

DISTRICT CONSUMER DISPUTES REDRESSAL FORUM-II
Udyog Sadan, C-22 & 23, Qutub Institutional Area
(Behind Qutub Hotel), New Delhi- 110016

Case No.79/19

Mrs. Nirmala Guler

(through her attorney)

W/o Mr. Hakam Singh Guler

Through Attorney (Tripat Kau-daughter)

R/o 53 G, Lajpat Nagar-II

New Delhi-110024.

....Complainant

VERSUS

Orthostar Hospital & Clinics

Through its Director

Dr. Sachin Yadav

L-85 Lajpat Nagar-II

New Delhi.

Dr. Sachin Yadav

C/o L-85, Lajpat Nagar

New Delhi.

....Opposite Parties

Coram:

Ms. Monika A Srivastava, President

Ms. Kiran Kaushal, Member

Sh. U.K. Tyagi, Member

ORDER

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Date of Institution:19.03.2019

Date of Order :12.03.2024

President: Ms. Monika A Srivastava

Complainant has filed the present complaint seeking compensation of Rs.18,00,000/- with interest @18% per annum from 15.12.2018 on account of physical, mental agony, pain sufferings, financial losses, deficiency in service and unfair trade practice on the part of the OP. Complainant also seeks Rs. 1,00,000/- as litigation expenses and imposition of exemplary costs on the OP. OP-1 is Ortho Star Hospital and OP-2 is Dr. Sachin Yadav, who is also Director of OP-1.

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1. It is stated by the complainant that she was under the treatment of OP-2 for pain experienced by her while doing her household chores and office work whereby treatment was given by OP-2 after examining her. It is stated that on 15.12.2018 OP-2 after conducting physical examination of the complainant injected her with an injection on her right shoulder and prescribed her further medicines categorically stating that all medicines need to be purchased from their counter situated at the clinic. The X-ray was also conducted at the clinic of OP-2 but the film was denied by OP-2 by stating that it was part of the official medical record which would be retained by OP-1. It is stated by the complainant that the bill/receipt of X-ray and medicines purchased from the OP-1 were not provided to the complainant even though she asked for it several times.
2. It is stated that the complainant before consulting the OPs she was able to perform her daily household chores and office work, fulfil her basic personal needs but after being treated, the complainant became incompetent to perform all these activities. The medical prescription along with the documents of OP-1 and OP-2 are annexed as Annexure-B (colly).
3. It is the case of the complainant that from the very next day i.e. 16.12.2018 complainant developed acute pain in her right shoulder and arm and when she visited OP-1 hospital she was assured by OP-2 that she will get better and further medicine were prescribed. Complainant again requested for X-ray report and bill receipts, however, same were not provided.
4. It is further stated that on 20.12.2018 complainant was unable to lift her right arm due to acute pain and swelling and was taken to Max Smart Super Speciality Hospital, Saket where she was prescribed medicines and advised to undergo various tests. She was admitted in emergency on 26.12.2018 as her condition worsened and the pain spread towards the back and thereafter on 27.12.2018 complainant was admitted to BLK Hospital for further treatment. The medical prescription of Max Smart Super Speciality Hospital, Saket are annexed as annexure -C (Colly).
5. Complainant was treated as BLK Super Speciality from 27.12.2018 till 04.01.2019. It is further stated by the complainant as soon as she

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reached her house pus started oozing out from her right arm again and again was taken to hospital for change of dressing and the doctor on duty told the complainant that the surgeon was on leave for a few days. Due to immense trauma and torture, secretion of pus from her arm, swelling immobility of the arm compelled her for another opinion at Apollo hospital. The discharge summary dated 04.01.2019 of BLK Super Speciality is annexed as Annexure-D (colly).

