

**BEFORE THE DISTRICT CONSUMER DISPUTES REDRESSAL
COMMISSION KANGRA AT DHARAMSHALA, H.P.**

Date of Institution: 15.03.2022
Date of final hearing: 05.01.2024
Date of Pronouncement: 22.02.2024

Consumer Complaint No.-158/2022

IN THE MATTER OF

Smt. Beena Devi wife of Shri Balvir Singh Resident of Ward No.4
Village Gagwal, P.O. Bhadroya, Tehsil Nurpur, Distt. Kangra HP.

(Through: Mr. Ravi K. Puri, Advocate)

.....Complainant

Versus

1. Fortis Hospital, B-22, Sector 62, Noida-201301 U.P Through its
Managing Director.

2. Dr. Ajay Bhalla Director & HOD, Department of Gastroenterology,
Fortis Hospital, B-22, Sector 62 Noida-201301 U.P.

(Through: Mr.

.....Opposite Party(s)

CORAM:

President: Mr. Hemanshu Mishra

Members: Ms. Arti Sood & Sh. Narayan Thakur

PER: Mr. Hemanshu Mishra, President:-

ORDER

The complainant has filed instant complaint seeking
direction to the opposite party(s) as under:-

a) To pay the claim of Rs.05 Lakh as compensation as well as entire
OPD

treatment, attendant expenses and other expenses.

b) To pay a compensation of Rs.10 Lakh on account of Physical pain,
humiliation, harassment, financial loss, suffering mental agony,
stress and strain along with litigation expenses.

c) To pay a compensation of Rs.5,00,000/- for deficiency of service.

2. Facts giving rise to filing of this complaint are that
complainant was suffering from abdomen pain along with vomiting

and being adjoining place taken for treatment at Pathankot and during diagnosis at Pathankot (Punjab) MR Cholangiogram was performed at Gurdaspur (Punjab) on 08-12-2020 and she was reported CHOLEDOCHOLITHIASIS and as in Pathankot, facility for treatment at that time was not available due to Covid 19, hence complainant was taken for treatment to Delhi by family members. The complainant got checked at Apollo Clinic in Indrapuram on 12-12-2020 by one Dr. Tarun Kumar, who referred her to Opposite parties No.2 Dr. Ajay Bhalla for ERCP & Stenting treatment. After examination in OPD, complainant was admitted in Fortis Hospital on 15-12-2020 under opposite parties No.2 under UHID 10412440, Episode No. 150304/20/1104 and remained admit from 15-12-2020 to 19-12-2020. During admission period she had been operated and ERCP + EPT WITH BILIARY STENTING was DONE ON 17-12-2020 as per opposite parties record of treatment and after discharge on 19-12-2020, Complainant was advised to revisit after 5 days and accordingly complainant visited on 26-12-2020 where she was examined after recording her history of treatment and medicines were prescribed and even thereafter complainant kept on visiting regularly as advised by doctor and also administered various medicines, but there was no relief from pain. It is pleaded that afterwards during treatment at Amandeep Hospital at Pathankot (Punjab) it is found that opposite parties though extracted amount from complainant in the name of ERCP, Stenting and even removal of stenting, though she was not operated/treated. Alleging deficiency in the service on the part of opposite party(s), the complainant has filed the present complaint.

3. Upon notice, opposite party(s) appeared through counsel and contested the complaint by taking preliminary objection of cause of action and suppression of material facts. It is pleaded that opposite parties complied with the standard medical procedure in the treatment of the ERCP and Stone removal and Biliary stenting. It is submitted that there was no negligence whatsoever or any deficiency in treatment of the Complainant or any other deficiency

while treating the patient. The Complainant has not filed any medical evidence/expert opinion to establish the allegation that stenting procedure was not done by opposite parties in the present complaint. There is no negligence or lack of care on part of the OPs because the opposite parties had given their best effort and also provided the best treatment in every possible way to the Complainant throughout her admission and she got discharged in a stable condition with no complaint.

4. The complainant has filed rejoinder denying the contents of the reply filed by opposite party(s) and reiterating those of complaint.

