

SUPREME COURT OF INDIA

Ins. Malhotra

Vs.

Dr. A. Kriplani

C.A.No. 1386 of 2001

(Lokeshwar Singh Panta and B. Sudershan Reddy JJ)

24.03.2009

JUDGEMENT

LOKESHWAR SINGH PANTA, J.

1] This appeal arises out of order dated 15.09.2000 of the National Consumer Disputes Redressal Commission (hereinafter referred as the "Commission") in Original Petition No. 265 of 1992, whereby a complaint filed by Ms. Ins. Malhotra-complainant has been dismissed.

2] Brief facts leading to the filing of this appeal are as follows:

2.1] The complainant-appellant herein is the sister of Priya Malhotra who died on 24.08.1989 in Bombay Hospital- respondent no. 7 herein. In May, 1989 Priya Malhotra complained of burning sensation in stomach, vomiting and diarrhea. On 13.07.1989, her family doctor Dr. P. H. Joshi advised to get the patient admitted to Bombay Hospital for investigation and treatment under the care of Dr. Ramamoorthy. On 14.07.1989, Priya Malhotra was admitted to the Bombay Hospital, but on that day Dr. Ramamoorthy was out of station and in his absence Dr.

Chaubal examined Priya Malhotra and prescribed to undergo several tests. Priya Malhotra was diagnosed as having Koch's of abdomen.

2.2] On 16/17.07.1989, Dr. Jain suspecting kidney problem referred Priya Malhotra to Dr. A.Kriplani, a Nephrologist. On 18.07.1989, Dr. A. Kriplani informed appellant that Priya Malhotra had kidney failure and chronic renal failure. The appellant consented for immediate Haemodialysis as was recommended by the doctor to save Priya Malhotra's life. In spite of Haemodialysis, Priya Malhotra continued to have vomiting and diarrhea and the same went out of control.

Dr. A. Kriplani directed performance of Ba-meal and Ba- enema tests suspecting Koch's of abdomen and the two tests conformed dilated loops of small intestine. Dr. Vasant S.

Sheth carried out ascetic tapping. On 22.07.1989, Dr. A. Kriplani advised Peritoneoscopy for confirming Koch's of abdomen. On the same day, on the recommendation of Dr.

Vasant S. Sheth and Dr. A. Kriplani, ultrasonography of upper abdomen was performed on Priya Malhotra for confirmation of Koch's of abdomen. On 31.07.1989, Dr. Vasant S. Sheth performed ascetic tapping on Priya Malhotra and the diagnosis made from Histopathologist was confirmation of Koch's abdomen (anti malignant). Dr. A. Kriplani prescribed Streptomycin injection with other

medicines. The two reports of M.D. (Pathologist) and Dr. Arun Chitale dated 01.08.1989 would show no T.B. organism in Peritoneal Fluid. On 03.08.1989, Dr. A. Kriplani advised CT scan for confirmation of T.B. lower abdomen. Priya Malhotra vomited and could not be controlled even by giving I.V.C.C Perinorm injection. On 06.08.1989, chest X-ray taken by X-ray Department of the Bombay Hospital showed lung and pleura normal.

2.3] On 08.08.1989, Dr. Vasant S. Sheth and Dr. [Mrs.] S. R.

Jahagirdar examined Priya Malhotra and advised laparoscopy.

The operation was to be performed by Dr. [Mrs.] S. R.

Jahagirdar on 09.08.1989. Four bottles of blood were given to Priya Malhotra during diagnosis. Liver profile and renal profile tests were performed. Liver profile showed 'Australia Antigen' positive and renal profile showed low serum sodium and serum potassium. On 09.08.1989, Dr. Pramod came at about 3:00 a.m. and removed Femoral Cath. On that day, Priya Malhotra was having high fever. On the same day, Dr. [Mrs.] S. R. Jahagirdar, could not attend the hospital and in her absence Dr. Pratima Prasad performed Laparoscopy when Dr. A. Kriplani, Dr. Vasant S.

