

**IN THE NATIONAL CONSUMER DISPUTES REDRESSAL COMMISSION
AT NEW DELHI**

FIRST APPEAL NO. 476 OF 2019

(From the order dated 31.08.2018 in CC No. 10/2015 of the
State Consumer Disputes Redressal Commission Punjab)

Kanwalpreet Kaur Appellant (s)

Versus

Dayanand Medical College and Ors. Respondent(s)

FIRST APPEAL NO. 479 OF 2019

(From the order dated 31.08.2018 in CC No. 10/2015 of the
State Consumer Disputes Redressal Commission Punjab)

Dayanand Medical College and Ors. Appellant (s)

Versus

Kanwalpreet Kaur and Ors. Respondent(s)

FIRST APPEAL NO. 664 OF 2019

(From the order dated 31.08.2018 in CC No. 10/2015 of the
State Consumer Disputes Redressal Commission Punjab)

Mediways Hospital and Ors. Appellant (s)

Versus

Dayanand Medical College and Ors. Respondent(s)

FIRST APPEAL NO. 1637 OF 2019

(From the order dated 31.08.2018 in CC No. 10/2015 of the
State Consumer Disputes Redressal Commission Punjab)

United India Insurance Company Ltd. Appellant (s)

Versus

Kanwalpreet Kaur and Ors. Respondent(s)

FIRST APPEAL NO. 1639 OF 2019

(From the order dated 31.08.2018 in CC No. 10/2015 of the
State Consumer Disputes Redressal Commission Punjab)

Oriental Insurance Company Ltd.

..... Appellant (s)

Versus

Kanwalpreet Kaur and Ors.

..... Respondent(s)

BEFORE:

**HON'BLE MR. JUSTICE A.P. SAHI, PRESIDENT
HON'BLE MR. BHARATKUMAR PANDYA, MEMBER**

Appeared at the time of arguments:

For the Complainant :	Ms. Kanwalpreet Kaur (VC) Mr. Ujjwal Jain, Advocate, Mr. Geetansh Bharti, Advocate
For Dayanand Medical College	Mr. BBS Sobti, Advocate Mr. Ritesh Khare, Advocate Ms. Namrata Chandorkar, Advocate
For Mediways Hospital	Mr. K.G. Sharma, Advocate Dr. Satish Jain, In Person Dr. Sumit Jain, In Person
For the United India Ins. Co. Ltd.	Mr. Abhishek Gola, Advocate Mr. Ravi Kumar, Advocate
For the Oriental Ins. Co. Ltd.	Ms. Mithilesh Sinha, Advocate

Pronounced on : 19th December, 2025

ORDER

JUSTICE A.P. SAHI, PRESIDENT

1. These Appeals arise out of a 142 paragraph order of the State Commission, Punjab dated 31.08.2018 running into 123 pages with more than

a 1000 pages of pleadings, evidence, applications, affidavits and orders. The volume of the pleadings is obvious on account of the nature of the complaint of an alleged medical negligence that took the shape of CC No. 10 of 2015 filed by Dr. Kanwalpreet Kaur, herself a Dentist, who has described and narrated her experience of a facial surgery undergone by her, which according to her was unnecessary and was performed in haste, treating it to be malignant, whereas according to her and the evidence relied upon by her, the surgery was based on absolutely infirm prognosis and an unconfirmed diagnosis of malignancy that was later on found to be just the opposite. The complaint was filed by her, alleging negligence against the Pathologists who conducted the pre-operative pathological tests, the haste with which the surgeons performed the surgery and the consequences which she had to face that has transformed her life into a permanent trauma.

2. The State Commission after having perused the pleadings and assessed the evidence finally arrived at the conclusion that there was negligence at both the stages of diagnosis and treatment and as a consequence thereof, the complainant had to suffer further complications, as such the Complaint deserved to be allowed. Accordingly, by the impugned order dated 31.08.2018, the State Commission awarded a lumpsum amount of Rs.55.00 lakhs as compensation the liability distributed in the manner as indicated in paragraph no. 140 of the impugned judgment together with Rs.55,000/- as litigation costs and also indicating the liabilities of the insurers.

The amount awarded has been supplemented with interest @ 9% p.a. from the date of filing of complaint i.e. 16.01.2015 till its realization.

3. The liability with regard to negligence in the pathological assessment has been fixed on OP No.1 Dayanand Medical College, and OP No.5,6 and 7, who are the pathologists having prepared the reports that are contested, and OP No.8, the Principal Dayanand Medical College, Ludhiana. They have been saddled with a liability of Rs. 10.00 lacs + 9% interest out of the total amount and the liability for the negligent surgery has been fixed on OP No.2, 3 and 4, namely, the Mediways Hospital, Dr. Satish Jain and Dr. Sumeet Jain. They have been saddled with the liability of the balance of Rs.45.00 lacs together with interest thereon.

4. Since they were having professional immunity insurance covers by United India Insurance Company and Oriental Insurance Company respectively to the extent indicated, observations were made in respect to the limited reimbursements available. Even though applications had been moved for deleting the Insurance Companies but the final order of the State Commission explains their involvement to the limited extent of indemnification.

5. With the aforesaid liabilities imposed upon them, the Dayanand Medical College, its Principal and the three doctors have filed First Appeal No. 479 of 2019 praying for setting aside of the impugned order. Similarly, Mediways Hospital alongwith the surgeons Dr. Satish Jain and Dr. Sumeet Jain have filed First Appeal No. 664 of 2019 praying for setting aside of the impugned order. Later on, the United India Insurance Company and the Oriental

Insurance Company have also filed First Appeal Nos. 1637 of 2019 and 1639 of 2019 assailing the impugned order, contending that in the absence of any privity of contract between the complainant and the Insurance Company or any liability whatsoever, the impugned order deserves to be set aside insofar as it comments upon and imposes liabilities against the said applicants.

