SUPREME COURT OF INDIA

Kusum Sharma

Vs.

Batra Hospital &Med.Research Centre

C.A.No.1385 of 2001

(Dalveer Bhandari and Harjit Singh Bedi JJ.)

10.02.2010

JUDGEMENT

Dalveer Bhandari, J.

1. This appeal is directed against the judgment and order dated 30th August, 2000 passed by the National Consumer Disputes Redressal Commission, New Delhi (for short, `National Commission') in Original Petition No.116 of 1991.

2. The appellants filed a complaint under section 21 of the Consumer Protection Act, 1986 claiming compensation of Rs.45 lakhs attributing deficiency in services and medical negligence in the treatment of the deceased Shri R.K. Sharma (who was the husband of appellant no.1, Kusum Sharma and the father of appellant nos. 2 and 3).

3. Brief facts which are necessary to dispose of this appeal are as under:-

4. Late Shri R.K. Sharma was a Senior Operations Manager in the Indian Oil Corporation (Marketing Division). In June 1989, he developed blood pressure. He was very obese. He complained of swelling and breathlessness while climbing stairs. He visited Mool Chand Hospital on 10.12.1989 but no diagnosis could be made. The Indian Oil Corporation referred him to Batra Hospital on 14.3.1990 where he was examined by Dr. R.K. Mani, respondent no.2 and Dr. S. Arora who advised him to get admitted for Anarsarca (Swelling).

5. On 18.3.1990, Shri Sharma was admitted in Batra Hospital. On 20.3.1990, an ultrasound of abdomen was done and the next day, i.e., on 21.3.1990, a C.T. scan of abdomen was done and it was found that there was a smooth surface mass in the left adrenal measuring 4.5 x 5 cm and that the right adrenal was normal. Surgery became imperative for removing the left adrenal. The deceased, Shri Sharma and appellant no.1 were informed by Dr. Mani, respondent no.2 that it was well encapsulated benign tumor of the left adrenal 2 of less than 5 cm in size which could be taken out by an operation. It was decided to carry out the surgical operation for the removal of abdominal tumor. On 2.4.1990, the doctor obtained consent from the appellants for the operation of removal of abdominal tumor. On test, the tumor was

found to be malignant. The treatment for malignancy by way of administering Mitotane could not be given as it was known to have side effects.

6. The surgery was carried out on 2.4.1990 by Dr. Kapil Kumar, respondent no.3. During the surgery, the body of the pancreas was damaged which was treated and a drain was fixed to drain out the fluids. According to the appellants, considerable pain, inconvenience and anxiety were caused to the deceased and the appellants as the flow of fluids did not stop. After another expert consultation with Dr. T.K. Bose, respondent no.4 a second surgery was carried out on 23.5.1990 in Batra Hospital by Dr. Bose assisted by Dr. Kapil Kumar.

7. Shri Sharma was fitted with two bags to drain out the fluids and in due course, wounds were supposed to heal inside 3 and the fluid was to stop. The deceased was discharged on 23.6.1990 carrying two bags on his body, with an advice to follow up and for change of the dressing. The deceased next visited Batra Hospital only on 31.8.1990 and that too to obtain a Medical Certificate from Dr. Mani, respondent no.2.

8. On 9.10.1990, Shri Sharma vomited at home and arrangements for shifting him to the Batra Hospital were made and the Hospital's ambulance sent by Dr. Mani. Shri Sharma died in the hospital on 11.10.1990 on account of `pyogenic meningitis'.

9. It is pertinent to mention that after the discharge from Batra Hospital on 23.6.1990, the deceased wrote a letter on 26.6.1990 to his employer narrating the agony and the pain he underwent at the hands of the doctors in Batra Hospital.

10. The deceased, on the suggestion of Dr. Bose, respondent no.4 visited Modi Hospital on 10.7.1990 where Dr. Bose was a Consulting Surgeon for change of dressing after 17 days.

> "Respondent nos. 2 and 3, namely, Dr. Mani and Dr. Kapil Kumar visited the residence of the deceased on 14.7.1990 and found him in a bad condition and asked him to go to AIIMS 4 where he was admitted on 22.7.1990 and treatment was given for pancreatic fistula and chronic fistula. He was discharged on 26.7.1990 with an advice to follow up in the O.P.D. The deceased again went to Mool Chand Hospital on 17.8.1990 with pancreatic and feacal fistula which was dressed. The deceased was discharged from Mool Chand Hospital on 31.8.1990. The deceased went to Jodhpur on 29.9.1990 and on 30.9.1990 he had to be admitted in the Mahatma Gandhi Hospital at Jodhpur where he was diagnosed with having post- operative complications of Adrenoloctomy and Glutteal abscess. The deceased was discharged from there on 3.10.1990 with an advice to get further treatment at AIIMS and when the deceased again went to AIIMS on 8.10.1990, Dr. Kuchupillai, a senior doctor at AIIMS wrote on a slip `to be discussed in the Endo-Surgical Conference on 8.10.1990'."

11. The appellants after the death of Shri Sharma filed a complaint under section 21 of the Consumer Protection Act, 1986 before the National Commission claiming compensation

attributing deficiency in services and medical negligence in the treatment of the deceased Shri Sharma.

12. The appellants attributed death of Shri Sharma because of negligence of the doctors and the hospital. The appellants alleged that the informed consent was completely lacking in this case. The appellants also alleged that the only tests done before operation to establish the nature of tumor were ultrasound and C.T. scan which clearly showed a well capsulated tumor of the size 4.5 x 5 cm. in the left adrenal and the right adrenal was normal.

13. The appellants alleged that the deceased Shri Sharma had no access whatsoever to any of the hospitals records before filing the complaint.

14. The appellants also alleged that there was nothing on record to conclusively establish malignancy of the tumor before the operation was undertaken. The appellants also had the grievance that they were not told about the possible complications of the operation. They were told that it was a small and specific surgery, whereas, the operation lasted for six hours. The appellants alleged that pancreatic abscess was evident as a result of pancreatic injury during surgery. The appellants further alleged that there was nothing on record to 6 show that Dr. Kapil Kumar, respondent no. 3 possessed any kind of experience and skill required to undertake such a complicated operation.

