IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA.

RSA No. 136 of 2017
Reserved on: 01.12.2023
Decided on: 4th December, 2023

The Secretary(Health) and others. .....Appellants

Versus

Anshika Kumari and another. ...Respondents

Coram

The Hon'ble Mr. Justice Tarlok Singh Chauhan, Judge.

Whether approved for reporting?[1] Yes

For the appellants: **Ms. Sharmila Patial and Mr. Navlesh Verma, Addl. AGs**

For the respondents: **Mr. Neel Kamal Sharma for respondent No.1.**

Ms. Shruti Sharma, Advocate, vice Mr. C.S. Thakur, Advocate for respondent No.2.

Tarlok Singh Chauhan, Judge

The defendants/appellants after having lost before both the courts below have filed the instant petition.

The parties shall be referred to as the plaintiff and defendants, respectively.

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[1] Whether the reporters of Local Papers may be allowed to see the judgment? Yes.

2. Briefly stated the facts of the case are that the plaintiff (minor) was born out of wedlock of Mukesh Kumar and Smt. Neelam. On 14.3.2003, mother of the plaintiff Neelam was brought to the Zonal Hospital, Hamirpur for the delivery. The proforma respondent Dr. B.D. Dhiman Gynecologist, Zonal Hospital H.P checked her and opined that the delivery was 10 days over than the due date. She was a complicated case with High Blood pressure. She was admitted in the hospital at Hamirpur for delivery. On 15.3.2003 at about 7.15 P.M, Smt. Neelam gave birth to a child with some complications i.e retained placenta but later on unfortunately died. The plaintiff subsequently alleged death of her mother Smt. Neelam on account of gross negligence on the part of the doctors and staff nurses including proforma respondent (herein) of the Zonal Hospital, Hamirpur. The plaintiff through her father filed a Civil suit for damages to the tune of Rs. 5,00,000/-.

3. The appellants contested the suit by filing written statement wherein it is specifically contended that there was no negligence on the part of gynecologist or the other doctors and staff nurses of the Zonal Hospital Hamirpur and the patient died natural death because of shock due to vaginal bleeding.

4. The learned trial Court after framing issues and recording evidence decreed the suit of the plaintiff by awarding

damages to the tune of Rs. 2,60,000/-alongwith interest of 6% per annum from the date of filing of the suit till the realization of the amount.

5. Aggrieved by the judgment and decree passed by the learned trial Court, the defendants files an appeal before the learned District Judge, Hamirpur, who vide his judgment and dismissed the appeal with costs and upheld the judgment and decree passed by the trial Court.

6. Being aggrieved by the judgments and decrees rendered by the both the Courts below, the defendants have filed the instant appeal.

7. On 12.4.2013, the appeal was admitted on the following substantial questions of law:

> 1. Whether learned courts below have failed to appreciate the law of negligence vis-a-vs the vicarious liabilities of the State in law of Torts?
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> 2. Whether the judgment and decree dated 7.4.2012 passed by the learned Civil Judge (Senior Divison), Hamirpur in Civil Suit No. 126/2007 and dated 8.6.2015 passed by the learned District Judge Hamirpur in Civil Appeal No. 123/2012 stand vitiated by mis-appreciating facts and the law on record.
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> 3. Whether the learned courts below have misread and misconstrued the evidence on record?

8. It would be noticed that substantial questions No. 2 and 3 are practically the same and as regards the question

No.1, same essentially will have to be determined alongwith questions No. 2 and 3. Therefore, all these questions being intrinsically interconnected and interconnected are being taken up together for consideration and would be answered by common reasoning.