6. The complainant Dr. Kanwalpreet Kaur has approached this Commission first by filing First Appeal No. 476 of 2019 praying that with the findings of negligence arrived at by the State Commission, the quantum of compensation awarded was inappropriate and inadequate looking to the proportion of the loss, damage and injury suffered by the complainant and, therefore, has prayed for enhancement of the lumpsum amount from Rs.55.00 lakhs to Rs.95.00 lakhs as well as additional prayers pointing out that with all the complications that developed post surgery, she had to entail huge expenses and also had to undergo treatment of her nervous system as well as for all the deformities she had suffered on account of the surgery, right upto the treatment undergone in the United States of America, where she currently resides.

7. Thus, there are 5 appeals in all. It may be pointed out that 2 of the appeals, one by Dr. Kanwalpreet Kaur -FA No. 476 of 2019 for enhancement and the other appeal by Dayanand Medical College and its Doctor – FA No. 479 of 2019, have both been filed within limitation, whereas the Appeal filed by the Hospital – Mediways Hospital, where the surgery was conducted, alongwith Dr. Satish Jain and Dr. Sumeet Jain – FA No. 664 of 2019 has been

filed with delay a of 27 days. This appeal was entertained and notices were issued on the delay condonation application on 18.06.2019 but the delay does not seem to have been condoned. The delay condonation application No. 6162 of 2019 is on record and having perused the same, we are satisfied that the delay deserves to be condoned and seems to have been impliedly condoned vide order dated 25.10.2021 by a 3 Member's Bench when IA No. 7704 of 2021 filed for condoning the delay in filing of the written submission was condoned. The matter was thereafter directed to be listed for final hearing alongwith connected appeals. IA No.6162 of 2019 is therefore allowed as sufficient cause has been shown explaining the delay.

8. The other 2 appeals filed by the Insurance Companies were also filed beyond limitation and FA No. 1637 of 2019 filed by the United India Insurance Company that was delayed by 147 days, whereas FA No. 1639 of 2019 filed by the Oriental Insurance Company was delayed by 146 days.

9. FA No. 1637 of 2019 filed by United India Insurance Company could not be proceeded with as the arguing counsel was not available. The order dated 25.02.2020 passed in FA No. 1637 of 2019 is extracted hereinunder:

Learned proxy counsel is present for the appellant. Learned arguing counsel is not available.

List on 01-04-2020 for hearing on admission.

This shall be the last opportunity to argue on admission.

10. However, FA No. 1639 of 2019 filed by Oriental Insurance Company was taken up and argued by the counsel and a detail order was passed condoning the delay in the said appeal on payment of Rs.1.00 lakh as cost.

11. Thus FA No. 1637 of 2019 that was accompanied by a delay condonation application IA No. 13211 of 2019 seems to have remained undisposed. We have perused the same and since we have heard all the 5 matters finally, we dispose off the said delay condonation application observing that even though the said application remained pending, yet in the interest of justice, when the matter is being simultaneously heard, we allow the application, which even though contains unconvincing explanations regarding the time taken in preparation of the appeal, but the same deserves to be condoned on payment of Rs.10,000/- cost. The appellant therein shall, therefore, pay a cost of Rs.10,000/- to respondent no.1 Dr. Kanwalpreet Kaur.

12. Having cleared the deck regarding limitation in filing of the appeals, it would be appropriate to record the terms and conditions that were imposed by this Commission while entertaining the appeals of the OPs who had been saddled with liabilities.

13. The Appeal No.479 of 2019 filed by OP Dayanand Medical College and its directors against was heard on the interim matter on 27.05.2019 and the following order was passed :

Learned counsel for respondent has filed I.A. No. 8397/2019 stating that in the order dated 26.04.2019 passed by this Commission, the portion relating to stay has been missed out. The same has been confirmed by the learned counsel for the appellant.

Accordingly, the impugned order of the State Commission dated 31.08.2018 shall remain stayed subject to appellant depositing Rs. 8,35,000/- (Rupees Eight Lacs Thirty Five Thousand Only) with the State Commission within a period of four weeks. The State Commission shall keep this amount in the shape of a FDR with a nationalized bank initially for a period of one year, subject to renewal from time to time.

This stay order shall be in respect of present appellant i.e. Dayanand Medical College & Hospital & Ors.

Accordingly, I.A. No. 8397/2019 stands disposed of.

Appellant is directed to submit the proof of deposit before the next date of hearing.

List the matter on the date already fixed i.e. 25.02.2020.

14. It may be pointed out that sum of Rs.8,35,000/- was directed to be deposited in a fixed deposit with the State Commission for a year, subject to renewal from time to time.

15. An interim order was passed on 18.06.2019 in FA No. 664 of 2019 filed by Mediways Hospital and Dr. Satish Jain and Dr.Sumeet Jain with a direction to deposit a sum of Rs. 25.00 lakhs. The order is extracted hereinunder :

Heard.

Issue notice to the respondents, returnable on 25th February 2020, on the memo of appeal as well as on the application for condonation of delay.

Meanwhile, the order of the State Commission dated 31.08.2018 shall remain stayed subject to the appellant depositing Rs.25 lakh with the State Commission within a period of four weeks. The State Commission shall keep this amount in a fixed deposit in a nationalised bank initially for a period of one year, subject to renewal from time to time.