15. The appellants also had the grievance that they were not informed in time of the damage caused to the body of pancreas and the removal of the spleen.

16. According to the appellants, the `anterior' approach adopted at the time of first surgery was not the correct approach. Surgery should have been done by adopting `posterior' approach for removal of left adrenal tumor. Dr. Kapil Kumar, respondent no. 3 after the first operation on 2.4.1990 told the appellants that the operation was successful and the tumor was completely removed which was in one piece, well defined and no spreading was there. After the surgery, blood was coming out in a tube which was inserted on the left side of the abdomen. On specific query made by the deceased and appellant no.1, respondent nos. 2 and 3 told them that the pancreas was perfectly normal but during operation on 2.4.1990, it was slightly damaged but repaired instantly, hence there was no cause of any anxiety. When the 7 fact of damage to pancreas came to the notice of the deceased, he asked for the details which were not given. The appellants alleged that the tumor taken out from the body was not malignant.

17. The complaint of the appellants was thoroughly examined and dealt with by the National Commission. The National Commission had decided the entire case of the appellants in the light of the law which has been crystallized by a number of cases decided by this Court. Some of them have been extensively dealt with by the Commission.

18. The allegations in the complaint were strongly rebutted by Dr. Kapil Kumar, respondent no. 3. Dr. Kapil stated in his affidavit that the anterior approach was preferred over the posterior approach in the suspected case of cancer, which was the case of Shri Sharma. The

former approach enables the surgeon to look at liver, the aortae area, the general spread and the opposite adrenal gland. The risk involved was explained to the patient and the appellants and they had agreed to the surgery after due consultation with the family doctor.

19. With the help of medical texts in support of adopting `anterior' approach, respondent no. 3 mentioned as under:

> "(i) "The `anterior' approach for adrenalectomy is mandatory whenever optimum exposure is required or when exploration of the entire abdomen is necessary. Therefore, this approach is used in patients with adrenal tumours 4 cm in diameter, or in patients with possibly malignant tumours of any size, such as pheochromocytoma or adrenocortical carcinoma.....
>
> Resection of the left adrenal gland requires mobilization of the spleen and left colon. The lateral peritoneal attachments of the left colon are freed, initially. Then the spleen is scooped out from the left upper guardant medially and the avascular attachments between the spleen and diaphragm are divided. The spleen, stomach, pancreatic tail and left colon are retracted medially en bloc to the superior mesenteric vessels. The left adrenal gland is exposed splendidly in this manner". - Peritoneum, Retroperitoneum and Mesentery - Section IV.
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> (ii) "Adrenal operations. Surgery should be initial treatment for all patients with Cushing syndrome secondary to adrenal adenoma or carcinoma. Preoperative radiologic lateralization of the tumor allows resection via a unilateral flank incision. Adrenalectomy is curative. Postoperative steroid replacement therapy is necessary until the suppressed gland recovers (3-6 months).
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> Adrenal carcinoma should be approached via a midline incision to allow radical resection, since surgery is only hope for cure". - Principles of Surgery, 18th Edition Page 560.
>
> (iii) "Adrenocortical malignancies are rare, often at advanced stage when first discovered and should be approached using an anterior approach to allow adequate exposure of the tumor and surrounding soft tissue and organs". - Technical Aspects of Adrenalectomy - By Clive S. Grant and Jon A. Van Heerden - Chapter Thirty Five."

20. The medical texts quoted above speak of both the approaches for adrenaloctomy. Nowhere the appellant no.1 has been able to support her contention that posterior approach was the only possible and proper approach and respondent no. 3 was negligent in adopting the anterior approach.

21. Apart from the medical literature, Dr. N. K. Shukla, Additional Professor at AIIMS and a well-know surgeon stated in unequivocal terms in response to a specific question from the appellant no.1 that for malignant tumors, by and large, we prefer anterior approach.

22. Dr. Nandi, Professor and Head of Department of Gastro- Intestinal Surgery at AIIMS also supported `anterior' approach and confirmed and reconfirmed adoption of `anterior' approach in view of inherent advantages of the approach.

23. In view of the medical literature and the evidence of eminent doctors of AIIMS, the National Commission did not find any merit in the allegations levelled.

24. According to the appellants, Dr. Bose, respondent no. 4, who performed the second surgery on 23.5.1990 did not follow the advice of Dr. Nandi, Professor and the Head of Department of Gastro-Intestinal Surgery at AIIMS. Dr. Nandi had advised placing of feeding tube at a designated place, but this was not done.

25. Dr. Bose, Respondent no. 4 stated in his affidavit that there are three well known alternative methods of food supply of nutrition minimizing any leakage of enzymes from the pancreas. Any of the alternative methods could be adopted only after opening the stomach and this is precisely what respondent no. 4 did, i.e. cleared the area of abscess, dead and other infective tissues and inserted a second tube for drainage of fluid in the affected area and in the pancreatic duct. Respondent no. 4 also inserted a second tube connecting the exterior of the abdomen with the affected part of the 11 pancreas and the abdomen for drainage and clearance in support of the first tube inserted for drainage. According to respondent no. 4, this was the best course which could be done keeping in view the inside status of the stomach of the deceased and that was done.

26. The National Commission did not find any merit in this complaint of the appellants.

27. Another complaint made by the appellants was with regard to `Gluteal abscess' which was attributed to `pyogenic meningitis' resulting in the death of Shri Sharma which was first observed in the Medical College Hospital at Jodhpur, where the deceased had gone in connection with performing certain rites in connection with the death of his mother-in-law.
The Gluteal abscess was drained by a simple incision. He was discharged from there on 3.10.1990 with an advice to go to AIIMS, New Delhi and meet Dr. Kuchupillai, the Endoconologist. According to the doctor, there was not even a whisper of any incision or draining of gluteal abscess. The Essentiality Certificate makes it clear that no incision was made to drain out gluteal abscess.

28. The appellants aggrieved by the judgment and order of the National Commission filed the present appeal before this court.

29. This court issued notice and in pursuance to the notice issued by this court, a counter affidavit on behalf of respondent no.1 has been filed by Dr. Ranbir Kumar Gupta. It is mentioned in the affidavit that although the respondents fully sympathized with the appellants' unfortunate loss, the respondents are constrained to submit that the appellants had presented a malicious, fabricated and distorted account to create a false impression that the respondents were guilty of negligence in treating late Shri R.K. Sharma.