Sheth and Dr. S. Gupta were also present in the O.T.

2.4) After the operation, Priya Malhotra was removed to the recovery room where she allegedly told the appellant by gestures that she was having severe pain in the chest and she was speechless and having breathing difficulty.

Dr. A. Kriplani observed that there was no need to worry and Priya Malhotra would be kept in I.C.U for two days under observation. On 12.08.1989, Priya Malhotra was shifted to 3rd floor of the hospital. According to the appellant, Priya Malhotra started becoming semi-conscious and erratic in behaviour. On 20.08.1989, Priya Malhotra developed intestinal fistula leading to her throwing out liquid from her body and she developed serious infections septicemia.

On 22.08.1989, Priya Malhotra became deep unconscious and she passed no urine and her face was swollen.

On 23.08.1989, Dr. A. Kriplani advised Haemodialysis and Pneumothorax. Unfortunately, on 24.08.1989 at about 9:15 a.m., Priya Malhotra expired. On the same day, post-mortem upon the dead body of Priya Malhotra was conducted at J.J. Hospital, Bombay. The post-mortem report revealed the cause of death was due to Peritonitis with renal failure.

2.5) The appellant filed police complaint against the doctors of Bombay Hospital in Azad Maidan Police Station, Bombay.

In the year 1990, complaint was also filed before the Maharashtra Medical Council.

2.6) On 02.07.1992, written complaint was sent by post to the National Consumer Disputes Redressal Commission, which was registered as Complaint No. 265 of 1992 against Dr. A. Kriplani, Dr. [Mrs.] Pratima Prasad, Dr. S. Gupte, Dr. Singhania, Dr. [Mrs.] S. R. Jahagirdar and Dr. Sachdeva.

On notice, the respondents entered appearance and filed their separate written statements. The

Bombay Hospital initially was not a party in the complaint. An application for impleadment of Bombay Hospital as party respondent no. was allowed by the Commission in the year 1996.

3) During the course of the proceedings before the Commission, the appellant was granted opportunity to produce written opinion of expert doctors in support of her allegations made in the complaint against the named doctors and Bombay Hospital for their medical negligence or lack of proper medical treatment to deceased Priya Malhotra. The appellant could not lead the evidence of any expert doctor in support of her complaint and she pleaded before the Commission that no expert doctor was willing to give an opinion against the doctors of Bombay Hospital though, according to her, unofficially some doctors had expressed an opinion that injustice had been done to deceased Priya Malhotra. The appellant was issued notice to appear on 09.07.2000 for recording of her cross-examination. The 7 counsel for the respondents stated before the Commission that they did not intend to cross-examine the appellant. None of the respondent had appeared as witness in support of his or her defence, as pleaded in the written statement.

3.1) On consideration of the entire material on record, the Commission vide its order dated 15.09.2000 dismissed the complaint of the appellant holding that the complainant has not been able to establish a case of medical negligence against the respondents.

4) Being aggrieved thereby, the appellant has filed this appeal under Section 23 of the Consumer Disputes Redressal Commission Act, 1986 (hereinafter referred to as the "Act").

5) We have heard learned counsel for the parties, who have taken us through the order of the Commission and other relevant materials brought on record.

6) The learned counsel appearing for the appellant contended that the order of the Commission is bad on facts and in law as the same is passed without proper appreciation of the evidence of the appellant made in examination-in-chief before the Commission which has gone unrebutted and uncontroverted as she has not been cross-examined by the respondents. He next contended that none of the respondents have appeared for cross-examination before the Commission nor any one of them has filed evidence on affidavit as prescribed under Section 13 (4) (iii) of the Consumer Protection Act, 1986 which prescribed procedure on admission of complaint before the District Forum. The learned counsel also contended that the appellant, despite her sincere efforts, could not get the assistance of expert doctors in support of her complaint and to dislodge the claim of the respondents, the Commission in the interest of the appellant could have on its own summoned expert doctors from some Government institutions at Delhi to ascertain whether proper and necessary medical treatment was given by the doctors to Priya Malhotra or the doctors of Bombay Hospital in discharge and performance of their duties were, in any manner, negligent and careless.