6. Complainant was then admitted to Apollo Hospital on 07.01.2019 where she was advised to undergo immediate surgery and she underwent her first surgery on 08.01.2019 and was discharged on 12.01.2019. She again underwent second surgery on 01.02.2019 and third surgery on 04.02.2019. The complainant was discharged on 06.02.2019 after her health stabilised and was given vac dressing. The dressing had to be changed every 5th day and the complainant had been getting in-house treatment alongwith the IV antibiotics and pain killers. The discharge summary dated 12.01.2019 and 06.02.2019 issued by Apollo Spectra Hospital are annexed as Annexure-E (colly).

7. Complainant was also granted medical certificate from 07.01.2019 to 08.03.2019 from Apollo Spectra Hospital and it was further extended from 09.03.2019 to 08.04.2019 wherein she was declared medically unfit as her right arm was immobile and even for her personal care and hygiene she needed assistance from attendant and required special diet. Complainant had to incur huge financial expenses. The medical services bills are annexed as Annexure-F & G.

8. Complainant was again admitted to Apollo Spectra Hospital on 26.02.2019 with complaint of "FUC and cellulite with raw area arm and shoulder" having surgical history of "intra articular injection on right shoulder on 15.12.2018 and patient developed as pain and swelling on right should and arm 2-3 days after the injection....." She was admitted to cover the open wound on the right arm and was discharged on 28.02.2019. The discharge summary dated 28.02.2019 is annexed as Annexure-A and the photographs of the entire process of surgery and open wounds of the complainant are annexed as Annexure-I (colly).

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9. It is further the case of the complainant that she is working with the Railways and was unable to attend her work and had also to incur huge expenses in managing her day to day affairs on account of medical negligence on the part of the OP. The daughter of the complainant also lost her job as she had to look after the complainant on a daily basis and therefore the complainant is facing financial, physical mental hardships on account of medical negligence on the part of the OPs.
10. It is the case of the complainant that while treating the complainant OP-2 has performed his duty with utmost careless manner and has indulged in unfair trade practice which caused grave and serious injury to the complainant.
11. In their reply, the OP-1 & OP-2 statement in a common WS have stated that complaint is totally misconceived and has been cooked up without any reason to harass, defame and extract sum from the OPs. It is stated that no specific, scientific and justified allegations have been made by the complainant in regard to negligence or deficiency of service provided by the OP it is stated complainant clarified as to how the OPs were "negligent". The complaint is based on non-specific, unscientific and laymen conjecture.
12. OP has placed reliance on the judgment passed by the Hon'ble Supreme Court in *Martin F D'souza Vs. Mohd. Ishfaq CA No.3541 of 2002* and *Jacob Mathew Vs. State of Punjab (2005) 6 SCC 1*. It is stated by the OPs that diagnosis, disease and treatment and the complications thereafter are a matter of fact and no speculation and the treatment given cannot be garbed as negligence where OP-1 has tried his level best and used highest degree of knowledge, infrastructure, efforts and precautions to avoid complications. Even if it is presumed that something went wrong with the treatment, the treating doctor is not God and cannot give surety or guarantee of 100% relief in all cases. It is stated that complainant was explained in detail, the line of treatment, the actual treatment procedure and therefore unless and until the complainant is unable to prove that the treating doctor is deviated from the normal/prescribed line of treatment no negligence can be inferred against the treated doctor.
13. It is further stated that the complainant was properly examined, investigated, diagnosed and treated by the OP as per the prescribed

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norms of general practice which find mention in the textbooks and journals of the subject. It is further stated that the complainant was well aware of the capability and competency of the OP and also about the quality infrastructure and hospital facility of OP-1.

14. It is further stated that treatment was provided to the complainant after explaining the diagnosis treatment, prognosis benefits, losses and known complications etc.. No guarantee was given by the OP about the result of the treatment therefore, there is no negligence or deficiency in service on the part of the OP. OP has further stated that insurance company has not been made a party to the case which is a proper party as it has assured the OPs for professional indemnity.

15. OP has further stated that the complainant visited OP only once on 15.12.2018 and after conducting X-ray, diagnosis of *subacromial bursitis* was made, infiltration locally and all aseptic precautions in subacromial space was given as part of the advice. Anti inflammatory medicines were prescribed. It is stated that the treatment provided was as per the prescribed norms of general practice which find mention in the textbooks and journals of the subject concerned. OPs have denied that the treatment given to the complainant on her right shoulder downward towards her arm has resulted in multiple surgeries or disability in her right arm.