30. The respondents also submitted that the appellants have ignored the fact that the medicine is not an exact science involving precision and every surgical operation involves uncalculated risks and merely because a complication had ensued, it does not mean that the hospital or the doctor was guilty of negligence. A medical practitioner is not expected to achieve success in every case that he treats. The duty of the Doctor like that of other professional men is to exercise 13 reasonable skill and care. The test is the standard of the ordinary skilled man. It is further submitted in the counter affidavit that the hospital and the doctors attended late Shri Sharma with utmost care, caution and skill and he was treated with total devotion and dedication. Shri Sharma's death was attributable to the serious disease with which he was suffering from. It is also mentioned that the conduct of the deceased himself was negligent when he was discharged on 23.6.1990. The doctors specifically advised him "Regular Medical Follow Up" which the deceased failed to attend. In fact, subsequently, it was respondent no.4 who called upon the deceased and persuaded him to visit the Modi Hospital for a change of dressing. The Fitness Certificate issued to the deceased also bore the endorsement "he would need prolonged and regular follow up". However, the deceased did not make any effort and was totally negligent.

31. According to the affidavit, the deceased was admitted on 18.3.1990 in Batra Hospital. Dr. R.K. Mani recommended certain investigations such as abdominal Utrasound, Echo-cardiogram Blood Tests etc. On 20.3.1990, Dr. Mani ordered a C.T. Scan of the abdomen for a suspected lump in the 14 abdomen. The C.T. abdomen revealed a large left adrenal mass. Accordingly, the following note was recorded by Dr. R.K. Mani in the case sheet on 21.3.1990:- "CT abdomen reveals a large left adrenal mass.

Evidently there is a secreting adrenal tumour.

> “Patient needs full work up re hormonal status and CT Head Scan." The same day Dr. R.K. Mani referred the case to Dr. C.M. Batra, Endocrinologist and sought Dr. Batra's opinion on the diagnosis made by him that Anasrarca was attributable to the Adrenal tumour. Dr. Mani also referred Shri R.K. Sharma to a Dermatologist. That after reviewing the case Dr. C.M. Batra agreed with Dr. Mani that Anarsarca was due to the Adrenal Tumour. Dr. Batra was also of the opinion that the Adrenal Tumour could be due to either Adrenal or Adrenal Carcinoma (i.e. cancer). Dr. Batra recommended a C.T. Thorax Bone and Skeletol survey. The Dermatologist Dr. Kandhari reported that Shri R.K. Sharma had a fungal infection. After the reports of all the tests and the report of the hormonal assays had been received, respondent no.2 came to a confirmed diagnosis that Shri R.K. Sharma had a secreting adrenal tumour. The patient was informed that surgery for removal of an adrenal tumour was planned. Appellant no.1 was also informed that the tumour was suspected to be malignant. Mrs. Kusum Sharma told respondent no.2 that one of her relations was a doctor working in Jodhpur Medical College and that she would like to consult him. The said relation of Smt. Kusum Sharma came down to Delhi, examined Shri R.K. Sharma and went through all the reports. Thereafter, Smt. Kusum Sharma gave consent for the surgery. Dr. Kapil Kumar, who specializes in surgical oncology, i.e., cancer surgery was asked to operate upon Shri R.K. Sharma. The risk involved in the operation was

explained to the petitioner, her 15 husband (now deceased) and their relative and they agreed after due consultation with their family doctor."

32. Shri Sharma was operated on 2.4.1990 by Dr. Kapil Kumar, respondent no.3 and the adrenal tumour was removed. During surgery it became necessary to remove the spleen of Shri R.K. Sharma. The operation was successful. However, the tail of the pancreas was traumatized during retraction as Shri R.K. Sharma was extremely obese. On examination, the injury to the pancreas was found to be superficial and non-ductal. The damage to the pancreas was repaired immediately with interrupted non-absorbable sutures and drains were placed. The injury to the pancreas was known during surgery and the same was repaired immediately. It was clearly recorded in the operation transcript that the body of the pancreas was damaged on its posterior surface. The said fact was recorded in the discharge summary.

33. It is submitted that after the surgery Shri R.K. Sharma was subjected to ultrasound imaging and sonogram. On 26.4.1990 respondent no.2 ordered a CT Scan as he suspected the existence of a pancreatic abscess. The CT Scan report was 16 suggestive of paripancreatic inflammation and pancreatic abscess. Thus the CT Scan merely confirmed the suspicion of appellant no.1, the wife of Shri R.K. Sharma who was well aware of the injury to the pancreas and the possibility of there being a pancreatic abscess and she had long discussion with respondent nos.2 and 3 regarding the prognosis. It is denied that the patient and the appellants were assured that fluid discharge would stop within 2 or 3 days time or that it was normal complication after any surgery.

34. It is submitted that the tumour mass was sent for biopsy the same day i.e. 2.4.1990. The histopathology report was received the next day and it recorded a positive finding of the tumour being malignant. Since cases of adrenal cancer have a very poor prognosis, six slides were sent to Sir Ganga Ram Hospital for confirmation. The histopathology report from Sir Ganga Ram Hospital also indicated cancer of the adrenal gland.

35. It is admitted that due to the insistence of the patient and the appellants to seek expert advice of the All India Institute of Medical Science the patient was referred to Sir 17 Ganga Ram Hospital for E.R.C.P. Test. After the CT Scan report dated 26.4.1990 confirmed the existence of pancreatic abscess, on 28.4.1990, respondent nos.2 and 3 sought the advice of Dr. T.K. Bose, respondent no.4. An E.R.C.P. test and Sonogram were recommended by respondent no.4 and it was again respondent no.4 who suggested that the opinion of Prof. Nandi of All India Institute of Medical Sciences be sought.

E.R.C.P. and Sonogram are sophisticated tests and the patient can hardly be expected to be aware of such procedures. It is submitted that the E.R.C.P. test confirmed the initial diagnosis made by respondent nos. 2 and 3 that there being a leakage from the pancreatic duct and showed the exact site of leakage. Determination of exact site of leakage is one of the principal functions of the E.R.C.P. test.