6.1) In support of his submission reliance is placed upon a decision of this Court in Civil Appeal No. 3541 of 2002 titled Martin F. D'Souza v. Mohd. Ishfaq decided on 17.02.2009.

In the said case, the Division Bench of this Court has passed some directions, which read as under:-
"We, therefore, direct that whenever a complaint is received against a doctor or hospital by the Consumer Forum (whether District, State or National) or by the Criminal Court then before issuing notice to the doctor or hospital against whom the complaint was made the Consumer Forum or Criminal Court should first refer the matter to a competent doctor or committee of doctors, specialized in the field relating to which the medical negligence is attributed, and only after that doctor or committee reports that there is a prima facie case of medical negligence should notice be

then issued to the concerned doctor/hospital. This is necessary to avoid harassment to doctors who may not be ultimately found to be negligent. We further warn the police officials not to arrest or harass doctors unless the facts clearly come within the parameters laid down in Jacob Mathew's case (supra), otherwise the policemen will themselves have to face legal action."

7) Mr. Shyam Diwan, Senior Advocate appearing on behalf of Dr. Kriplani, has canvassed correctness of the views taken by the Commission in the impugned order. He submitted that the approach of the Commission in appreciating the consequences of the complaint and the defence of the doctors taken in their written statements can never be found faulty.

He then contended that the evidence of the appellant in examination-in-chief does not establish that Dr. A. Kriplani was ever negligent in performing his duties in his discipline.

He contended that the treatment which was adopted by the doctors was in conformity with the advice and opinion of Dr. P.H. Joshi and Dr. Ramamoorthy and the appellant has not proved on record that there was any kind of disagreement or divergence of opinion between Dr. A. Kriplani on the one hand and Dr. P.H. Joshi on the other hand. The learned counsel for other respondents has adopted the arguments advanced by Mr. Shyam Diwan, Senior Advocate appearing for Dr. A. Kriplani.

8) In order to appreciate the rival contentions of the learned counsel for the parties, we have examined the impugned order of the Commission and the evidence led by the parties. The Commission in its order has noticed the decision of Maharashtra Medical Council dated 13.05.1999, whereby the Registrar of the Council conveyed that the Maharashtra Medical Council after discussion on the merits and demerits of the case unanimously resolved that 'there is no negligence on the part of medical practitioners and they have managed the case to the best of their ability, therefore, it was unanimously resolved to drop the said inquiry and the medical practitioners be exonerated.' 9) The order of the Commission would reveal that Dr. P.H. Joshi had made noting on 26.07.1989 which reads "Laparoscopy SOS shall review later" while referring the case of Priya Malhotra to Dr. S.R. Jahagirdar who at the relevant time was in-charge of Department of Obstetrics and Gynaecology of the Bombay Hospital. The appellant had no complaint to make against Dr. P.H. Joshi, rather she had got full faith in him. As noticed above, Dr. S.R. Jahagirdar was out of town on the day when the patient was to be operated upon and in her absence Priya Malhotra was examined by Dr.

Pratima Prasad and she has filed written statement before the Commission in which it has categorically been stated that on perusal of the case papers, she noticed that the patient was referred to her because of suspected "Tubercular Peritonitis"

of the lower abdomen and "renal failure". On examination of Priya Malhotra, Dr. Pratima Prasad noticed that the patient was not getting menstruation for the last three months although before that period, her menstruation periods were stated to be normal. After clinical examination, Dr. Pratima Prasad advised Ultrasonograph of the pelvis and laparoscopy to confirm the existence of tuberculosis of the gynaecological parts. Dr. Pratima Prasad stated that laparoscopy was considered necessary for confirmation of the diagnosis of tuberculosis of the abdomen and to get the histopathological report. She stated that in the presence of Dr. Vasant V. Sheth laparoscopy was done. The laparoscopy was not contra-indicated from the various investigation reports and check-ups carried out on the patient prior to 09.08.1989. The Commission has in its order extracted the necessary averments made by Dr. Pratima Prasad in her written statement in regard to the procedure and method of conducting laparoscopy which, in our view, are not necessary to be repeated in this

judgment for unnecessarily burdening the record. The record produced before the Commission would show that in the operation theatre, the patient was jointly examined by Dr. A. Kriplani and Dr. S.R. Gupte, Hon.