16. These deposits were directed as interim measures apart from the statutory pre deposit of Rs.35,000/- that was also made by these two appellants.

17. The United India Insurance Company deposited a sum of Rs.35,000/- as the statutory pre deposit in FA No. 1637 of 2019 and there were no interim orders passed in the said appeal. However, in FA No. 1639 of 2019 filed by Oriental Insurance Company, apart from imposing a sum of Rs.1.00 lakh while condoning the delay, the Commission called upon the Oriental Insurance

Company to deposit Rs.20,000/- to defray the travel and allied expenses of the respondent – complainant Dr. Kanwalpreet Kaur. In addition thereto, the interim stay was granted, subject to deposit of Rs.10.00 lakhs with the State Commission to be kept in an FDR by it. The interim order dated 25.02.2020 passed in FA No. 1639 of 2019 is extracted hereinunder:

1. Heard arguments on admission from the learned counsel for the appellant insurance co.

Also heard the learned counsel for the respondent no. 1 / complainant.

Perused the material on record.

2. The State Commission vide its impugned Order dated 31.08.2018 has returned findings of medical negligence.

3. This appeal has been filed under section 19 of the Act 1986 challenging the said Order dated 31.08.2018 of the State Commission with self-admitted delay of 149 days.

4. To begin with, the application for condonation of delay was taken up.

5. The stated reasons for delay, as contained in paras 1, 1(a) to 1(d) and 2 of the application for condonation of delay, are quoted below, verbatim, in toto, for ready appreciation.

1. That there has been a delay of 149 days in filing this appeal before the Honorable Commission if the date of the certified copy of the Order of the H'ble State Commission is taken. The certified copy of the order dated 31.08.2018 of the Honorable State Commission, Punjab was received on 14.02.2019. Accordingly the appeal should have been filed before the Honorable Commission by 13.03.2019. However, the appeal could be filed before the honourable commission only on for the under mentioned reasons.

*a. Four Ops, namely i) Dayanand Medical College and Hospital, ii) Dr. Neena Sood, iii) Dr. Harpreet Kaur, and iv) Dr. Vikram Narang, filed first appeal, FA/479/2019 against the order of the Honorable State Commission before the honorable Commission, and **by its order dated 27 May 2019, the honourable Commission was pleased to stay the order of the State Commission** subject to the Dayanand Medical*

College and Hospital depositing an amount of Rs. 8.35 lakhs with the State Commission.

b. Further OP 2, Mediways Hospital, O P 3, Dr. Satish Jain, the Doctor who had taken the Professional Indemnity Policy (for doctors) from the Appellant, and O P 4, Dr. Sumeet Jain, in the complaint case No. 10 of 2015, before the Honourable State Commission, had filed First Appeal, FA/664/2019, against the impugned order of the Honorable State Commission, Punjab, informing the Appellant about the same, and by its order dated 18.06.2019, of the honorable Commission ordered as under; **"Meanwhile the order of the state commission dated 31.08.2018 shall remain stayed subject to the Appellant depositing Rs. 25 lakhs with the State Commission within a period of four weeks....."**

Since the above mentioned opposite parties, Appellants in the first appeal FA/664/2019, had appealed before the honorable Commission and the honorable Commission was pleased to stay the operation of the order of the State Commission,

and since the **Appellant would become liable only for the amount of compensation fixed on Dr. Satish Jain, OP 3 above, ultimately, and that too according to the terms and conditions of the policy, to be decided in future**, the Appellant was of the belief that the stay granted to the above mentioned appellants would also become applicable to this Appellant. By his letter dated 1 July 2019, **Dr. Satish Jain, the insured Doctor, requested the appellant to pay an amount of Rs. 8.34 lakhs making it as the contribution of the Appellant to be paid by a demand draft in the name of the Honorable State Commission, in order to comply with the order dated 18 June 2019 of the honorable Commission, for the purpose of stay.**

c. Under the circumstances, the Appellant was advised to obtain a **separate stay from the honorable Commission since it had made the Application for deletion of its name from the array of parties based on the grounds mentioned in the Appeal and the ratio of the honorable National Commission in the cases cited in the Appeal, deleting the name of the Insurance Companies/Appellant from the array of parties**, and the Appellant is most likely to succeed of the grounds taken in the Appeal.

In the Application before the honorable Commission for the deletion of the name of the Appellant from the array of parties, the honorable Commission was pleased to direct the Appellant to provide copies of the aid application to all the opposite parties and the matter be put up on the next date of hearing already fixed.

d. Moreover, the complainant in the complaint before the Honorable State Commission, **has filed first appeal FA/476/2019 for enhancement of the compensation amount given by the Honorable State Commission in the above mentioned impugned order.** As such, the complainant/ O P 1 should be considered as precluded from filing any execution petition against the opposite parties till the disposal of the Appeal/s by the Honourable Commission.

2. That in view of the submissions made herein before, delay is only circumstantial and there was no intention on the part of the Petitioner to cause such delay. **Moreover, the Appellant is not contesting the appeal as mentioned earlier, on merits, which is being done by the concerned doctors and hospitals, but is merely praying before the honorable Commission for the deletion of its name from the array of parties.** As such, it is the humble prayer of the Petitioner to the Honorable Commission to condone the delay of 149 days.

6. A mere perusal shows that the stated reasons point towards managerial inefficiency and perfunctory and casual attitude to the law of limitation, they are illogical and unpersuasive in explaining convincingly and cogently the delay in filing the appeal.