9. In order to appreciate the contentions as raised in questions No. 2 and 3, one would essentially have to refer to the plaint to find out as to what exactly is the negligence attributable to the defendants. For this purpose, it would necessary to refer to paras 7 to 9 of the plaint which read as under:-

> " That there was hardly any effect or medicians, but by grace of almightily deceased Neelam mother of the plaintiff delivered a female child at about 7.15 P.M on 15.3.2023. After the delivery the deceased was kept in the labour room on the protest that Placenta has not come out as yet as told by the staff Nurses and no attendant was allowed to enter inside the labour room. But the father of plaintiff smelled that the condition of the deceased Neelam has become deteriorated. Dr. Dhiman (Gyane spl) concerned with the case of the deceased left the Hospital at 3.30 P.M sharp and never attended the partient right from 3.30 P.M till the death of Neelam. Dr. Dhiman or any (Gynae) never given call during the intervening nights of 15.3.03 and 16.3.03.
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> 8. That at 9.30 P.M one Dr. Pancham was given call by the staff nurses who was not expert in Gynae treated the patient about one hour. The father of plaintiff wes told that his wife expired at about 11.00P.M on 15.0.03. The father of

> complainant was never advised by any better treatment/ management in some other good health clinic.
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> 9. That from the circumstances it is evidently clear that the mother of the plaintiff had died due to the gross collective negligence."

10. Obviously, the aforesaid plea falls short of what is required to be pleaded in a case of negligence and ought to have been in conformity with the provisions, as contained under Order 6 Rule 4 of the Code of Civil Procedure. However, bearing in mind the fact that the person has lost her life, the Court would not like to go into technicalities and adopt a pedantic approach but nevertheless the Court has to bear in mind the concept of professional negligence by Doctor that too of a Government Hospital.

11. Even though, there is a plethora of law on the subject, however, the Court would only refer to one of the latest pronouncements on the issue rendered by the Hon'ble Supreme Court in Civil Appeal No. 3975 of 2018, ***M.V. Biviji*** vs ***Sunita and others***, decided on 19th October, 2023, wherein it was observed as under:-

> **"34.** Before proceeding further, let us understand what this Court has found to constitute medical negligence. In *Jacob Mathew vs. State of Punjab1,* the Court held:
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> > "48. (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.Sing), 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 the 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. 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 the 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 maybe 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."

35. Following *Jacob Mathew,* the Court in *Kusum Sharma vs. Batra Hospital* laid down the following principles 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.

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 another 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.

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….."

36. As can be culled out from above, the three essential ingredients in determining an act of medical negligence are: (1.) a duty of care extended to the complainant, (2.) breach of that duty of care, and (3.) resulting damage, injury or harm caused to the complainant attributable to the said breach of duty. However, a medical practitioner will be held liable for negligence only in circumstances when their conduct falls below the standards of a reasonably competent practitioner.

37. Due to the unique circumstances and complications that arise in different individual cases, coupled with the constant advancement in the medical field and its practices, it is natural that there shall always be different opinions, including contesting views regarding the chosen line of treatment, or the course of action to be undertaken. In such circumstances, just because a doctor opts for a particular line of treatment but does not achieve the desired result, they cannot be held liable for negligence, provided that the said course of action undertaken was recognized as sound and relevant medical practice. This may include a procedure entailing a higher risk element as well, which was opted for after due considerationand deliberation by the doctor. Therefore, a line of treatment undertaken should not be of a discarded or obsolete category in any circumstance.

38. To hold a medical practitioner liable for negligence, a higher threshold limit must be met. This is to ensure that these doctors are focused on deciding the best course of treatment as per their assessment rather than being concerned about possible persecution or harassment that they may be subjected to in high-risk medical situations. Therefore, to safeguard these medical practitioners and to ensure that they are able to freely discharge their medical duty, a higher proof of burden must be fulfilled by the complainant. The complainant should be able to prove a breach of duty and the subsequent injury being attributable to the aforesaid breach as well, in order to hold a doctor liable for medical negligence. On the other hand,

> doctors need to establish that they had followed reasonable standards of medical practice."

13. Bearing in mind the aforesaid exposition of law, it would be noticed that the crucial issue that arises for consideration in the instant appeal is whether the defendants have exhibited negligence in providing proper post-operative medical care to the patient because the entire case set up by the plaintiff is also lack of proper post-operative medical care.

14. The Medical Officer can 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 or of the professional proceeded against on indictment of negligence.

(See: ***Jacob Mathew*** Vs ***State of Punjab and another***, (2005) 6 SCC 1).