16. OPs have denied the allegations that medicine needed to be purchased from their counter situated in the clinic. It is stated that dispensary in the clinic is only for the convenience of the patient. As far as the X-ray was concerned, it is stated that medical records pertaining to the complainant were tendered to her. It is further stated that complainant did not visit on 16.12.2018 and only a call was made by the daughter of the complainant informing the OP about the pain. OP-2 asked her to visit the OPs but the complainant did not come. It is further stated by the OPs that relatives of the complainant visited the OPs on 20 & 21.10.2018 who argued that the diagnosis by the OPs were wrong and that they had taken the complainant to Neurologist. OP-2 asked them to bring the complainant but was showed the MRI report only. It is also stated by the OP that complainant has not explained as to why the other treating hospitals i.e. Max Smart Super Speciality Hospital and BLK Hospital not made a party to this case.

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17. It is reiterated by the OPs that that inability, disability, hardship has been caused to the complainant due to alleged medical negligence, unfair trade practice on the part of the OP. It is stated that complainant has failed to prove any medical negligence, unfair trade practice on the part of the OPs. It is further stated by the OP that complainant has put an arbitrary valuation of Rs.20,00,000/- without any justification.

18. In her rejoinder to the reply of OP-1 and 2, the complainant has reiterated that there is negligence on the part of the OPs. Complainant has denied that she was properly examined, investigated, diagnosed and treated by the OPs as per prescribed norms of general practice. It is further denied by the complainant that OPs explained the diagnosis, treatment prognosis, benefits, losses, known complications to the complainant. It is further stated that due to the unprofessional and negligent act of the OP the complainant had to undergo various surgeries resulting in permanent disability of right hand. It is stated by the complainant that OP had posted about his 19 years knowledge in medical field and assured the complainant that he can treat the complainant. It is reiterated by the complainant that she has not been provided the X-ray film till date.

19. Insurance company was impleaded as OP-3 vide order of this Commission and in their reply OP-3 has stated that with Professional Indemnity policy, it is the legal liability policy and OP-3 would become liable only when OP-2 becomes legally liable to compensate any third party according to the terms and conditions of the policy.

20. It is stated that the provisions of professional indemnity policy make it imply clear with the privity of contract is between OP-2 and not between any third party and OP-2. It is further stated by OP-3 that the matter is a technical in nature and it may not have the competence/technical wisdom to appropriately defend the matter in the court and that OP-2 is a technical person and would defend his own case.

21. It is stated the complainant does not have any privity of contract with OP-3 and there is no contractual obligation of any kind between them.

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22. All the parties have filed their respective evidence affidavits. Written arguments have been filed on behalf of complainant as well as OP-1 & OP-2. Complainant has placed reliance on the judgment passed by the Hon'ble Supreme Court in *Maharaja Agarsen Hospital Vs. Master Rishabh Sharma* decided on 16.12.2019, *Harnek Singh Vs. Gurmit Singh* decided on 18.05.2022 and *CPL Ashish Kumar Chauhan Vs. Commanding Officer & Ors.* decided on 26.09.2023 and decision of the Hon'ble NCDRC in *Rohandeep Singh Jaiswal Vs. Kokilaben Dhirubhai Ambani Hospital and Medical Research Institute* decided on 19.12.2022.

23. OP, on the other hand, has relied on the judgment of the Hon'ble Supreme Court in *Matin F. D'souza Vs. Mohd. Ishfaq CA No.3541/2002* and *Jacob Mathew Vs. State of Punjab (2005) 6 SCC 1, Kusum Sharma & Ors. Vs. Batra Hospital and Medical Research CA No.1385/2001* and on the point of compensation of OP has placed reliance on the judgment passed by the Hon'ble Chandigarh State Commission in *Surender Singh Vs. New Indian Assurance Company FA No.504 of 2013*.