7. Sufficient cause to explain the delay is not forthcoming.

8. However, in the interest of justice, to provide fair opportunity to the appellant, to adjudicate the first appeal on merit, on facts and law, the delay is condoned, subject to just and appropriate cost of Rs. 1 lakh to be paid by the appellant to the respondent no. 1 / complainant within four weeks from today.

9. Learned counsel for the respondent no. 1 / complainant submits that he has no objection on the delay being condoned, on the aforesaid terms.

10. Issue notice on the memo of appeal to the respondents, subject to payment of Rs. 20,000/- to the respondent no. 1 / complainant within

a period of four weeks **from today to defray travel and allied expenses.**

11. Learned counsel for the respondent no. 1 accepts notice.

12. The Registry may ensure that the notice is issued and despatched to the respondents no. 2 to no. 6 within a period of ten days from today.

13. **The operation of the impugned Order dated 31.08.2018 of the State Commission is stayed, qua the appellant (only), subject to deposit of Rs. 10 lakh** with the State Commission within a period of six weeks from today, which shall be kept in the shape of an FDR, initially for a period of one year, to be renewed regularly.

14. It is made clear that the stay on the operation of the State Commission's impugned Order (qua the appellant herein) shall automatically stand vacated if all three conditions, the condition attached with condoning the delay in filing the appeal i.e. payment of cost of Rs. 1 lakh to the respondent no. 1 / complainant within four weeks from today, the condition attached with the issuance of notice i.e. payment of Rs. 20,000/- to the respondent no. 1 / complainant within four weeks from today, and the condition attached with the grant of stay i.e. deposit of Rs. 10 lakh with the State Commission within six weeks from today, are not complied with within the respective stipulated period. In such contingency, the State Commission shall proceed for execution as per the law.

15. List on 05.01.2021 for final hearing along with connected FA no. 476 of 2019, FA no. 479 of 2019 and FA no. 664 of 2019.

16. All parties are directed to file their respective briefs of written arguments in terms of Regulation 13(2) of the Consumer Protection Regulations, 2005 at least two days before the next date of hearing with copies in advance to each other.

'Dasti', in addition, to all parties.

18. The Oriental Insurance Company challenged the said order before the Apex Court in SLP No. 15431 of 2020 that was dismissed but the remarks made against the Insurance Company for having filed a belated appeal were expunged. The order dated 27.01.2021 is extracted hereinunder:

Heard learned counsel for the Petitioner.

The special leave petition is dismissed.

However, certain remarks made against the petitioner in the impugned judgment are expunged.

Pending applications, if any, stand disposed off accordingly.

19. By this time, the period granted for the deposit under the interim order dated 25.02.2020 had expired and, therefore the State Commission did not entertain the request for deposit by the Oriental Insurance Company for deposit and observed that the State Commission did not have the power to extend the period of deposit, for which the applicant may seek an order of extension from the National Commission. The order passed by the State Commission on 12.04.2021 is extracted hereinunder:

This application has been filed by the applicant-Oriental Insurance Co. Ltd., for compliance of order dated 25.02.2020 of Hon'ble National Commission passed In F.A.No. 1639 of 2019.

Heard.

It was specifically ordered by the Hon'ble National Commission on 25.02.2020 that the operation of the impugned Order dated 31.08.2018 of this Commission is stayed, qua the appellant (only), subject to deposit of Rs. 10 lakh with this Commission within a period of six weeks, which shall be kept in the shape of an FDR, initially for a period of one year, to be renewed regularly. It has also been made clear in the order that the stay on the operation of the impugned Order shall automatically stand vacated if all three conditions, the condition attached with condoning the delay in filing the appeal i.e. payment of cost of Rs.1 lakh to the respondent no. 1/complainant within four weeks from today, the condition attached with the issuance of notice ie. payment of Rs.20,000/- to the respondent no. 1/complainant within four weeks from today, and the condition attached with the grant of stay i.e. deposit of Rs. 10 lakh with this Commission within six weeks, are not complied with within the respective stipulated period. In such contingency, this Commission shall proceed for execution as per the law.

The six weeks period had already expired on 07.04.2020 and we have no power to extend the period granted by the Hon'ble National Commission. Hence, the application is dismissed. However, applicant may seek extension from the Hon'ble National Commission.

Registry is directed to return DD No.853795 dated 19.03.2021 of Rs. 10 lac to the learned counsel for the applicant against proper receipt.

20. Accordingly, the Insurance Company filed an application seeking extension of time for deposits to be made under the interim order dated 25.02.2020 through IA No. 5432 of 2021 that was allowed vide order dated 07.09.2021. The same is extracted hereinunder:

"Taken up through video conferencing.

IA/5432/2021

This application has been moved seeking extension of time to comply with the Order dated 25.02.2020 submitting that the amount of Rs.10,00,000/- could not be deposited within the stipulated time for certain reasons.

Counsel has tried to explain the reasons for the delay. It has also been submitted that the State Commission has refused to accept the deposition of money because of the expiry of the stipulated period of time mentioned in the Order dated 25.02.2020 passed by this Commission.

Counsel appearing for respondents no. 3,4 & 5 and no. 2 have no objection if the time is extended in order to the comply with the Order dated 25.02.2020 in its entirety.

*Keeping in view the totality of the circumstances and the no objection of counsel appearing for respondents no. 3, 4 & 5 and no. 2 **a period of two weeks from today is being granted to the appellant to comply with the Order dated 25.02.2020 and the directions made therein.***

The Registry is requested to send a copy each of this Order to all parties in this appeal and their learned counsel as well to the State Commission within three days. The stenographer is requested to upload this Order on the website of this Commission immediately."

