patient of the likely results of the operation. The *Shakoor* case is a highly persuasive case for Pacific island jurisdictions.

According to Mr. Tamati, some of the other reasons why traditional healers are not held liable for their practices under the law in the Pacific are that the legislators are people from the same community and believe in traditional healing and traditional doctors and that cultural and custom practices and respect for traditional healers are instilled in the people from childhood and the societies in which they have been brought up are traditional. People value their customs and elders and have a firm belief in tradition and custom practices. Moreover, going to traditional healers often provides easy access to medicine rather than travelling miles to a hospital; traditional healers turn out to be much cheaper than hospitals.

It can be concluded from the above that the Pacific societies are far from holding traditional healers responsible for any treatment that goes wrong. The patient bears the risk and has no remedy from traditional practitioners in the region. This is similar to the English approach and the standard of care attached to traditional healers is much lower that those of professional doctors. As long as custom is embedded in the lives of the Pacific people and the traditions are valued, traditional healers will continue to enjoy being exempt from liabilities resulting from their so-called healing practices.

[45] *Shakoor v Situ (t/a Eternal Health Co.)* [2000] 4 All ER 181.
[46] Ibid.