36. In the counter-affidavit it is specifically denied that the deceased was dissatisfied with the treatment. In the affidavit, it is mentioned that Dr. T.K. Bose and Dr. Kapil Kumar adopted the procedure, which in their opinion was in the best interest of the patient, Shri Sharma.

37. During the second operation on 23.5.1990 it was found that there was matting together of proximal jejunal loops (intestinal loops) in the left infra-colic compartment subjacent to root of transverse mescolon and it was technically hazardous to do feeding jejunostomy. That is why a deviation was made. Dr. T.K. Bose and Dr. Kapil Kumar were not obliged to follow every detail of Dr. Nandi's recommendation as appropriate decisions were to be made in accordance with the findings at surgery. It would be pertinent to point out that Dr. Nandi's note was at best a theoretical analysis whereas Dr. Bose was the man on the spot. Matting of jejunal loops was not known to Dr. Nandi and came to be known only on the operation table.

38. It is submitted that the bleeding (hematemsia) was due to stress ulceration and not due to damage to the stomach by a Nasodudoenal tube. Such bleeding is quite common after major surgery. It is denied that fundus of the stomach was damaged during surgery or during placement of the Nasodudoenal tube as alleged by the appellants. In fact, the site of surgery was nowhere near the fundus of the stomach. It is denied that any procedure adopted by Dr. Bose and Dr. Kapil Kumar in surgery endangered the life of the patient. Shri R.K. Sharma was discharged as his surgical wounds had healed and his overall condition was satisfactory.

39. It is submitted that after his discharge from Batra Hospital on 23.6.1990, Shri R.K. Sharma did not maintain any contact with the answering respondents till 9.10.1990 barring one visit to respondent no.2 on 31.8.1990 for the purpose of obtaining fitness certificate. The answering respondent cannot be held responsible for any mishap, which might have taken place when the deceased Shri R.K. Sharma was being treated elsewhere.

40. It is further submitted that no request was received by respondent no.1 from AIIMS for supply of the case sheets or the tumour mass. Had such a request been received the case sheets would have been sent to AIIMS forthwith. The tumour mass would also have been sent subject to availability, as generally the mass is not preserved beyond a period of 4 weeks. As a standard practice, case sheets are never given to patients as they contain sensitive information which can affect their psyche.

41. It is submitted that no malafides can be attributed to the answering respondents for declining the request of Shri R.K. Sharma for handing over the entire mass of tumour. Had the mass been available, it would have definitely been given. As per standard practice, specimens are discarded after one month and, therefore, the tumour mass was not available and as such could not be given to Shri R.K. Sharma. All over the world the standard practice is to preserve slides and to use them for review.

42. The Histopathology report from Mool Chand Hospital recorded the presence of Mitosis, which are indicative of malignancy. The Histopathology reports from Batra Hospital and Sir Ganga Ram Hospital clearly indicated the presence of malignancy, whereas the report from

Mool Chand Hospital did not specifically indicate whether the tumour was malignant or benign. Rather it was stated in the report that a follow up was required.

43. It is submitted that pyrogenic meningitis was most probably the consequence of gluteal abscess for which the patient had not received any proper treatment in the proceeding weeks. It was only when the patient was in a critical condition that he was brought to Batra Hospital.

However, at that stage the disease of the patient was too far advanced.

44. It is denied that pyrogenic Meningitis "is swelling in the brain due to the spoiled surgery and the unhealed wounds inside caused by the repeated insertions of tubes introducing infections." It is denied that surgery was spoiled at Batra Hospital. Further when the deceased Shri R.K. Sharma was discharged, all his wounds had healed. Pyrogenic Meningitis is not swelling of the brain but inflammation of the covering of the brain. It could not have been the consequence of the surgery or the pancreatic abscess.

45. In the discharge summary prepared initially it was recorded specifically that the adrenal mass was malignant and that the patient should be started on Mitotane at the earliest after the period of recovery from the operation. However, the appellants had requested respondent no.2 to delete all references about cancer from the discharge slip as her husband was likely to read the same. She apprehended that in such an event her husband would become mentally disturbed. Having regard to the apprehension expressed by the appellant no.1, Smt. Kusum Sharma, respondent no.2 prepared a fresh discharge summary which did not contain any reference to cancer. The diagnosis of cancer was not an afterthought. The diagnosis of cancer was a considered one after two histopathological reports were received. It is however denied that the patient was told that he was suffering from cancer.

46. It is also denied that Dr. Kapil Kumar lacks experience. On the contrary, Dr. Kapil Kumar has impressive credentials and he had undertaken training in the well known Tata Cancer Hospital at Mumbai and he had adequate experience in handling such operations.

47. The learned counsel appearing for the appellants placed reliance on Spring Meadows Hospital & Another v. Harjot Ahluwalia through K.S. Ahluwalia & Another (1998) 4 SCC 39 and Dr. Laxman Balkrishna Joshi v. Dr. Trimbak Bapu Godbole & Anr. AIR 1969 SC 128. According to respondent no.1, these cases have no application to the 23 present case. The facts in these cases are entirely different and the law of negligence has to be applied according to the facts of the case.

48. According to Halsbury's Laws of England Ed.4 Vol.26 pages 17-18, the definition of Negligence is as under:- "22. Negligence : Duties owed to patient. A person who holds himself out as ready to give medical (a) advice or treatment impliedly undertakes that he is possessed of skill and knowledge for the purpose. Such a person, whether he is a registered medical practitioner or not, who is consulted by a patient, owes him certain duties, namely, a duty of care in deciding whether to undertake the case: a duty of care in deciding what

treatment to give; and a duty of care in his administration of that treatment (b) A breach of any of these duties will support an action for negligence by the patient (c)."

49. In a celebrated and oftenly cited judgment in Bolam v. Friern Hospital Management Committee (1957) I WLR 582 :

(1957) 2 All ER 118 (Queen's Bench Division - Lord Justice McNair observed.