21. Consequently, with the aforesaid interim orders passed in the 3 appeals, the matter proceeded and on 17.11.2021, this Commission passed an order directing all the matters to be listed simultaneously for hearing with a direction to the learned counsel for the parties to file their synopsis of arguments. The order dated 17.11.2021 is extracted hereinunder:

The Registry has listed these three cases today. However, the previous Order dated 25.10.2021, the matter was fixed for Final Hearing on 27.12.2021.

Learned Counsel for the Parties are present. The Appellant in FA No.476 of 2019 - Ms. Kanwalpreet Kaur is present in person. She submits that she has to go for corrective surgery in U.S. in the next year probably in the month of January. Considering the factual situation, list the matter on 14th and 15th December, 2021 at 2 p.m. The date already fixed i.e. 27.12.2021 stands cancelled.

*It is came to notice that **there are total five Appeals arose from the same impugned Order. List all the five Appeals i.e. FA No.476/2019, FA No.479/2019, FA No.664/2019, FA No.1637/2019 & FA No.1639/2019 on that date.***

In the meantime, Parties are directed to file brief synopsis of Arguments. It is made clear that no adjournment is granted on any ground to either Party on the next date of hearing.

List on 14th & 15th December, 2021 at 2 p.m.

22. This is how the cases were consolidated but with the intervening Covid period, the matter could not be heard and was proceeded with thereafter.

23. The subsequent proceedings are also to be recorded as they have added another dimension to this entire dispute. The matter was heard by a Bench of 2 Hon'ble Members on a couple of dates in November – December 2021 and the following order was passed on 23.12.2021.

The learned Counsel for the Complainant brought to our attention that the cheque issued by the Oriental Insurance Co. for a sum totaling Rs.1,20,000/- is outdated at present. The learned Counsel for the Insurance Co. undertakes to make good within a week.

Arguments concluded by both the sides.

The parties have filed medical literature and relevant case laws. The same are taken on record.

The order is reserved.

In the meantime, the parties, if they so wish, may file their respective briefs of written arguments within a week with copies in advance to each other.

24. On 11.01.2022 the Commission after examining the respective pathological reports and the opinions obtained including the opinion of All India Institute of Medical Sciences that had been summoned by the State

Commission on 18.11.2015, directed that since the histopathological slides and blocks were not made available to ascertain the final diagnosis as to whether there was any malignancy or not, therefore, in the interest of justice and for fair adjudication, the Commission found it appropriate to obtain an opinion from the Medical Board of experts from AIIMS and accordingly passed the following order:

1. *We have heard the arguments from both the sides and perused the entire record.*
2. *As per the facts, on 28.07.2014, the Complainant Ms. Kanwalpreet Kaur (38 y), a Dentist by profession underwent an excision biopsy of a small growth on her cheek (right side) at Ludhiana. The biopsy was performed by Dr. Ravinder Tah; Plastic Surgeon at Mediways Hospital, Ludhiana. On the same day the biopsy specimen was sent to the Department of Histopathology of Dayanand Medical College (DMC) at Ludhiana for Histopathology examination (HPE) Reporting. At DMC it was numbered as Surg.Path.No.14-6842 . The HPE was reported on 02.08.2014 as "Histological features suggestive of Malignant Melanoma"*
3. *Thereafter, on 7.8.2014 at Mediway's Hospital, the surgeon Dr. Satish Jain (and/or) Dr. Sumeet Jain operated her for "local wide excision face (Rt) with MNP level - I to IV under GA" and the surgical specimen was sent for HPR study to SRL Diagnostic at Mumbai. The SRL Dign. registered as Path No: 14W-12120 the specimen consists - Total 7 specimens: one wide local excision of Rt. cheek and other 6 lymph nodes at level: I A, I B, II A, II B, III & IV]. The surgical pathology (HPE) was reported on 14.08.2014.*
4. *We note that, the Complainant took second opinion on HPE report of the 1st biopsy Surg. Path.No.14-6842 from the various Pathologists in India (and/or) . abroad; but unfortunately, no consensus was arrived on the final diagnosis of Malignant Melanoma. The different institutes opined as below:*

<i>Sr</i>	<i>Reported on</i>	<i>Opinion from</i>	<i>Material for reporting</i>
<i>1</i>	<i>02.08.2014</i>	<i>PMC and Hospital, Ludhiana</i>	<i>H&E, advised-IHC</i>

2	07.08.2014	PMC and Hospital, Ludhiana	IHC-CK&S100
3	12.08.2014	SRL Piagnostic Laboratories, Mumbai	IHC: HMB45 & MELAN.A. No H&E opinion
4	10.09.2014	SRL Diagnostic Laboratories, Mum Path.No 14 W- 13144:Pr.Anita Borges	On Block- H&E opinion
5	11.10.2014	Pathology Consultancy Services, Noida, by Dr.Sara Edward, Leeds	On Digital slides
6	23.10.2014	Oncopath Diagnostic, Pune by Dr. Prashant Joshi : HP No: S14-1385	On Block 6802/14
7	05.12.2014	PGIMER, Department of Histopathology, Chandigarh	Slide for review
8	06.12.2014	Tata Memorial Centre, Mumbai	On stained Slide- 6802 1 paraffin block
9	27.12.2014	PGIMER, Department of Histopathology, Chandigarh	On slide
10	03.01.2015	PGIMER, Department of Histopathology, Chandigarh	On slide

5. We have perused the opinion dated 18.11.2015 issued by the medical board of AIIMS, New Delhi which was sought by the State Commission, during the proceedings. Admittedly, the opinion was given on the basis of medical records which were available at the relevant time. It is pertinent to note that the HPE Slides / Blocks were not made available /provided to review the slides from the experts in Department of Pathology, to ascertain the final diagnosis whether it was a malignant or non-malignant lesion on the Rt. Cheek.