15. This issue has elaborately been considered by the Hon'ble Supreme Court in ***Bombay Hospital and Medical Research Centre*** vs. ***Asha Jaiswal and others***, AIR 2022 SC 204 wherein after taking into consideration the previous judgments on the subject, it has been observed as under:-

> 16. Learned counsel for the appellants herein argued that the Hospital is a renowned hospital having four operation theatres and advance machines including DSA. Three other hospitals in Mumbai such as Jaslok Hospital, Hinduja Hospital and Breach Candy Hospital alone 6 [1981] 1 Weekly Law Reports 246 had DSA machines at the relevant time. The Hospital in its affidavit had inter alia mentioned that the DSA test is not a bed side test. The patient has to be carefully shifted to the cardiac cauterization department where the DSA machine was installed. The patient hence had to be stabilized before he was shifted to DSA department. Since the patient was put on ventilator and on several support medications, it was not possible to immediately undergo the DSA test. But when the patient was taken for DSA test, the machine developed certain technical problem. Since the DSA machine was not working, angiography was thought to be the best possible test and was thus conducted. The Hospital had specialized staff in all branches of medicine and the medical assistance as was required from time to time including nephrology, orthopedics etc. was provided to the patient. It was argued that the professional competence of Doctor has not been doubted even by the Commission but two factors have been taken against the Doctor for holding him negligent; first, that he did not visit the patient soon after the surgery till 9/9.30 a.m. on the next day to verify the blood flow after the surgery, and second, he did not visit the patient from 29.4.1998 to 9.5.1998 when he was in Mumbai and from 9.5.1998 to 7.6.1998 when he went abroad for attending medical conferences.

23. It is to be noted that it is not the case of the complainant that Doctor was not possessed of requisite skill in carrying out the operation. In fact, the patient was referred to him by Dr. Deshpande keeping in view the expertise of the Doctor in vascular surgery. There is no proof that there was any negligence in performing the surgery on 23.4.1998 or in the process of re-exploration on 24.4.1998. The allegation is of failure of the Doctor to take the follow-up action after surgery on 23.4.1998, a delayed decision to amputate the leg subsequent to re-exploration on 24.4.1998, and the alleged undue foreign visit of the Doctor.

29. In Martin F. D'Souza v. Mohd. Ishfaq9, this court observed that the doctor cannot be held liable for medical negligence by applying the doctrine of res ipsa loquitur for the reason that a patient has not favourably responded to a treatment given by a doctor or a surgery has failed. There is a tendency to blame the doctor when a patient dies or suffers some mishap. This is an intolerant conduct of the family members to not accept the death in such cases. The in- creased cases of manhandling of medical professionals who worked day and night without their comfort has been very well seen in this pandemic. This Court held as under:-

8 (2021) 7 SCC 704 9(2009) 3 SCC 1 "40. Simply because a patient has not favourably responded to a treatment given by a doctor or a surgery has failed, the doctor cannot be held straightaway liable for medical negligence by applying the doctrine of res ipsa loquitur. No sensible professional would intentionally commit an act or omission which would result in harm or injury to the patient since the professional reputation of the professional would be at stake. A single failure may cost him dear in his lapse.

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42. When a patient dies or suffers some mishap, there is a tendency to blame the doctor for this. Things have gone wrong and, therefore, somebody must be punished for it. However, it is well known that even the best professionals, what to say of the average professional, sometimes have failures. A lawyer cannot win every case in his professional career

but surely he cannot be penalised for losing a case provided he appeared in it and made his submissions."

31. In another judgment reported as Arun Kumar Manglik v. Chirayu Health and Medicare Private Limited and Anr.11, this Court held that the standard of care as enunciated in Bolam case must evolve in consonance with its subsequent interpretation by English and Indian Courts. The threshold to prove unreasonableness is set with due regard to the risks associated with medical treatment and the conditions under which medical professionals' function. The Court held as under:

"45. In the practice of medicine, there could be varying approaches to treatment. There can be a genuine difference of opinion. However, while adopting a course of treatment, the medical professional must ensure that it is not unreasonable. The threshold to prove unreasonableness is set with due regard to the risks associated with medical treatment and the conditions under which medical professionals function. This is to avoid a situation where doctors resort to "defensive medicine" to avoid claims of negligence, often to the detriment of the patient. Hence, in a specific case where unreasonableness in professional conduct has been proven with regard to the circumstances of that case, a professional cannot escape liability for medical evidence merely by relying on a body of professional opinion." 11 (2019) 7 SCC 401