Anaesthesiologist and they had taken conscious decision that the laparoscopy was not contra-indicated in any way.

Dr. Pratima Prasad felt that an attempt to conduct laparoscopy had to be abandoned and it became necessary to perform the laparotomy to get tissue for biopsy which was the main and only objective of the investigation. In the process, the perforations caused during laparoscopy were duly sutured. On opening the abdomen, it was noticed that the patient had active military tuberculosis. Peritoneum and all the abdominal structures were adhered together. It was also noticed that the intestines were perforated due to introduction of laparoscopy trocar and cannula. It was stated by Dr. Pratima Prasad that Dr. Vasant V. Sheth performed the peritoneal biopsy and sutured six intestinal perforations. The laparotomy was performed with complete success and did not create any complication to the patient. Dr. Pratima Prasad also submitted in her statement that it was conclusively proved by the post-mortem examination that the sutured intestines had healed and had not developed any leak.

10) Dr. Pratima Prasad has strongly refuted the allegation made by the appellant that Tubercular Peritonitis had developed due to laparoscopy. She stated that Tubercular Peritonitis is a chronic disease which could not suddenly develop. It was already present when laparoscopy was conducted. Dr. Pratima Prasad also stated in the written statement that the allegations of the appellant that there was a departure from the line of action taken by Dr. P.H. Joshi and Dr. Ramamoorthy, were wholly untrue. She stated that in fact, a perusal of the case papers would show that Dr. P.H.

Joshi had himself suggested laparoscopy on the patient. It was her statement that medical opinion was clear that tuberculosis of intestines could be detected best and easily by performing laparoscopy. The allegations of the appellant that the right lung of Priya Malhotra was collapsed due to the laparoscopy has empathetically been denied by her.

Dr. Pratima Prasad pleaded that during laparoscopy the direction of the trocar and cannula were towards pelvis (downward direction) eliminating any chance of causing pneumothorax or collapse of the lung. The appellant could not lead evidence of any expert doctor to counter or rebut the statement made by Dr. Pratima Prasad in her written statement.

11) In the light of the unrebutted and uncontroverted statement of Dr. Pratima Prasad, the Commission, in our view, has rightly come to the conclusion that the appellant has failed to establish that Dr. Pratima Prasad, in any manner, was negligent or careless in performing laparoscopy upon the deceased.

12) The appellant also alleged that Dr. A. Kriplani and his team of doctors had discarded the line of treatment being pursued by Dr. Ramamoorthy and Dr. P.H. Joshi, which had resulted in the death of Priya Malhotra. The appellant could not even remotely substantiate this allegation made against Dr. A. Kriplani. There is not an iota of evidence on record to prove that Dr. A. Kriplani had ever departed from the line of treatment being taken and adopted by Dr. Ramamoorthy and Dr. P.H. Joshi. The appellant has clearly and unequivocally stated that she had no complaint against the line of treatment being advised by Dr. P.H. Joshi. It was categorically stated by Dr. Pratima Prasad and Dr. A. Kriplani in their respective written statements that it was Dr. P.H. Joshi who had in writing

recommended laparoscopy and the said recommendation was placed on record of the Commission by Dr. Pratima Prasad in support of her written statement. The doctors-respondents who were involved in the treatment of deceased Priya Malhotra have established on record that the course of treatment pursued by them in the Bombay Hospital was in no way contradictory or against the treatment given by Dr. Ramamoorthy. In fact, Dr. Ramamoorthy had examined the patient and carried the investigation as a result thereof it was found that the patient was suffering from chronic renal failure. Dr. Ramamoorthy requested Dr. A. Kriplani- respondent no.1 for an opinion recorded as "Unit Note" dated 16.07.1989, a copy thereof has been produced before the Commission duly signed by Dr. Ramamoorthy. The contents of the "Unit Note" are extracted by the Commission in its order.