6. Therefore, in the interest of justice and for the fair adjudication, in order to , we at this stage deem it appropriate to confirm the final diagnosis (on the HPE Slides) medical board of experts from AIIMS consisting of specialists in Oncology, De

review all available seek opinion from the medical board of experts from AIIMS consisting of specialist in Oncology, Department of Pathology (Surgical Pathology div) and related branches to review all available HPE slides (H & E and / or IHC) of the 1st biopsy (Surg. Path. No. 14-6842) of DMC) and the slides from the surgical specimen (wide excision and the lymph nodes i.e. Path No.14W-12120 – of SRL Diagnostics). The applicable charges for review of slides /blocks and opinion from AIIMS shall be borne by this Commission.

7. Accordingly, the Complainant is directed to submit the following within 3 weeks or at the earliest:

- a. All the slides (H & E, IHC) of Surg. Path Np. 14-6842 (listed at Sr. No.1,2,3,4,6 & 8)
- b. All H & E Slides and paraffin blocks of the surgically resected specimen which was repaved by SRL Diagnostics –Ref Path No.14W-12120

List under the category of directions on 1st February 2022.

In the meanwhile, all the parties are also directed to file the soft copies of their Paper Books and Written Arguments.

25. The correct number of the slide had not been mentioned which was rectified vide order dated 01.02.2022 and it was further recorded that complainant had filed slides and blocks in a sealed cover before the Registrar to be sent to AIIMS. Accordingly, a direction was further issued that parties or their counsel shall appear, who shall open the sealed cover and verify the slides and blocks as per the order passed on 11.01.2022 and then be dispatched to AIIMS. The order dated 01.02.2022 is extracted hereinunder:

*Learned counsel for the Appellant in FA No. 479 of 2019 has brought our attention to IA No. 640 of 2022 about the typographical mistake in the number of the slide which erroneously mentioned as 6842 instead of 6802 in the Order dated 11.01.2022. Same was confirmed by the Complainant and other Counsel also. Therefore, the correction is made accordingly. It is further read as **Surg.Path. No.14-6802**. IA No. 640 of 2022 is disposed of.*

In pursuance to the Order dated 11.01.2022, the Complainant has filed number of slides and blocks in the sealed cover to the

Registrar of this Commission. The entire material is to be sent to the AIIMS for further operation.

To avoid any controversy, we deem it appropriate that let the parties or their Counsel shall be present before this Commission on the next date and verify and confirm the material which was to be sent to the AIIMS

The parties or their Counsel are directed to appear before the Registrar of this Commission on 09.02.2022 at 11.00 AM. The Registrar is directed to open the sealed cover, verify the slide and blocks as per our Order dated 11.01.2022 as per Chart. Thereafter, it will be sent to AIIMS for expert's opinion.

In case, if the Opposite Parties have any slide or block of the instant case, they may bring on 09.02.2022 and submit before the Registrar with due acknowledgment.

List the matter on 09 02.2022 before the Registrar for further proceedings.

26. The non-availability of the slides was intimated to the Commission and then another order was passed on 09.02.2022 to the following effect:

1. Today this matter was placed before the Registrar to receive the material in pursuance to Order dated 11.01.2022. Accordingly, the Jt Registrar Mr. S. Hanumantha Rao has received the items (blocks and slides in sealed cover) and prepared the list. He brought it before the Bench at 3.30 p.m. for further directions. The parties/their Counsel are also present.

2. To seek an expert medical board opinion (Histopathology Review) from AIIMS, vide Order dated 11.01.2022, we have specifically asked the Complainant to furnish the H & E slides and blocks as detailed in the table/chart

3 Today the Complainant submits that the one H & E slide No.14-6802 issued by DMC is not with her, but paraffin block of the same primary lesion (biopsy of mole) is available and handed over to the Joint Registrar She submitted that slides may be prepared from the said block for further opinion.

4 On a query from the bench about the availability of H & E stained slides from different laboratories wherein she took opinion from 4 centers by sending the paraffin block She submits, the slides may be available with the concerned laboratories, but they are not issuing the slides for want of their record

5 It is evident from the record that the Complainant took Histopath opinion on the basis of said paraffin block from different centers in India as listed below. Certainly, H & E slides were prepared from said paraffin block at the following centres

(1) SRL Diagnostic Laboratories, Mumbai (Path. No.14 W-13144)

(2) Oncopath Diagnostic, Pune (HP No.S14-1385),

(3) Tata Memorial Centre, Mumbai,

(4) The slide which was reviewed at PGIMER, Chandigarh on 27.12.2014 & 03.01.2015.

6. The Complainant shall file the H & E slides from the above centers. For easy facilitation, we direct those labs/centers shall issue the H&E slide(s) of the patient Ms. Kanwalpreet Kaur at the earliest within 8 days from her requisition.

The Pathologists/ Chief Administrator of concerned laboratories shall certify the correctness of H & E slides

7. One IHC slide of DMC was handed over to the Joint Registrar by the Pathologist of DMC. The Complainant and her Counsel have serious objection to take the said slide on record.

8. The Joint Registrar is directed to preserve all the items (slides/blocks) properly in the sealed cover as per list maintained by him.