32. In C.P. Sreekumar (Dr.), MS (Ortho) v. S. Ramanujam12, this Court held that the Commission ought not to presume that the alle- gations in the complaint are inviolable truth even though they re- mained unsupported by any evidence. This Court held as under:

"37. We find from a reading of the order of the Commission that it proceeded on the basis that whatever had been al- leged in the complaint by the respondent was in fact the in- violable truth even though it remained unsupported by any evidence. As already observed in Jacob Mathew case [(2005) 6 SCC 1 : 2005 SCC (Cri) 1369] the onus to prove medical negligence lies largely on the claimant and that this onus can be discharged by leading cogent evidence. A mere aver- ment in a complaint which is denied by the other side can, by no stretch of imagination, be said

to be evidence by which the case of the complainant can be said to be proved. It is the obligation of the complainant to provide the facta probanda as well as the facta probantia."

33. In another judgment reported as Kusum Sharma and Others v.

Batra Hospital and Medical Research Centre and Others13, a complaint was filed attributing medical negligence to a doctor who performed the surgery but while performing surgery, the tumour was found to be malignant. The patient died later on after prolonged treatment in different hospitals. This Court held as under:

"47. 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.

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72. The ratio of Bolam case [(1957) 1 WLR 582 : (1957) 2 All ER 118] 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.

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78. 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 Penal Code, 1860 has taken care to ensure that people who act in good faith should not be punished. Sec- tions 88, 92 and 370 of the Penal Code give adequate protection to the professionals and particularly medical professionals."

34. Recently, this Court in a judgment reported as Dr. Harish Kumar Khurana v. Joginder Singh & Others14 held that hospital and the doctors are required to exercise sufficient care in treating the pa- tient in all circumstances. However, in an unfortunate case, death may occur. It is necessary that sufficient material or medical evi- dence should be available before the adjudicating authority to arrive 14 (2021) SCC Online SC 673 at the conclusion that death is due to medical negligence. Every death of a patient cannot on the face of it be considered to be medi- cal negligence. The Court held as under:

"11. …….. Ordinarily an accident means an unintended and unforeseen injurious occurrence, something that does not occur in the usual course of events or that could not be rea- sonably anticipated. The learned counsel has also referred to the decision in Martin F.D'Souza v. Mohd. Ishfaq, (2009) 3 SCC 1 wherein it is stated that simply because the patient has not favourably responded to a treatment given by doc- tor or a surgery has failed, the doctor cannot be held straight away liable for medical negligence by applying the doctrine of Res Ipsa Loquitor. It is further observed therein that sometimes despite best efforts the treatment of a doc- tor fails and the same does not mean that the doctor or the surgeon must be held guilty of medical negligence unless there is some strong evidence to suggest that the doctor is negligent.

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14. Having noted the decisions relied upon by the learned counsel for the parties, it is clear that in every case where the treatment is not successful or the patient dies during surgery, it cannot be automatically assumed that the medi- cal professional was

negligent. To indicate negligence there should be material available on record or else appropriate medical evidence should be tendered. The negligence al- leged should be so glaring, in which event the principle of res ipsa loquitur could be made applicable and not based on perception. In the instant case, apart from the allegations made by the claimants before the NCDRC both in the com- plaint and in the affidavit filed in the proceedings, there is no other medical evidence tendered by the complainant to indicate negligence on the part of the doctors who, on their own behalf had explained their position relating to the medi- cal process in their affidavit to explain there was no negli- gence. ……"