24. This Commission has gone through the entire material on record. It is seen that the complainant has visited a number of medical facilities i.e. different hospitals for her treatment. It is difficult to pin point whether there is any medical negligence on the part of the treating doctor of OP-1 as there have been various treatments by various branches of doctors at various other hospitals.

25. The independent medical board opinion received from Safdarjung Hospital also states that the complications of *cellulites abscess, necrotising, fasciitis can occur after procedure, these are known complications after injection.*

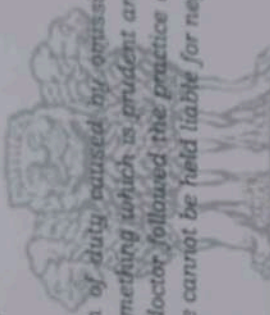
26. It is seen that the complainant has visited the OP for treatment as she thought that the OP was competent and capable of handling ailment of the complainant having an experience of over 19 years in the medical field, however, it is not clear as to how the complainant came to know about such boasting of OP-2. No documents has been placed on record to stress on the point that the complainant had visited OP-2 only due to his laurels being boasted. There is no doubt that complainant must have undergone a lot of physical discomfort,

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however, the strict tests laid down by the Hon'ble Supreme Court in various judgments pertaining to medical negligence of the doctor have laid down that 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.

27. Medical opinion was received from Saffdarjung Hospital dated 17.07.2023 wherein they have stated "the board is of the opinion that the treatment given for the primary disease subacromial bursitis is a standard practice and the complications of cellulite abscess, necrotising fasciitis and septic arthritis after procedure, these are known complications after injection".

The Hon'ble Supreme Court in *Jacob Mathew vs. State of Punjab and Ors.* (2005)6 SCC 1 has held:



"Negligence is a breach of duty caused by omission to do something and commission or doing something which is prudent and reasonable man would not do. So long as the doctor followed the practice acceptable to the medical profession of that day he cannot be held liable for negligence."

(1) *Negligence is the breach of a duty caused 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. 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*

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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. 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. So also, the standard of care, while 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. Similarly, 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 particular time (that is, the time of the incident) at which it is suggested it should have been used.

(3) A professional may be held liable for negligence on one of the 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.

(4) The test for determining medical negligence as laid down in Bolam's case [1957] 1 W.L.R. 582 holds good in its applicability in India.

28. There is no document filed by the complainant wherein it could be proved that the surgery done by the OP was incorrect or without any due diligence. However, it is noticed that it is not the case of the OP nor has he stated in his Reply that he had explained the procedure which he undertook on the complainant. It has nowhere been recorded either in the prescriptions filed on the record or any other document that the complainant was explained the procedure and its known complications since cellulites abscess, necrotising, fasciitis can

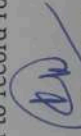
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occur after procedure and is a known complication of the disease subacromial bursitis.

29. This Commission is of the view that medical negligence on the part of the OP-2 is not made out but it has been proved that the complainant was not informed of the complications of the procedure undertaken on her. It is also noticed that though the complainant was not informed of the complications and her condition deteriorated as a complication of the treatment given to her by OP-2. At the same time, it is not missed that the complainant added to her own woes by changing doctors and leaving hospitals against medical advice which aggravated her condition. Therefore, this Commission is of the view that there is contributory lack of care on the part of the complainant.

30. Though a case of medical negligence is not made out against the OP but a case of procedural lapse in not informing is made out against the OP and therefore this Commission is of the view that ends of justice be met by directing the OP 2 to compensate the complainant with Rs.3,00,000/- within three months from the date of pronouncement of this order failing which the compensation amount would be Rs. 3,50,000/-. This compensation amount is given keeping in mind that the road to corrective surgery was delayed by the complainant herself for the reasons best known to her.

Copy of the order be provided to the parties as per rules. File be consigned to record room. Order be uploaded on the website.


(Kiran Kaushal)
Member


(Monika A Srivastava)
President