> "(i) a doctor is not negligent, if he is acting in accordance with a practice accepted as proper by a reasonable body of medical men skilled in that particular art, merely because there is a body of such opinion that takes a contrary view. The direction that, where there are two different schools of medical practice, both having recognition among practitioners, it is not negligent for a 24 practitioner to follow one in preference to the other accords also with American law; See 70 Corpus Juris Secundum (1951) 952, 953, para 44. Moreover, it seems that by American law a failure to warn the patient of dangers of treatment is not, of itself, negligence ibid. 971, para 48). Lord Justice McNair also observed : Before I turn that, I must explain what in law we mean by "negligence". In the ordinary case which does not involve any special skill, negligence in law means this : some failure to do some act which a reasonable man in the circumstances would do, or doing some act which a reasonable man in the circumstances would not do; and if that failure or doing of that act results in injury, then there is a cause of action. How do you test whether this act or failure is negligent? In an ordinary case, it is generally said, that you judge that by the action of the man in the street. He is the ordinary man. In one case it has been said that you judge it by the conduct of the man on the top of a Clapham omnibus. He is the ordinary man. But where you get a situation which involves the use of some special skill or competence, then the test whether there has been negligence or not is not the test of the man on the top of a Claphm omnibus, becausehe has not got this man exercising and professing to have that special skill. A man need not possess the highest expert skill at the risk of being found negligent. It is well-established law that it is sufficient if her exercises the ordinary skill of an ordinary competent man exercising that particular art."

50. Medical science has conferred great benefits on mankind, but these benefits are attended by considerable risks. Every surgical operation is attended by risks. We cannot take the benefits without taking risks. Every advancement in technique is also attended by risks.

51. In Roe and Woolley v. Minister of Health (1954) 2 QB 66, Lord Justice Denning said : `It is so easy to be wise after the event and to condemn as negligence that which was only a misadventure. We ought to be on our guard against it, especially in cases against hospitals and doctors. Medical science has conferred great benefits on mankind but these benefits are attended by unavoidable risks. Every surgical operation is attended by risks. We cannot take the benefits without taking the risks. Every advance in technique is also attended by risks. Doctors, like the rest of us, have to learn by experience; and experience often teaches in a hard way."

52. It was also observed in the same case that "We must not look at the 1947 accident with 1954 spectacles:". "But we should be doing a disservice to the community at large if we were to impose liability on hospitals and doctors for everything that happens to go wrong. Doctors would be led to think more of their own safety than of the good of their patients. Initiative would be stifled and confidence shaken. A proper sense of proportion requires us to have regard to the conditions in which hospitals and doctors have to work. We must insist on due care for the patient at every point, but we must not condemn as negligence that which is only a misadventure.

53. In *Whitehouse v. Jordon & Another*[1] House of Lords per Lord Edmund-Davies, Lord Fraser and Lord Russell:

> "The test whether a surgeon has been negligent is whether he has failed to measure up in any respect, whether in clinical judgment or otherwise, to the standard of the ordinary skilled surgeon exercising and professing to have the special skill of a surgeon (dictum of McNair Jo. In *Bolam v. Friern Hospital Management Committee*[2]

54. In *Chin Keow v. Government of Malaysia & Anr*[3]*.:* the Privy Council applied these words of McNair J in Bolam v. Friern Hospital Management Committee:

> ".....where you get a situation which involves the use of some special skill or competence, then the test as to whether there has been negligence or not is not the test of the man on the top of a Clapham omnibus because he has not got this special skill.
>
> The test is the standard of the ordinary skilled man exercising and professing to have that special skill."

55. This court in the case of *State of Haryana v. Smt. Santra*[4] in the matter of negligence relied upon the case of Bolam v. Friern Hospital Management Committee (supra) and on Whitehouse v. Jordan & Another (supra).

56. In *Poonam Verma v. Ashwin Patel & Ors*[5]. where the question of medical negligence was considered in the context of treatment of a patient, it was observed as under:- "40. Negligence has many manifestations - it may be active negligence, collateral negligence, comparative negligence, concurrent negligence, continued negligence, criminal negligence, gross negligence, hazardous negligence, active and passive negligence, wilful or reckless negligence or Negligence per se."

57. In the instant case, Dr. Kapil Kumar, respondent no.3 who performed the operation had reasonable degree of skill and knowledge. According to the findings of the National Commission, he cannot be held guilty of negligence by any stretch of imagination.

58. Negligence per-se is defined in Black's Law Dictionary as under:- Negligence per-se: - Conduct, whether of action or omission, which may be declared and treated as negligence

without any argument or proof as to the particular surrounding circumstances, either because it is in violation of a statute or valid municipal ordinance, or because it is so palpably opposed to the dictates of common prudence that it can be said without hesitation or doubt that no careful person would have been guilty of it. As a general rule, the violation of a public duty, enjoined by law for the protection of person or property, so constitutes."

59. In Bolam v. Friern Hospital Management Committee (supra), Lord McNair said :

> ".....I myself would prefer to put it this way : A doctor is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men in that particular art". In the instant case, expert opinion is in favour of the procedure adopted by Opposite Party No.3 at the time of Surgery on 2.4.90.

60. The test is the standard of ordinary skilled man exercising and professing to have that special skill.

61. In Roe and Woolley (supra) Lord Denning said:

"We should be doing a dis-service to the community at large if we were to impose liability on Hospitals and Doctors for everything that happens to go wrong".

62. Other rulings and judgments also hold and support this view. It is on these judgments that the Supreme Court has relied to determine negligence or otherwise.

63. Judgment in the case of State of Haryana (supra) in the context of `Negligence per se', is not applicable in the instant case, as herein, there was no violation of public duty enjoined by law. The term 'negligence' is used for the purpose of fastening the defendant with liability under the Civil Law and, at times, under the Criminal Law. It is contended on behalf of the respondents that in both the jurisdictions, negligence is negligence, and jurisprudentially no distinction can be drawn between negligence under civil law and negligence under criminal law.

64. In *R. v. Lawrence*[6], Lord Diplock spoke for a Bench of five judges and the other Law Lords agreed with him. He reiterated his opinion in R. v. Caldwell 1981(1) All ER 961 (HL) and dealt with the concept of recklessness as constituting mens rea in criminal law. His Lordship warded against adopting the simplistic approach of treating all problems of criminal liability as soluble by classifying the test of liability as being "subjective" or "objective", and said "Recklessness on the part of the doer of an act does presuppose that there is something in the circumstances that would have drawn the attention of an ordinary prudent individual to the possibility that his act was capable of causing the kind of serious harmful consequences that the section which creates the offence was intended to prevent, and that the risk of those harmful consequences occurring was not so slight that an ordinary prudent individual would feel justified in treating them as negligible. It is only when this is so that the doer of the act is acting 'recklessly' if, before doing the act, he either fails to give any thought to the possibility

of there being any such risk or, having recognized that there was such risk, he nevertheless goes on to do it."