13) Dr. Vasant S. Sheth of Bombay Hospital for the first time examined Priya Malhotra on 24.07.1989 and found the patient suffering from kidney failure. Dr. Vasant S. Sheth was informed that the patient had been undergoing haemodialysis since about 18.07.1989. On 21.07.1989, on clinical examination and going through the reports of the investigation conducted till that day, it was found that the patient was suffering from end-stage renal failure and would require kidney transplant for her survival. When various tests were carried out, Dr. A. Kriplani suspected the patient to be suffering from abdominal tuberculosis. In view of the suffering from abdominal tuberculosis and also of the gastrointestinal problems which had gone out of proportion to the Uremia, the expert doctors-respondents had decided not to carry out any operation for kidney transplant. Dr. A.

Kriplani and Dr. Vasant S. Sheth both had agreed that it would not be advisable to carry out kidney transplant, having regard to the state of health of the patient. The position of the patient was fully explained by Dr. Vasant S. Sheth to the patient and the appellant and both of them were informed that renal failure cases stood surgery bodily and were likely to develop complications following minor surgery and might even result in death. On 31.07.1989, Dr. Vasant S. Sheth performed diagnostic peritoneal tap for ascetic fluid examination and also to judge whether laparoscopy would be safe or not. Having regard to the various problems of the patient and also the pathological and other reports of the patient, Dr. A. Kriplani and his colleagues came to the conclusion that there was no better method available for the patient than to perform laparoscopy. Dr. Ramamoorthy also examined patient on 04.08.1989 and approved the decision of Dr. A. Kriplani to start anti-tuberculosis drugs and advised administration of rifampicin/pyrazinamide. Dr. Ramamoorthy had also insisted upon decision to do histopathological tissue diagnosis to confirm existence of tuberculosis.

14) Dr. [Mrs.] S.R. Jahagirdar-respondent stated that Priya Malhotra was admitted to Bombay Hospital under the observation of Dr. Ramamoorthy and was later being treated by Dr. A. Kriplani who referred the patient to her for laparoscopy. It was Dr. Vasant S. Sheth who on or about 08.09.1989 contacted her on telephone and gave her the details of the complications of Priya Malhotra. Dr. S. R.

Jahagirdar stated that Dr. [Mrs.] Pratima Prasad who had special training to perform tissue biopsy by laparoscopy was assigned the job. Dr. A. Kriplani is a Nephrologist, who at the relevant time was the In-charge of the Nephrology Unit of the Bombay Hospital. Dr. Vasant S. Sheth is the General Surgeon, who is specialized in kidney transplant surgery.

Dr. Vasant S. Sheth had to do laparotomy on Priya Malhotra after having supervised laparoscopy conducted by Dr. [Mrs.] Pratima Prasad. On 21.07.1989, the patient was referred by Dr. Ramamoorthy to Dr. A. Kriplani and Dr. Vasant S. Sheth.

On detailed clinical examination and going through the records of the investigation done upto 21.07.1989, Dr. Vasant S. Sheth came to the conclusion that patient was at the end- stage of renal failure and as such she needed kidney transplant for her survival as after multiple sessions of haemodialysis the abdomen did not settle down and also because of occurrence of recurrent features of intestinal obstruction, it was decided not to have surgical intervention in the case of the patient. Dr. Vasant S. Sheth agreed to the opinion given by two doctors namely, Dr. A. Kriplani and Dr. Ramamoorthy that the issue of kidney transplantation did not arise till abdominal tuberculosis would get healed completely.