36. As discussed above, the sole basis of finding the appellants negligent was res ipsa loquitor which would not be applicable herein keeping in view the treatment record produced by the Hospital and/or the Doctor. There was never a stage when the patient was left unattended. The patient was in a critical condition and if he could not survive even after surgery, the blame cannot be passed on to the Hospital and the Doctor who provided all possible treatment within their means and capacity. The DSA test was conducted by the Hospital itself on 22.4.1998. However, since it became dysfunctional on 24.4.1998 and considering the critical condition of the patient, an alternative angiography test was advised and conducted and the re-exploration was thus planned. It is only a matter of chance that all the four operation theatres of the Hospital were occupied when the patient was to undergo surgery. We do not find that the expectation of the patient to have an emergency operation theatre is reasonable as the hospital can provide only as many operation theatres as the patient load warrants. If the operation theatres were occupied at the time when the operation of the patient was contemplated, it cannot be said that there is a negligence on the part of the Hospital. A team of specialist doctors was available and also have attended to the patient but unfortunately nature had the last word and the patient breathed his last. The

family may not have coped with the loss of their loved one, but the Hospital and the Doctor cannot be blamed as they provided the requisite care at all given times. No doctor can assure life to his patient but can only attempt to treat his patient to the best of his ability which was being done in the present case as well."

16. Earlier to this the Hon'ble Supreme Court in ***Malya Kumar Ganguly*** Vs ***Sukumar Mukherjee*** and others, 2009 (9) SCC 221, in paragraph 34, observed as under:

"34. Medical science is a difficult one. The court for the purpose of arriving at a decision on the basis of the opinions of experts must take into consideration the difference between an 'expert witness' and an 'ordinary witness'. The opinion must be based on a person having special skill or knowledge in medical science. It could be admitted or denied. Whether such an evidence could be admitted or how much weight should be given thereto, lies within the domain of the court. The evidence of an expert should, however, be interpreted like any other evidence. This Court in State of H.P. v. Jai Lal and others, 1999 7 SCC 280 held as under :-

" 17. Section 45 of the Evidence Act which makes opinion of experts admissible lays down that when the court has to form an opinion upon a point of foreign law, or of science, or art, or as to identity of handwriting or finger impressions, the opinions upon that point of persons specially skilled in such foreign law, science or art, or in questions as to identity of handwriting, or finger impressions are relevant facts. Therefore, in order to bring the evidence of a witness as that of an expert it has to be shown that he has made a special study of the subject or acquired a special experience therein or in other words that he is skilled and has adequate knowledge of the subject.

18. An expert is not a witness of fact. His evidence is really of an advisory character. The duty of an expert

witness is to furnish the Judge with the necessary scientific criteria for testing the accuracy of the conclusions so as to enable the Judge to form his independent judgment by the application of this criteria to the facts proved by the evidence of the case. The scientific opinion evidence, if intelligible, convincing and tested becomes a factor and often an important factor for consideration along with the other evidence of the case. The credibility of such a witness depends on the reasons stated in support of his conclusions and the data and material furnished which form the basis of his conclusions.

19. The report submitted by an expert does not go in evidence automatically. He is to be examined as a witness in court and has to face cross- examination. This Court in the case of Hazi Mohammad Ekramul Haq v. State of W.B. concurred with the finding of the High Court in not placing any reliance upon the evidence of an expert witness on the ground that his evidence was merely an opinion unsupported by any reasons."

17. In ***Kusum Sharma*** vs ***Batra Medical Research Centre and others***, 2010 (3) SCC 480, the Hon'ble Supreme Court laid down the following tests, in para 94, on medical negligence, which are required to be kept in mind while deciding whether the medical professional was guilty of medical 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."

18. In a recent judgment in ***Dr. Harish Kumar Khurana*** Vs ***Joginder Singh and others***, 2022 ACJ I, the Hon'ble Supreme Court held that the hospital and doctors are required to exercise sufficient care in treating the patient in all circumstances. However, in an unfortunate case death may occur. It will be necessary that sufficient material of medical evidence should be available before the adjudicating authority to arrive at a conclusion that the death is due to medical

negligence. Every death of a patient it cannot, on the face of it be considered to be medical negligence.

19. Thus, what clearly emerges from the aforesaid exposition of law is that a medical practitioner is not liable to be held negligent simply because things went wrong from mischance or misadventure or through an error of judgment in choosing one reasonable course of treatment in preference to another. He would be liable only where his conduct fell below the standard of reasonably competent practitioner in his field. In practice of medicine, there could be varying approaches. There could be a general difference of opinion. Nonetheless while adopting a course of treatment, the duty casts upon the medical practitioner is to ensure that the medical practitioner followed the medical protocol to the best of his skill and competence at his command. At the given time the medical practitioner would be liable only where his conduct falls below the standards of a reasonably competent practitioner.