65. We are here concerned with the criminal negligence. We have to find out that the rashness was of such a degree as to amount to taking a hazard knowing that the hazard was of such a degree that injury was most likely imminent. The element of criminality is introduced by the accused having run the risk of doing such an act with recklessness and indifference to the consequences.

66. Lord Atkin in his speech in Andrews v. Director of Public Prosecutions, [1937] A.C. 576, stated, "Simple lack of care -- such as will constitute civil liability is not enough; for purposes of the criminal law there are degrees of negligence; and a very high degree of negligence is required to be proved before the felony is established." Thus, a clear distinction exists between "simple lack of care" incurring civil liability and "very high degree of negligence" which is required in criminal cases. Lord Porter said in his speech in the same case -- "A higher degree of negligence has always been demanded in order to establish a criminal offence than is sufficient to create civil liability. (Charlesworth & Percy on Negligence (10th Edn., 2001) Para 1.13).

67. The aforementioned statement of law in Andrews's case (supra) has been noted for approval by this court in Syad Akbar v. State of Karnataka (1980) 1 SCC 30. This court has dealt with and pointed out with reasons the distinction between negligence in civil law and in criminal law. The court opined that there is a marked difference as to the effect of evidence, viz. the proof, in civil and criminal proceedings. In civil proceedings, a mere preponderance of probability is sufficient, and the defendant is not necessarily entitled to the benefit of every reasonable doubt; but in criminal proceedings, the persuasion of guilt must amount to such a moral certainty as convinces the mind of the Court, as a reasonable man, beyond all reasonable doubt. Where negligence is an essential ingredient of the offence, the negligence to be established by the prosecution must be culpable or gross and not the negligence merely based upon an error of judgment.

68. A three-Judge Bench of this court in *Bhalchandra alias Bapu & Another v. State of Maharashtra*[7] has held that while negligence is an omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do; criminal negligence is the gross and culpable neglect or failure to exercise that reasonable and proper care and precaution to guard against injury either to the public generally or to an individual in particular, which having regard to all the circumstances out of which the charge has arisen, it was the imperative duty of the accused person to have adopted.

69. This court in a landmark judgment in Jacob Mathew v. State of Punjab & Another (2005) 6 SCC 1 while dealing with the case of negligence by professionals also gave illustration of legal profession. The court observed as under:- "18. 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 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 and exercised with reasonable degree of care and caution. He does not assure his client of the result. A lawyer does not tell his client that the client shall win the case in all circumstances. 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, a 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 necessary for every professional to possess the highest level of expertise in that branch which he practices. In Michael Hyde and Associates v. J.D. Williams & Co. Ltd. , [2001] P.N.L.R. 233, CA, Sedley L.J. said that where a profession embraces a range of views as to what is an acceptable standard of conduct, the competence of the defendant is to be judged by the lowest standard that would be regarded as acceptable.

(Charles worth & Percy, ibid, Para 8.03)"

70. In Jacob Mathew's case, this court heavily relied on the case of Bolam (supra). The court referred to the opinion of McNair, J. defining negligence as under:-

> "19.Where you get a situation which involves the use of some special skill or competence, then the test as to whether there has been negligence or not is not the test of the man on the top of a Clapham omnibus, because he has not got this special skill.
>
> The test is the standard of the ordinary skilled man exercising and professing to have that special skill .
>
> . . A man need not possess the highest expert skill;
>
> it is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art."

71. In Eckersley v. Binnie, Bingham, L.J. summarized the Bolam test in the following words :-

"From these general statements it follows that a professional man should command the corpus of knowledge which forms part of the professional equipment of the ordinary member of his profession. He should not lag behind other ordinary assiduous and intelligent members of his profession in knowledge of new advances, discoveries and developments in his field. He should have such an awareness as an ordinarily competent practitioner would have of the deficiencies in his knowledge and the limitations on his skill. He should be alert to the hazards and risks in any professional task he undertakes to the extent that other ordinarily competent members of the profession would be alert. He must bring to any professional task he undertakes no less expertise, skill and care than other ordinarily competent members of his profession would bring, but need bring no more. The standard is that of the reasonable average. The law does not require of a professional man that he be a paragon combining the qualities of polymath and prophet." (Charles worth & Percy, ibid, Para 8.04)

72. The degree of skill and care required by a medical practitioner is so stated in Halsbury's Laws of England (Fourth Edition, Vol.30, Para 35):-

"The practitioner must bring to his task a reasonable degree of skill and knowledge, and must exercise a reasonable degree of care. Neither the very highest nor a very low degree of care and competence, judged in the light of the particular circumstances of each case, is what the law requires, and a person is not liable in negligence because someone else of greater skill and knowledge would have prescribed different treatment or operated in a different way; nor is he guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art, even though a body of adverse opinion also existed among medical men. Deviation from normal practice is not necessarily evidence of negligence. To establish liability on that basis it must be shown (1) that there is a usual and normal practice; (2) that the defendant has not adopted it; and (3) that the course in fact adopted is one no professional man of ordinary skill would have taken had he been acting with ordinary care."

73. In *Hucks v. Cole & Anr*[8]. Lord Denning speaking for the court observed as under:- "a medical practitioner was not to be held liable simply because things went wrong from mischance or misadventure or through an error of judgment in choosing one reasonable course of treatment in preference of another. A medical practitioner would be liable only where his conduct fell below that of the standards of a reasonably competent practitioner in his field."

74. In another leading case Maynard v. West Midlands Regional Health Authority the words of Lord President (Clyde) in Hunter v. Hanley 1955 SLT 213 were referred to and quoted as under:-

"In the realm of diagnosis and treatment there is ample scope for genuine difference of opinion and one man clearly is not negligent merely because his conclusion differs

from that of other professional men...The true test for establishing negligence in diagnosis or treatment on the part of a doctor is whether he has been proved to be guilty of such failure as no doctor of ordinary skill would be guilty of if acting with ordinary care...".