15) On re-examination and re-appraisal of the entire material on record, we find that there was absolutely no difference or divergence of opinion between a team of specialists and experts consisting of Dr. Ramamoorthy, Dr. P.H. Joshi and Dr. A. Kriplani at any stage about the method and mode of treatment adopted by doctors-respondents in this case.

Doctors had informed the patient and her relatives well in time that condition of Priya Malhotra was critical and kidney transplantation could not be done nearly for one year and also the consequence of the renal failure suffered by the patient.

Dr. Vasant S. Sheth had opined that attempt to do laparoscopy had failed in spite of two attempts and it became all the more important to perform laparotomy to get tissue for biopsy and to avoid any further injury that might have occurred due to the attempt at laparoscopy. On opening abdomen of the patient it became clear that the patient had extensive chronic peritonitis plastering the whole intestinal tract and intestines were perforated due to introduction of laparoscopic pressure and cannula. Dr. Vasant S. Sheth performed peritoneal biopsy and sutured six intestinal perforations to start with. The patient was put in I.C.U and at the initial stages she was doing well but unfortunately on 17.08.1989 i.e. eight days after the operation she developed jaundice probably due to anti-tuberculosis drugs which had to be stopped. The material on record would show that on 20.08.1989, the patient developed a fluid leak from the abdomen due to the leakage of ascites or beginning of fecal fistula. The condition of Priya Malhotra started deteriorating day by day despite best care and attention of specialists in I.C.U. The appellant was kept fully informed about the deteriorating condition of the patient, but the appellant abruptly instructed the doctors to stop haemodialysis treatment to the patient. Because of the persisting demand of the appellant, haemodialysis was stopped which according to the respondents resulted in the untimely death of Priya Malhotra. Exhibit-C which was part of the continuation sheet of treatment of Medical Research Centre of Bombay Hospital placed on record of the Commission would reveal that on 23.08.1989 at 9.00 p.m., the patient was examined and it was also recorded thereon "discussed with relatives and explained the consequences of not draining of pneumothorax and not doing haemodialysis". The appellant did not permit such treatment and gave in writing "I refused Haemodialysis and Pneumothorax on my risk".

16) In the facts and circumstances noticed hereinabove, the fact remains that when Priya Malhotra was brought to Bombay Hospital for treatment her health was in very bad condition. Renal failure had already taken place. In the post mortem report conducted at J.J. Hospital, Bombay, it finds recorded that "patient was sick since four months by loose motion, vomiting and she was admitted in Bombay Hospital since 14.07.1989. She was operated on 09.08.1989 and died on 24.08.1989. The cause of death was due to peritonitis with renal failure".

17) In the backdrop of the factual situation of the present case, we have examined the principles of law laid down by this Court in the decisions cited by the learned counsel.