20. Judged in the light of the aforesaid exposition of law, it has already been noticed that as regards the pleadings of negligence, they are wholly deficient. The Court is fully conscious of the fact that the evidence for which no foundation has been laid in the pleadings has to be kept out of consideration. However, again being persuaded by the fact that

a young person has lost her life, I would proceed to consider the record independently to assess as to whether there is negligence or not. However, before doing that, I would refer to the judgment rendered by the trial court whereby it came to a conclusion that there was negligence on the part of the Hospital, Doctors and Staff.

21. Learned trial court has accorded the following reasons, as contained in paras 13 to 16 of the judgment, which read as under:

> "13. Now, it is to be determined whether Neelam had died due to the negligence of the defendants. Admittedly, a period of 10 days was over from the expected date of delivery and Neelam was having high B.P. She was given artificial labour pain. Doctor B.D. Dhiman (DW1) had left the hospital at about 3.30 p.m on 15.3.2003. He was Gynecologist. He has stated that he was the only Gynecologist and in his absence, Doctor Suman, C.M.O, was looking after the patient. He says that in case of high B.P at the time of delivery, there is danger to mother as well as to child. Admittedly, date of delivery was over by the due date. Artificial labour pain was induced. Thus, this situation was critical and emergent, where exigency of the service matters. In view of the evidence on record, this situation was unavoidable rather than the reason stated by DW1 for leave.
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> 14. No doubt, he left the hospital with permission of the competent authority, but no other Gynecologist was available to attend the patient immediately. Doctor Suman Sharma was given call much later at about 10.15 p.m. Child was delivered at about 7.15 p.m. Doctor Pancham was no doubt on duty, but at the time of delivery, he was also not

present in the labour room. No Gynae expert was present in the labour room at the time of delivery of the child. As per version of Doctor Pancham (DW4), he was called by Ward sister at about 8.10 p.m. Blood pressure of the patient was not normal. It was a case of retained placenta and placenta was not delivered. At about 8.30 p.m, placenta was delivered. He checked the patient again at 9.00 p.m and found bleeding. He was on duty till 9.30 p.m and says that Ward in charge was out of station. Doctor Suman Sharma, C.M.O, came at about 10.15 p.m.

15. Admittedly, there was left cervical tear from which bleeding was going on. Definitely, this tear had developed at the time of delivery of a child at about 7.15 p.m. This was not immediately attended and repaired. Doctor Suman Sharma attended rthe patient at about 10.15 p.m. The patient was having bleeding. Pulse was feeble and fast. General condition was poor. Blood pressure was not normal. The defendant No.1, 3 and 4 have stated in the written statement that patient died because of shock due to vaginal bleeding. This means, the patient was not given immediate and proper treatment to repair the vaginal bleeding. Even if Doctor B.D.Dhiman was permitted to leave the station by the competent authority, then proper arrangement could have been made for the attention and treatment of the patient by some Gynae expert. It has been stated by DW1 that Doctor Suman Lata was looking after this case in absence of Doctor B.D. Dhiman, but she did not look after the patient immediately and the patient was left in critical and precarious condition. There was complication of retained placenta and cervical bleeding. Even, in such critical condition, the patient was not given proper treatment immediately. The patient was left to the mercy of staff nurses at the time of delivery of a child.

16. Resultantly, it can be safely concluded that it is a case of civil negligence and plaintiff has to be compensated by the State for the negligence of its officials. The amount to be

awardable may be recovered from the erring officials by the State. Accordingly, issue No.1 is decided in favour the plaintiff".