The court per Lord Scarman added as under:- "A doctor who professes to exercise a special skill must exercise the ordinary skill of his specialty. Differences of opinion and practice exist, and will always exist, in the medical as in other professions. There is seldom any one answer exclusive of all others to problems of professional judgment. A court may prefer one body of opinion to the other, but that is no basis for a conclusion of negligence."

75. The ratio of Bolam's case is that 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 the respondent charged with negligence acted in accordance with the general and approved practice is enough to clear him of the charge. Two 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 on which it is suggested as should have been used.

76. A mere deviation from normal professional practice is not necessarily evidence of negligence.

77. In Jacob Mathew's case (supra) this court observed that higher the acuteness in emergency and higher the complication, more are the chances of error of judgment. The court further observed as under:- "25.....At times, the professional is confronted with making a choice between the devil and the deep sea and he has to choose the lesser evil. The medical professional is often called upon to adopt a procedure which involves higher element of risk, but which he honestly believes as providing greater chances of success for the patient rather than a procedure involving lesser risk but higher chances of failure. Which course is more appropriate to follow, would depend on the facts and circumstances of a given case. The usual practice prevalent nowadays is to obtain the consent of the patient or of the person in-charge of the patient if the patient is not be in a position to give consent before adopting a given procedure. So long as it can be found that the procedure which was in fact adopted was one which was acceptable to medical science as on that date, the medical practitioner cannot be held negligent merely because he chose to follow one procedure and not another and the result was a failure."

78. A doctor 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. This court in Jacob Mathew's case very aptly observed that 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.

79. Doctors in complicated cases have to take chance even if the rate of survival is low.

80. The professional should be held liable for his act or omission, if negligent, is to make life safer and to eliminate the possibility of recurrence of negligence in future. But, at the same time courts have to be extremely careful to ensure that unnecessarily professionals are not harassed and they will not be able to carry out their professional duties without fear.

81. It is a matter of common knowledge that after happening of some unfortunate event, there is a marked tendency to look for a human factor 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. A professional deserves total protection. The Indian Penal Code has taken care to ensure that people who act in good faith should not be punished. Sections 88, 92 and 370 of the Indian Penal Code give adequate protection to the professional and particularly medical professionals.

82. The Privy Council in John Oni Akerele v. The King AIR 1943 PC 72 dealt with a case where a doctor was accused of manslaughter, reckless and negligent act and he was convicted. His conviction was set aside by the House of Lords and it was held thus:- (i) That a doctor is not criminally responsible for a patient's death unless his negligence or incompetence went beyond a mere matter of compensation between subjects and showed such disregard for life and safety of others as to amount to a crime against the State.;

> “(ii) That the degree of negligence required is that it should be gross, and that neither a jury nor a court can transform negligence of a lesser degree into gross negligence merely by giving it that appellation.... There is a difference in kind between the negligence which gives a right to compensation and the negligence which is a crime.
>
> (iii) It is impossible to define culpable or criminal negligence, and it is not possible to make the distinction between actionable negligence and criminal negligence intelligible, except by means of illustrations drawn from actual judicial opinion....The most favourable view of the conduct of an accused medical man has to be taken, for it would be most fatal to the efficiency of the medical profession if no one could administer medicine without a halter round his neck."
> (emphasis supplied)

83. In the said case, their Lordships refused to accept the view that criminal negligence was proved merely because a number of persons were made gravely ill after receiving an injection of Sobita from the appellant coupled with a finding that a high degree of care was not exercised. Their Lordships also refused to agree with the thought that merely because too strong a mixture was dispensed once and a number of persons were made gravely ill, a criminal degree of negligence was proved.

84. This court in *Kurban Hussein Mohammedali Rangawalla v. State of Maharashtra*[9] while dealing with Section 304A of IPC, the following statement of law by Sir Lawrence Jenkins in *Emperor v. Omkar Rampratap*[10] was cited with approval:- "To impose criminal liability under Section 304A, Indian Penal Code, it is necessary that the death should have been the direct result of a rash and negligent act of the accused, and that act must be the proximate and efficient cause without the intervention of another's negligence. It must be the causa causans; it is not enough that it may have been the causa sine qua non."

85. In Dr. Laxman Balkrishna Joshi (supra), the court observed that the practitioner must bring to his task a reasonable degree of skill and knowledge and must exercise a reasonable degree of care. Neither the very highest nor a very low degree of care and competence judged in the light of the particular circumstances of each case is what the law requires. The doctor no doubt has a discretion in choosing treatment which he proposes to give to the patient and such discretion is relatively ampler in cases of emergency. In this case, the death of patient was caused due to shock resulting from reduction of the fracture attempted by doctor without taking the elementary caution of giving anaesthetic to the patient. The doctor was held guilty of negligence and liability for damages in civil law. We hasten to add that criminal negligence or liability under criminal law was not an issue before the Court - as it did not arise and hence was not considered.

86. In a significant judgment in Indian Medical Association v. V.P. Shantha & Others (1995) 6 SCC 651, a three-Judge Bench of this Court held that service rendered to a patient by a medical practitioner (except where the doctor renders service free of charge to every patient or under a contract of personal service), by way of consultation, diagnosis and treatment, both medicinal and surgical, would fall within the ambit of `service' as defined in Section 2(1)(o) of the Consumer Protection Act, 1986. Deficiency in service has to be judged by applying the test of reasonable skill and care which is applicable in action for damages for negligence.

87. In the said case, the court also observed as under:- "22. In the matter of professional liability professions differ from occupations for the reason that professions operate in spheres where success cannot be achieved in every case and very often success or failure depends upon factors beyond the professional man's control. In devising a rational approach to professional liability which must provide proper protection to the consumer while allowing for the factors mentioned above, the approach of the Courts is to require that professional men should possess a certain minimum degree of competence and that they should exercise reasonable care in the discharge of their duties. In general, a professional man owes to his client a duty in tort as well as in contract to exercise reasonable care in giving advice or performing services. (see: Jackson and Powell on Professional Negligence, 3rd Edn. paras 1-04,1-05 and 1-56).