5. The parties were called upon to produce their evidence in support of their contentions and accordingly the parties have adduced their respective evidence. The complainant has preferred an application for examining Dr. Suresh Gurkha, Sr. Medical Officer. The said witness was examined through video conference and was cross examined by Ld. Counsel for opposite parties at length on 05.11.2022.

6. We have heard learned counsel for the parties, written arguments filed by opposite parties No.1 & 2 and also gone through the case file carefully.

7. Perusal of record reveals that the complainant was admitted in Fortis Hospital, Sector 62, and Noida (OP No.1) on 15.12.2020 with complaint of abdomen pain and nausea 2/3 days. The complainant was admitted under Dr. Ajay Bhalla/opposite party No.2. As per discharge summary dated 18.12.2020 annexure C-4, on 17.12.2020 Endoscopic Retrograde Cholangiopancreatography (ERCP) (i.e. a procedure to diagnose and treat problems in the liver, gallbladder, bile ducts and pancreas), stone removal and biliary stenting procedure was done upon the complainant by the opposite party No.2. As per discharge summary patient tolerated the procedure well. Patient improved with the given treatment and is in

stable condition. Repeat blood workup showed improving parameter. As per annexure C-4, the condition at discharge was shown as stable. We have also gone through the procedure notes, which read as under:-

Procedure Notes

ERCP NOTES:

PAPILLA-WIDE PAPILLARY ORIFICE

CBD: MULTIPLE LARGE AND SMALL CALCULI IN DILATED CBD. STONES EXTRACTED WITH DORMIA BASKET AND EXTRACTION BALLOON. 7F7CM STENT(D/P) STENT PLACED AND FREE FLOW OF BILE ACHIEVED.

8. The patient/complainant again on 26.12.2020 vide annexure C-5 revisited hospital for follow up. As per this OPD consultation, the problems were mentioned as Port CCX CBD stone (ERCP) biliary stenting done on 17.12.2020. On 23.02.2021 vide annexure C-6 patient/complainant again revisited. Here it is mentioned that the patient is doing well. In the UGI report dated 23.02.2021, the opposite party No.2 in his findings has mentioned that side viewing endoscopy show papilla having previously done sphincterotomy. No visible stent seen and X-ray abdomen was advised. The complainant has again got ultra sound (USG) whole abdomen on 02.07.2021, wherein Gallbladder was not found as cholecystectomy was done.

9. In the cross examination by the Ld. Counsel for opposite parties, Dr. Suresh Gurkha has admitted that he has not seen earlier medical history except one report of Fortis Hospital which was of February, 2021. The said Dr. Suresh Gurkha has not seen stent which was placed earlier by Fortis Hospital, so he has placed new stent by performing the ERCP procedure. Dr. Suresh Gurkha also removed stones after completing ERCP. 90% CBD (Common Bile Duct) was cleared from stones at the time of ERCP on 6.08.2021. Dr. Suresh Gurkha On 17.10.2021 removed the stent placed on 06.08.2021 and also cleared remaining 10% of stones from CBD. The earlier report dated 17.12.2020 of Fortis Hospital

was not shown to the Dr. Suresh Gurkha. As per Dr. Suresh Gurkha findings of ultrasound was showing that there were stones in the bile duct. Dr. Suresh Gurkha was not sure that the earlier stent placed by Fortis Hospital was migrated by natural means, but he has admitted that stent can migrate through natural means in some cases.

10. Learned Counsel for opposite parties in the written arguments had relied upon judgment passed by The Hon'ble Supreme court in the case titled S. K. Jhunjhunwala vs. Dhanwanti Kaur and Another CIVIL APPEAL No.3971 OF 2011, wherein it was observed by the Lordship that "The negligence alleged was of suffering ailment as a result of improper performance of surgery. It was held that there has to be direct nexus with two factors to sue a doctor for negligence." The moot question that fell for adjudication before this commission was as to how and by which principle, negligence of a professional doctor was to be decided so as to hold him liable for his medical acts/advice.