9 Four weeks' time is granted to the Complainant to produce all the available H & E slides as mentioned above.

10. List on 14.03.2022 at 11.a.m. before the Registrar for the compliance and then before the Bench at 2 p.m. for further direction.

27. The matter seems to have been placed before the Registrar who drew proceedings on 14.03.2022 to the following effect:

The Hon'ble National Commission, vide its order dt.09.02.2022 had granted four weeks' time to the complainant-Ms. Kanwalpreet Kaur, to produce all the available H & E slides, before this Commission.

Vide the said order, it was also directed to list the appeals on 14.03.2022 at 11 am before the Registrar for the compliance and then before the Bench at 2 pm for further direction.

*Proceedings before the Registrar usually, commence at 11 am, and it is already 12.25 pm. **Neither the appellant in FA/476/2019, Ms. Kanwalpreet Kaur, nor any counsel on her behalf has put in appearance before the Registrar.***

However, the staff of the Registry was sent to her, to put in a word to the appellant Ms. Kanwalpreet Kaur, who was sitting in Hon'ble Bench No.5 at that time to appear before the Registrar, but she has

stated that she has some other matter in the said Bench and did not appear before the Registrar.

On enquiry, it is confirmed from the Assistant Registrar (FA Section), that no H & E slides were either produced before her or before the Registry.

Further, the Registry has reported that in FA/479/2019 (Item No.2), the Ld Counsel for the appellant has filed an application bearing number IA/1951/2022 seeking appropriate directions from this Commission to the respondent No.1 i.e. Ms. Kanwalpreet Kaur to produce the original block and slide bearing nos.14-6802.

List the matters before the appropriate Hon'ble Bench, today (14.03.2022) at 2 pm. in terms of the order dt.09.02.2022, for further directions.

(M. DURGA DEVI)
Assistant Registrar

Later on Mr. Shikhar Upadhyay, Advocate for Ms. Kanwalpreet Kaur put in appearance and he has been apprised of today's proceedings.

28. The matter was taken up on 14.03.2022 before the Bench and objections had been taken by learned counsel for Dayanand Medical College and the Doctors regarding the production of material on which the following order was passed on 14.03.2022:

In compliance of the order dated 09.02.2022, the Complainant has filed the slides as listed in the Index alongwith certificate of validity. All the material is taken on the records. The Opposite Parties objected that no Affidavit was filed for the same. The Complainant is directed to file an Affidavit in support of her slides.

Learned counsel for the D.M.C., who appears alongwith Dr. Vikram Narang (A.R.), raised some objections. They may file the objections alongwith application within a week. The Opposite Parties shall also file reply to IA / 1157/2022 within a week.

The Joint Registrar shall intimate about this compliance, i.e. receipt of the objections and the reply.

Thereafter, the Registry to send the material to the Director, AIIMS, New Delhi for Expert's opinion with proper direction from the Bench.

All the other applications will be considered after getting the Expert's opinion.

List on 06.04.2022 for directions at 2.00 P.M.

29. On 06.04.2022 final orders were passed directing that the material collected be sent to the AIIMS. The order dated 06.04.2022 is extracted hereinunder :

"Heard the IA No.2399 of 2022 and also the objections from Complainant side.

Today, the matter is listed specifically to pass the direction on the question of expert opinion. The Complainant has submitted the slides and blocks and same are kept in sealed cover with the appropriate list. The entire material will be sent to the Director, AIIMS, New Delhi with the special messenger alongwith covering letter from the Bench. We request the Director, AIIMS, New Delhi to constitute the Expert Medical Board consist of Profession/Associate Professor from the Department of Pathology (Division of Histopathology), the Dermatology and Oncology Department (surgical/medical). We further request Director, AIIMS, New Delhi that the opinion be sent expeditiously within two months from the receipt of the material.

List on 06.06.2022 for directions."

30. It seems that this matter pertaining to the dispatch of the blocks and slides were taken up in Chambers by the Bench and orders were passed on 22.04.2022 that is extracted hereinunder:

The Histopathology Review and an expert medical board opinion are sought from the AIIMS, New Delhi.

- The facts of the case are that the Complainant Ms. Kanwalpreet Kaur (38 yrs.), a Dentist by profession, underwent an excision biopsy of a small growth on her cheek (right side) at at Mediways Hospital, Ludhiana on 28.07.2014. The biopsy specimen was sent to the Department of Histopathology of Dayanand Medical College (DMC) at Ludhiana for HPE study.*
- The biopsy was numbered at DMC (Patho Department) as Surg.Path.No.14-6802. It was reported on 02.08.2014 as "Histological features suggestive of Malignant Melanoma".*
- On 07.08.2014, the patient was operated at Mediway's Hospital, for "local wide excision face (Rt) with MNP level -1 to IV under GA".*

The specimens consist of Total 7 specimens:

- (i) One wide local excision of Rt. cheek and;
- (ii) 6 lymph nodes at level: I A, I B, II A, II B, III &

IV

The surgical specimens were sent for HPE study to SRL Diagnostic at Mumbai. It was registered there as Path No: 14W-12120 for surgical pathology report. It was reported on 14.08.2014.

The Complainant (patient) sought few second opinions on the HPE report of DMC Surg. Path, No. 14-6802. She has filed the opinions from different centres/Pathologists in India and abroad. **The opinions differ and we are unable to arrive at the final diagnosis in the instant case.**

In the instant case, during proceedings before the State Commission, Punjab sought expert medical opinion from AIIMS. The opinion dated 18.11.2015 was given only on the basis of medical record and the HPE reports made available (opinion enclosed).