88. In Achutrao Haribhau Khodwa & Others v. State of Maharashtra & Others (1996) 2 SCC 634, this Court noticed that in the very nature of medical profession, skills differs from doctor to doctor and more than one alternative course of treatment are available, all admissible. Negligence cannot be attributed to a doctor so long as he is performing his duties

to the best of his ability and with due care and caution. Merely because the doctor chooses one course of action in preference to the other one available, he would not be liable if the course of action chosen by him was acceptable to the medical profession.

89. In Spring Meadows Hospital & Another (supra), the court observed that an error of judgment is not necessarily negligence. In Whitehouse (supra) the court observed as under:- "The true position is that an error of judgment may, or may not, be negligent, it depends on the nature of the error. If it is one that would not have been made by a reasonably competent professional man professing to have the standard and type of skill that the defendant holds himself out as having, and acting with ordinary care, then it is negligence. If, on the other hand, it is an error that such a man, acting with ordinary care, might have made, then it is not negligence."

90. In Jacob Mathew's case (supra), conclusions summed up by the court were very apt and some portions of which are reproduced hereunder:-

> " (1) Negligence is the breach of a duty caused by omission to do something which a reasonable man guided by those considerations which 46 ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do. The definition of negligence as given in Law of Torts, Ratanlal & Dhirajlal (edited by Justice G.P. Singh), referred to hereinabove, holds good. Negligence becomes actionable on account of injury resulting from the act or omission amounting to negligence attributable to the person sued. The essential components of negligence are three: 'duty', 'breach' and 'resulting damage'.
>
> (2) Negligence in the context of 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.
>
> (3) 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."

91. To prosecute a medical professional for negligence under criminal law it must be shown that the accused did something or failed to do something which in the given facts and circumstances no medical professional in his ordinary senses and prudence would have done or failed to do. The hazard taken by the accused doctor should be of such a nature that the injury which resulted was most likely imminent.

92. In a relatively recent case *in C.P. Sreekumar (Dr.), MS (Ortho) v. S. Ramanujam*[11] this court had an occasion to deal with the case of medical negligence in a case in which the respondent was hit by a motor-cycle while going on his by-cycle sustained a hairline fracture of the neck of the right femur.

93. Pre-operative evaluation was made and the appellant Dr. Sreekumar, on considering the various options available, decided to perform a hemiarthroplasty instead of going in for the internal fixation procedure. The respondent consented for the choice of surgery after the various options have been explained to him. The surgery was performed the next day.

> "The respondent filed a complaint against the appellant for 49 medical negligence for not opting internal fixation procedure. This court held that the appellant's decision for choosing hemiarthroplasty with respect to a patient of 42 years of age was not so palpably erroneous or unacceptable as to dub it as a case of professional negligence."

94. On scrutiny of the leading cases of medical negligence both in our country and other countries specially United Kingdom, some basic principles emerge in dealing with the cases of medical negligence. While deciding whether the medical professional is guilty of medical negligence following well known principles must be kept in view:- I. Negligence is the breach of a duty exercised by omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.

> "II. Negligence is an essential ingredient of the offence. The negligence to be established by the prosecution must be culpable or gross and not the negligence merely based upon an error of judgment.
>
> III. The medical professional is expected to bring a reasonable degree of skill and knowledge and must exercise a reasonable degree of care.
>
> Neither the very highest nor a very low degree of care and competence judged in the light of the particular circumstances of each case is what the law requires.
>
> IV. A medical practitioner would be liable only where his conduct fell below that of the standards of a reasonably competent practitioner in his field.
>
> V. In the realm of diagnosis and treatment there is scope for genuine difference of opinion and one professional doctor is clearly not negligent merely because his conclusion differs from that of other professional doctor.

VI. The medical professional is often called upon to adopt a procedure which involves higher element of risk, but which he honestly believes as providing greater chances of success for the patient rather than a procedure involving lesser risk but higher chances of failure. Just because a professional looking to the gravity of illness has taken higher element of risk to redeem the patient out of his/her suffering which did not yield the desired result may not amount to negligence.

VII. Negligence cannot be attributed to a doctor so long as he performs his duties with reasonable skill and competence. Merely because the doctor chooses one course of action in preference to the other one available, he would not be liable if the course of action chosen by him was acceptable to the medical profession.

VIII. It would not be conducive to the efficiency of the medical profession if no Doctor could administer medicine without a halter round his neck.

IX. It is our bounden duty and obligation of the civil society to ensure that the medical professionals are not unnecessary harassed or humiliated so that they can perform their professional duties without fear and apprehension.

X. The medical practitioners at times also have to be saved from such a class of complainants who use criminal process as a tool for pressurizing the medical professionals/hospitals particularly private hospitals or clinics for extracting uncalled for compensation. Such malicious proceedings deserve to be discarded against the medical practitioners.

XI. The medical professionals are entitled to get protection so long as they perform their duties with reasonable skill and competence and in the interest of the patients. The interest and welfare of the patients have to be paramount for the medical professionals."

95. In our considered view, the aforementioned principles must be kept in view while deciding the cases of medical negligence. We should not be understood to have held that doctors can never be prosecuted for medical negligence. As long as the doctors have performed their duties and exercised an ordinary degree of professional skill and competence, they cannot be held guilty of medical negligence. It is imperative that the doctors must be able to perform their professional duties with free mind.

96. When we apply well settled principles enumerated in the preceding paragraphs in dealing with cases of medical negligence, the conclusion becomes irresistible that the appellants have failed to make out any case of medical negligence against the respondents.

97. The National Commission was justified in dismissing the complaint of the appellants. No interference is called for. The appeal being devoid of any merit is dismissed. In view of the peculiar facts and circumstances of this case the parties are directed to bear their own costs.

Judgment

[1]*(1981) 1 All ER 267*
[2]*(1957) 2 All ER 118 at 121)*
[3]*(1967) WLR 813*
[4]*(2000) 5 SCC 182*
[5]*(1996) 4 SCC 332*
[6]*(1981) 1 All ER 974 (HL)*
[7]*AIR 1968 SC 1319*
[8]*(1968) 118 New LJ 0469*
[9]*(1965) 2 SCR 0622*
[10]*(1902) 4 Bom LR 0679*
[11]*(2009) 7 SCC 0130*