18) A three Judge Bench of this Court in the case of Jacob Mathew v. State of Punjab and Another [(2005) 6 SSC 1] had the occasion to deal with and decide the liability of doctors in a death case arising due to criminal medical negligence for an offence under Section 304-A of the Indian Penal Code, 1860. In the case of professional negligence, it was observed that in the law of negligence, professionals such as lawyers, doctors, architects and others are included in the category of persons professing some special skill or as skilled persons generally. Any task which is required to be performed with a special skill would generally be admitted or undertaken to be performed only if the person possesses the requisite skill for performing that task. Any reasonable man entering into a profession which requires a particular level of learning to be called a professional of that branch, impliedly assures the person dealing with him that the skill which he professes to possess shall be exercised with reasonable degree of care and caution. He does not assure his client of the result. A physician would not assure the patient of full recovery in every case. A surgeon cannot and does not guarantee that the result of surgery would invariably be beneficial, much less to the extent of 100% for the person operated on. The only assurance which such a professional can give or can be understood to have given by implication is that he is possessed of the requisite skill in that branch of profession which he is practising and while undertaking the performance of the task entrusted to him he would be exercising his skill with reasonable competence. This is all what the person approaching the professional can expect. Judged by this standard, the professional may be held liable for negligence on one of two findings: either he was not possessed of the requisite skill which he professed to have possessed, or, he did not exercise, with reasonable competence in the given case, the skill which he did possess. The standard to be applied for judging, whether the person charged has been negligent or not, would be that of an ordinary competent person exercising ordinary skill in that profession. It is not possible for every professional to possess the highest level of expertise or skills in that branch which he practices. A highly skilled professional may be possessed of better qualities, but that cannot be made the basis or the yardstick for judging the performance of the professional proceeded against on indictment of negligence. [Paras 18 and 48(3)] 18.1) In the case of medical negligence, it has been held that the subject of negligence in the context of medical profession necessarily calls for treatment with a difference. There is a marked tendency to look for a human actor to blame for an untoward event, a tendency which is closely linked with the desire to punish. Things have gone wrong and, therefore, somebody must be found to answer for it. An empirical study would reveal that the background to a mishap is frequently far more complex than may generally be assumed. It can be demonstrated that actual blame for the outcome has to be attributed with great caution. For a medical accident or failure, the responsibility may lie with the medical practitioner, and equally it may not. The inadequacies of the system, the specific circumstances of the case, the nature of human psychology itself and sheer chance may have combined to produce a result in which the doctor's contribution is either relatively or completely blameless. The human body and its working is nothing less than a highly complex machine. Coupled with the complexities of medical science, the scope for misimpressions, misgivings and misplaced allegations against the operator, i.e. the doctor, cannot be ruled out. One may have notions of best or ideal practice which are different from the reality of how medical practice is carried on or how the doctor functions in real life.

The factors of pressing need and limited resources cannot be ruled out from consideration. Dealing with a case of medical negligence needs a deeper understanding of the practical side of medicine. The purpose of holding a professional liable for his act or omission, if negligent, is to make life safer and to eliminate the possibility of recurrence of negligence in future.

The human body and medical science, both are too complex to be easily understood. To hold in favour of existence of negligence, associated with the action or inaction of a medical professional,

requires an in-depth understanding of the working of a professional as also the nature of the job and of errors committed by chance, which do not necessarily involve the element of culpability.

18.2) Negligence in the context of the medical profession necessarily calls for a treatment with a difference. To infer rashness or negligence on the part of a professional, in particular a doctor, additional considerations apply. A case of occupational negligence is different from one of professional negligence. A simple lack of care, an error of judgment or an accident, is not proof of negligence on the part of a medical professional. So long as a doctor follows a practice acceptable to the medical profession of that day, he cannot be held liable for negligence merely because a better alternative course or method of treatment was also available or simply because a more skilled doctor would not have chosen to follow or resort to that practice or procedure which the accused followed. The classical statement of law in Bolam's case, (1957) 2 All ER 118, at p. 121 D-F [set out in para 19 herein] has been widely accepted as decisive of the standard of care required both of professional men generally and medical practitioners in particular, and holds good in its applicability in India. In tort, it is enough for the defendant to show that the standard of care and the skill attained was that of the ordinary competent medical practitioner exercising an ordinary degree of professional skill. The fact that a defendant charged with negligence acted in accord with the general and approved practice is enough to clear him of the charge. It is not necessary for every professional to possess the highest level of expertise in that branch which he practices. Three things are pertinent to be noted. Firstly, the standard of care, when assessing the practice as adopted, is judged in the light of knowledge available at the time (of the incident), and not at the date of trial. Secondly, when the charge of negligence arises out of failure to use some particular equipment, the charge would fail if the equipment was not generally available at that point of time (that is, the time of the incident) on which it is suggested as should have been used. Thirdly, when it comes to the failure of taking precautions, what has to be seen is whether those precautions were taken which the ordinary experience of men has found to be sufficient; a failure to use special or extraordinary precautions which might have prevented the particular happening cannot be the standard for judging the alleged negligence. [Paras 48 (2), 48 (4), 19 and 24] 18.3) Again, it has been held that indiscriminate prosecution of medical professionals for criminal medical negligence is counter-productive and does no service or good to the society.