11. The Hon'ble supreme Court in judgment Kusum Sharma and Others v. Batra Hospital and Medical Research Centre and Others, (2010) 3 SCC 480 had laid down the following principles in PARA No. 94 that are to be considered while determining the charge of medical negligence: 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 unnecessarily 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 pressurising 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."

12. After perusal of records and going through the statement of Dr. Suresh Gurkha of himself is an expert, we are putting certain questions to ourselves i) if as per annexure C-8 dated 30-07-2021 Cholecystectomy is already done, gall bladder is not seen, patient was diagnosed at Fortis Hospital as Choledocholithiasis as per annexure C-4 and in the procedure notes dated 17-12-2020, so mentioned in discharge summary dated 19-12-2020, it is mentioned that CBD multiple large and small calculi in dilated CBD. Stones

extracted with dormia basket and extraction balloon 7F7CM stent (D/P) stent placed and free flow of bile achieved. Then how can in a subsequent ERCP annexure C-1 carried out by Dr. Suresh Gurkha stones were removed with the help of dormia basket and extraction balloon. Neither any specific question was asked by the While cross examining Dr. Suresh Gurkha, no particular suggestion has been given by the Ld. Counsel for opposite parties that Dr. Suresh Gurkha has not removed any stones from Common Bile Duct. Meaning thereby the procedure done by the Dr. Suresh Gurkha was admitted to be true by the opposite parties. Ld. Counsel for opposite party(s) from Dr. Suresh Gurkha who has specifically mentioned that he had also removed stones after completing ERCP. 90% CBD was cleared from stones at the time of ERCP. Once gall bladder has been removed, then formation of stones within 7 months from the operation has not been explained by the opposite parties. Even this relevant query was also not asked from Dr. Suresh Gurkha by the Learned Counsel for opposite parties, Dr. Suresh Gurkha is an expert and is MBBS, M.D. D.M Gastro and he has done specialization in Gastroenterology since 2014 and served as Senior Resident in PGI Chandigarh in the department of Gastroenterology. So the opposite parties were having ample opportunities but still have not explained the presence/formation of stones in the common bile duct after the procedure carried by the Opposite Party No.2 on 17-12-2020 in the Fortis Hospital Mohali. In our considered opinion procedure notes were not maintained/prepared properly in the Fortis Hospital Mohali. Due diligence required to be adhered while preparing the procedure notes were not as per standard medical practice. Comparing the notes prepared by Dr. Suresh Gurkha and the opposite party No.2, we observe certain specific deviations from standard medical procedure in the procedure notes. As per annexure C-11 on 06.08.2021 stones were removed by Dr. Suresh Gurkha and it was advised for repeat ERCP and common bile stones. Further on 17.10.2021 vide discharge summary dated 17/18.10.2021 ERCP

done and common bile duct was finally cleared and stent was removed.

13. As per medical Journals COMMON BILE DUCT is a tube that carries bile from the liver and gallbladder, through the pancreas, and into the small intestine. The common bile duct starts where the ducts from the liver and gallbladder join and ends at the small intestine. It is part of the biliary system. Whereas the gallbladder, also known as the cholecyst, is a small hollow organ where bile is stored and concentrated before it is released into the small intestine. In humans, the pear-shaped gallbladder lies beneath the liver, although the structure and position of the gallbladder can vary significantly among animal species. It receives bile, produced by the liver, via the common hepatic duct, and stores it. The bile is then released via the common bile duct into the duodenum, where the bile helps in the digestion of fats. The gallbladder can be affected by gallstones, formed by material that cannot be dissolved—usually cholesterol or bilirubin, a product of hemoglobin breakdown. These may cause significant pain, particularly in the upper-right corner of the abdomen, and are often treated with removal of the gallbladder (called a cholecystectomy). Cholecystitis, inflammation of the gallbladder, has a wide range of causes, including result from the impaction of gallstones, infection, and autoimmune disease. Gallstones and Gallbladder sludge is indication of cholecystectomy specially when pain in there. Small stone or some sludge can get blocked down in the common bile duct that can cause pain. ERCP procedure is performed before cholecystectomy to clear the common bile duct and remove the gallstones and sludge from common bile duct to avoid having recurrent pain and jaundice after gallbladder surgery (laparoscopic cholecystectomy). In our opinion once the gallbladder was already removed then it was not explained by the opposite parties that how the stones were again formed in the Common Bile duct after the clearance of Common bile duct on 17.12.2021. This

unexplained reason is not supported by any medical authority/citation. Even in follow up visit no such advisory was given to the complainant.