22. As regards the first Appellate Court, its reasoning are contained in paras 16 to 21 and 25, which read as under:

"16. Per this pleading, it is writ large, there was left cervical tear which bleeding was going on and ultimately it led to her death. Said cervical tear developed on 15.03.2003 at 7.30 p.m. when the female child i.e respondent No.1 was delivered while the time of the examination and the repair of the cervical tear done on the same date at 10.15 p.m Apparently there was a gap of about three hours in repairing the left cervical tear for the purpose of stoppage of bleeding. During this period of about 2 hours and 45 minutes, deceased was not provided with the treatment for the stoppage of bleeding. Her postmortem was not done and per contents of the written statement, it was a case of excessive bleeding from the vagina. There was no record that during the period of 7.30 p.m to 10.15 p.m i.e. 2 hours and 45 minutes any steps were taken for the purpose of stoppage of the vaginal bleeding and repair of cervical tear, which was source of bleeding.

17. Per the pleadings of the parties, proforma respondent, expert Gynecologist/Specialist had left the Hospital on the same day at 3.30 p.m. It was a case of emergency due to complication of high BP and period of 10 days was over. There was no other expert/Specialist in Gyne in the Hospital and the treatment for stoppage of bleedings was not given in the intervening period from 7.30 p.m to 10.15 p.m. This appears to be a case of gross negligence as the treatment was given belated at about 10.15 p.m by Dr. Suman Sharma, the then CMO who had experience in the Gynecology.

18. The respondent No.1 had examined Sh. Mukesh Kumar, her next friend father as PW-1 who put forth the facts

set out in the plaint. His statement was also supported by PW-2 Jagdish Chand on material particulars.

19. DW-1 is Dr. B.D. Dhiman ,Gynecologist .He has also admitted that it was a case of high BP and over date delivery. It is also his case that his father was chronic bed – ridden. It was not his case that his father had suffered immediate attack of paralysis. It was not emergency. Nature of leave sanctioned had not been disclosed either in the written statement or in the evidence led. He also knew it that except for him, there was no specialist in Gynecology available in the Hospital.

20. DW-2 is Dr. Archana Soni who had attended upon the deceased Neelam. According to her, it was a case of post-date pregnancy and hyper tension. Meaning thereby, after the delivery of the child, the hyper tension was to be reduced as it was pregnancy related. She is not a Gynecologist.

21. DW-3 is Lajwanti, Record Keeper who had produced the record of the Hospital and DW-4 is Dr. Pancham Kumar had attended upon the deceased on emergency duty. Per him, placenta was evacuated. How it did not notice the vaginal bleeding, is not understandable when it had started after the delivery of the child.

25. Appellants could not explain as to why steps for stoppage of vaginal bleeding and repair of tear were not taken in the intervening period of 7.30 p.m to 10.15 p.m. Apparently, the bleeding had started at the time of delivery of the child when the vagina had ejected the child outside at 7.30 p.m on 15.03.2003. Appellants had failed to explain this medical negligence".

23. It is more than settled that no amount of oral evidence can dislodge the documentary evidence in the cases of instant kind. The entire medical record has been produced

before the Court by DW-3. Ex,DW-3/A exhibited that the deceased Neelam was admitted in the Zonal Hospital, Hamirpur on 14.3.2023 at 12.10 PM and the blood pressure at the relevant time was found to be 130/100. A note has been appended in the bed head ticket which reads as under:

"Show to gynaecologist-positively."

24. It is not in dispute that the patient Neelam was brought to the hospital for the first time. She was checked by Dr. Archana Soni, lady Doctor, who found that the pregnancy was over due by 10 days from the expected date and the blood pressure was also high. It was on the advice of Dr. Archana Soni that the patient was admitted in the hospital on the same day. After admission in the hospital, she was examined by the proforma respondent and blood pressure was found to be high and expected date was over by 10 days. The proforma respondent advised instant treatment of high blood pressure and also observed that in case she did not deliver the child on 14.03.2003, then artificial labour pains to be given because her date of delivery was already over and no labour pain and symptoms of child were noted. After treatment of blood pressure and control of the same, as is evident from the medical record, artificial labour pains were started on 15.03.2003 at 9.30 A.M. and ultimately, the deceased delivered

a female child on the same day on 15.03.2003 at 07.30 PM. The child was healthy and weighed 2.5 kgs but the placenta had not been expelled, which eventually was expelled alongwith membrane at 8.35 PM and at that time there was no tear, no PPA. Earlier to that, the deceased was attended on call at 8.10 PM and at that time the blood pressure was absolutely normal and recorded as 100/80. The deceased was then examined at 8.30 PM and even at that time; the blood pressure was absolutely normal and recorded as 120/80 and she was perfectly alright. She even breast fed the child and that has specifically been recorded in the bed head ticket. The deceased was again attended to at 9.15 PM and this time the blood pressure was found to be at lower side and it has been recorded as 96/56 and scanty bleeding, bleeding P/V weas found and there is a specific record which reads :-

" Call sent to gynecologist(CMO)".