A medical practitioner faced with an emergency ordinarily tries his best to redeem the patient out of his suffering. He does not gain anything by acting with negligence or by omitting to do an act. Obviously, therefore, it will be for the complainant to clearly make out a case of negligence before a medical practitioner is charged with or proceeded against criminally. A surgeon with shaky hands under fear of legal action cannot perform a successful operation and a quivering physician cannot administer the end-dose of medicine to his patient. If the hands be trembling with the dangling fear of facing a criminal prosecution in the event of failure for whatever reason--whether attributable to himself or not, neither can a surgeon successfully wield his life-saving scalpel to perform an essential surgery, nor can a physician successfully administer the life-saving dose of medicine. Discretion being the better part of valour, a medical professional would feel better advised to leave a terminal patient to his own fate in the case of emergency where the chance of success may be 10% (or so), rather than taking the risk of making a last ditch effort towards saving the subject and facing a criminal prosecution if his effort fails. Such timidity forced upon a doctor would be a disservice to the society. [See paras 28, 29 and 47] 18.4) In the case of State of Punjab v. Shiv Ram and Others [2005] 7 SCC 1, a three Judge Bench of this Court while dealing with the case of medical negligence by the doctor in conducting sterilisation operations, reiterated and reaffirmed that unless negligence of doctor is established, the primary liability cannot be fastened on the medical practitioner. In paragraph 6 of the judgment it is said: (page no. 7) "Very recently, this

Court has dealt with the issues of medical negligence and laid down principles on which the liability of a medical professional is determined generally and in the field of criminal law in particular. Reference may be had to Jacob Mathew v. State of Punjab (2005) 6 SCC 1. The Court has approved the test as laid down in Bolam v. Friern Hospital Management Committee (1957) 1 WLR 582: (1957) 2 All ER 118 (QBD) popularly known as Bolam's test, in its applicability to India".

19. In the light of the propositions of law settled in the above cited judgments of this Court, we are of the view that both on facts and in law no case is made out by the appellant against the respondents. The allegations made in the complaint do not make out a case of negligence or deficiency in service on the part of the respondents. It is not the case of the appellant that the doctors named in the complaint are not qualified doctors and specialized in their respective fields to treat the patient whom they agreed to treat. All the doctors who treated the patient are skilled and duly qualified specialists in their respective fields and they have tried their best to save the life of Priya Malhotra by joining their hands and heads together and performed their professional duties as a team work. The appellant has not challenged the post mortem report dated 25.08.1989 submitted by J.J. Hospital wherein it has been stated that before Priya Malhotra was admitted to Bombay Hospital, she was sick since four months by loose motion and vomiting. A copy of post mortem report of deceased Priya Malhotra placed on record of the Commission by Dr. A. Kriplani with his evidence on affidavit would read as under:

III] Microscopy - 1) Kidneys (same histology in sections from the two bits) reveal advanced kidney disease in the end stage. Most of the glomeruli are sclerosed/hyalinised and structurally obsolete.

Some of the few glomeruli not effected by advanced sclerosis reveal hypercellularity indicating that the end stage is the result of chronic progressive diffuse proliferative glomerulonephritis. The end stage lesion is extensive, irreversible and can cause intractable chronic renal failure. Interstitial fibrosis and inflammation are widespread.

Finally, it was opined by doctors that the death of Priya Malhotra was due to peritonitis with renal failure.

20) On our independent examination of the order of the Commission and other entire material on record discussed hereinabove, we find that the Commission has properly and rightly appreciated the entire factual and legal aspects of the matter and there is no infirmity or perversity in the findings recorded by the Commission which warrants any interference in this appeal.

21) No other point has been raised by the appellant. We, thus, find no merit and substance in any of the submissions made on behalf of the appellant.

22) In the result for the above-stated reasons there is no merit in this appeal and it is, accordingly, dismissed.

23) The parties are left to bear their own costs.