14. Once the opposite parties claimed to follow the standard medical procedure than onus is also shifted upon them to prove that as per standard medical protocol or citations the stones formation can re occur within 7 months of the clearance of CBD. Even the opposite parties had not mentioned in their reply that the stones in CBD can reoccur within 7 months after removal that too when the gall bladder is removed already. The entire emphasis of the opposite party on the stent which was stated to be placed while performing ERCP procedure on 17-12-2021. If this version of the opposite parties for the argument sake regarding migration of stent is believed to be true, then it can be inferred only that stent so affixed has been migrated through natural means, but as the stones from CBD was removed by Dr. Suresh Gurkha, we are of the opinion that in earlier operation/procedure stones stated to be removed by the Opposite party No.2 were actually not removed either at all or properly. And once on 23-02-2021 the opposite party No. 2 has himself not seen the stent than why after effects, reasons and consequences were not explained to the complainant by the opposite party No. 2 on that very particular date.

15. In Case titled Mohit Jain vs. M/S Max Super Specialty Hospital & Ors. Hon'ble Supreme Court laid certain parameters to bring successful claim the victim or victim's family bringing the action must prove all the "four D's" against the erring doctor/hospital. The 4 D's of medical negligence stand for 1) 'Duty' 2) 'Dereliction/Deviation', 3) 'Direct (proximate) Cause' and 4th 'Damages'. In the instant case, the complainant have proved the negligence on the part of opposite parties by leading a cogent reliable evidence supported by an evidence of an expert Dr. Suresh Gurkha that certainly there is dereliction from duty of care caution by the opposite parties. The notes even were not maintained as per standard medical procedure by the opposite parties and there is

indeed direct cause to the damages (second ERCP procedure). In our considered opinion, it was the duty of the opposite party No.2 to maintain the proper records of the procedure. If some stones had remained inside the common bile duct or there are chances of reoccurrence, it was to be mentioned in the discharge Summary or in the further follow up visits. As already discussed on 23-02-2021 the opposite party No. 2 has himself not seen the stent even than the opposite party No. 2 had not explained the same to the complainant. The Annexure C-6 is also contrary to the Annexure C-7 . In Annexure C-6 it is mentioned that stent was removed on 23-2-2021 but in Annexure C-7 the stent was not seen and patient was advised for X-Ray abdomen.

16. We are of the opinion that there was gross negligence, dereliction specifically on the part of opposite party No.2 and deficiency in service on the part of the opposite parties. The complainant, who had gone to Fortis Hospital during Covid-19 period for the treatment of Choledocholithiasis, was not treated properly and was subjected to another ERCP procedure in the month of August, 2021. Thus, the opposite parties are liable to pay a hefty compensation to the complainant for act of dereliction. Hence complaint deserves to be allowed.

17. Accordingly, the complaint is allowed and opposite parties are jointly and severally directed to pay an amount of Rs.5,00,000/- as compensation to the complainant. Apart from this, opposite parties are jointly & severally also directed to pay litigation cost quantified as Rs.20,000/-.

18. Applications pending, if any, stand disposed of in terms of the aforesaid judgment.

19. A copy of this judgment be provided to all the parties free of cost as mandated by the Consumer Protection Act, 1986/2019. The judgment be uploaded forthwith on the website of the Commission for the perusal of the parties.

20. File be consigned to record room along with a copy of this Judgment.

(Hemanshu Mishra)
President

(Narayan Thakur)
Member

(Arti Sood)
Member