25. Thereafter it has been recorded that the Gynecologist Doctor Suman had been contacted at 9.30 P.M., who examined the patient at 9.45 P.M., and continued to examine her thereafter, as is evident from Ex. DW3/A-4 and Ex. DW3/A-5.

26. Unfortunately, none of these facts have been noticed by the trial Court or by the First Appellate Court and

both the Courts below have only been swayed by the fact that the plaintiff (minor) has lost her mother.

27. Mr. Neel Kamal Sharma, learned counsel for the plaintiff vehemently argued that the defendants did not take adequate care immediately and timely action on their part, more particularly Dr. Suman would have saved the life of the deceased. However, I find no merit in such contention.

28. The Court cannot be oblivious to the fact that it is dealing with a case of Government Hospital and judicial notice can be taken of the fact that there would be lot many patients, who require to be attended to. The deceased has been attended to by the proforma respondent till about 3.30 PM, who thereafter had to leave all of a sudden to look after his ailing father, who had suffered paralytic attack and there was no one to look after. In absence of the proforma respondent, the patient was thereafter treated by duty doctor, Dr. Panchan, Dr. Anand Dhiman and the CMO Dr. Suman Sharma from time to time. The death of the patient is unfortunate but the same in the given circumstances cannot be attributed to the negligence of the doctors.

29. Apart from the above, as observed by the Hon'ble Supreme Court in Bombay Hospital and Medical Research Centre vs Asha Jaswal and others, AIR 2022 SC 204, it is too

much to expect from a Doctor to remain on the bed side of the patient through in the hospital, which is being expected by the plaintiff.

30. Going by the pleadings and evidence on record, this Court has no hesitation to conclude that the doctors and nurses, who were expected to provide reasonable care, have duly provided the same and they have not been found to be lacking in manner.

31. This Court cannot be oblivious of the observations of the Hon'ble Supreme Court in ***Martin F D Souza*** vs ***Mohd. Ishfaq***, 2009 (3) SCC 1, wherein it was observed as under:

> "[40] Simply because a patient has not favourably responded to a treatment given by a doctor or a surgery has failed, the doctor cannot be held straightway liable for medical negligence by applying the doctrine of res ipsa loquitur. No sensible professional would intentionally commit an act or omission which would result in harm or injury to the patient since the professional reputation of the professional would be at stake. A single failure may cost him dear in his lapse."

32. It is also important to bear in mind what has been observed in para 42, which reads as under:

> "[49] When a patient dies or suffers some mishap, there is a tendency to blame the doctor for this. Things have gone wrong and, therefore, somebody must be punished for it. However, it is well known that even the best professionals, what to say of the average professional, sometimes have failures. A lawyer cannot win every case in his professional

> career but surety he cannot be penalized for losing a case provided he appeared in it and made his submissions."

33. Unfortunately, both the courts below have not at all considered the following pertinent observations made by the Hon'ble Supreme in ***Kusum Sharma's*** case, wherein in para 78, it has been observed as under:

> "[78] 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.

34. From the aforesaid discussion, it would be evidently clear that the findings rendered by both the courts below have been rendered out of sympathy. However, the same cannot sustain as the courts below have failed to appreciate the pleadings and the evidence on record in its right perspective and have rather misread and misconstrued the same. Further the courts below have failed to appreciate the law on the subject of negligence and also the vital aspect of vicarious liability in such like matters.

The questions of law are answered accordingly,.

35. Consequently, the Appeal filed by the Appellants is allowed and the judgments and decrees passed by both the courts below are set aside and resultantly, the suit filed by the plaintiff is ordered to be dismissed.

(Tarlok Singh Chauhan)
Judge

December 4th , 2023
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