However, at that time Histopathology review of slides or blocks was not done. Therefore, in the interest of justice and in order to confirm the final diagnosis from the surgical specimens, we deem it appropriate to send the blocks and slides and to seek opinion from the medical board of experts of AIIMS from Department of Pathology (Surgical Pathology / Dermato- pathology) and related branches.

Therefore the paraffin blocks, slides and the opinions/reports sought by complainant are enclosed herewith as listed below for the opinion of expert medical board.

1. One Paraffin Block of S14-1385 (Oncopath Diagnostic, Pune) [on referral it was **prepared from Block No 14-6802**]
2. Following Slides of Primary Lesion, labelled as A to G
 - i. A & B - Tata Memorial Hospital, 01 slide : 02 sections
 - ii. C - 25788, PGI, Chandigarh
 - iii. D - 14 W 13144
 - iv. E - SRL Laboratory HMB – 45
 - v. F SRL Laboratory Melan –A
 - vi. G - SRL Lab H & E
 - vii. Digital side – one CD
3. One IHC Slide for CK & S-100 of DMC from **Primary Lesion from 6802.**

02 sections - 01 Slide
4. **BOX NO.1 : PARAFFIN BLOCKS**

33 Paraffin Blocks of 14W12120 of wide excision of cheek and neck dissection.

1A to 1N	=	14
2A to 2B	=	02
3A to 3C	=	03
4A to 4B	=	02
5A to 5D	=	04
6A to 6E	=	05
7A to 7C	=	03
TOTAL	=	33

5. BOX NO.2: SLIDES

Consisting of 3 boxes containing total 33 slides of wide excision and block dissection.

1A to 1N	=	14
2A to 2B	=	02
3A to 3C	=	03
4A to 4B	=	02
5A to 5D	=	04
6A to 6E	=	05
7A to 7C	=	03
TOTAL	=	33

6. All the reports from different laboratories and the opinion of the AIIMS dated 23.11.2015 are enclosed.

We request that the opinion of expert medical board be sent preferably within a month.

31. Finally, the material was dispatched for consideration by AIIMS. We have narrated the aforesaid facts to indicate that this Commission had exercised powers for obtaining an opinion from AIIMS presumably under the powers exercisable by it in terms of Section 13 of the Consumer Protection Act, 1986 read with rules framed thereunder. The AIIMS tendered its report and on 06.06.2022, this Commission passed an order directing the office to supply xerox copies of the report to the learned counsel for the parties and further issued directions for return of the material (slides and blocks) supplied by the concerned parties after obtaining appropriate acknowledgement. The order dated 06.06.2022 is extracted hereinunder:

The opinion from the Board of Medical Expert of AIIMS has been received.

The Court Master is directed to issue the Xerox copy of the said report with acknowledgment from the respective counsel today after 2.00 p.m. itself.

The Registry is directed to return the materials (slides and blocks) to the concerned parties with proper acknowledgment. Parties on both the sides shall file their written arguments if they wish after going through the expert opinion.

List the matter on 26.07.2022 as item no.1 in medical category.

32. All the matters were again taken up and heard on 27.07.2022 but it seems that orders could not be pronounced and on 06.04.2023 the following order was passed :

It is transpired that the disability certificate was issued to the Complainant by the PGIMER, Chandigarh on 29.09.2017. Therefore, we deem it appropriate that the Complainant shall file the latest disability certificate as on date within two weeks.

List the matters for compliance and directions on 25.04.2023.

33. One of the Hon'ble Members who had heard the matter earlier demitted office and, thereafter, the appeals came to be listed before Bench No.1 and on 08.08.2023, following order was passed :

We have heard all these connected matters and from the record we find that First Appeal No. 664 of 2019 on behalf of Mediways Hospital Ltd. should be the leading case to be heard, inasmuch as the same challenges the impugned judgment of the State Commission, whereby the liability has been fixed on the Appellants in the said Appeal, calling upon them to pay a compensation of Rs.45.00 Lakhs, together with other ancillary benefits, referred to in the impugned judgment, on the ground that medical negligence on their part is established. The Appeal has been filed questioning the correctness of the conclusions drawn by the State Commission on the ground that the medical reports clearly indicate that coupled with the pathological findings arrived at, the Complainant, who is the patient and the Appellant in First Appeal No. 476 of 2019 and has come up for enhancement of compensation, was suffering from cancer.

On the other hand, the Complainant contends that this was a case of gross negligence as in the absence of any precautions to be taken for confirming the diagnosis of the cancer, the State Commission has rightly arrived at the conclusion that there was negligence on the part of the Hospital and doctors attending on the patient. It is also the contention that the pathological findings recorded are also bereft of the standard protocols of medical science meant for recording pathological diagnosis and in such circumstances both the pathological findings as well as the consequential treatment given to the Complainant, all established the negligence on their part. In the given circumstances, the impugned judgment is being supported and it is contended that the judgment deserves to be upheld insofar as the findings of negligence are concerned but at the same time on the basis of said findings the compensation deserves to be enhanced.

We have considered the rival submissions raised and we find that on the last occasion when the matter is reported to have been heard by the earlier Bench a direction was issued to the Complainant to file a certificate of current disability suffered by her.

After going through the records of the Appeals, the first issue, which has to be established, is as to whether there is any negligence on the part of the hospital and doctors, against whom the complaint had been filed. Once it is either established or negatived, it is only then the issue of compensation for any disability arises. We, therefore, do not find any need for a disability certificate at this juncture even before the Appeals are finally heard and the conclusions arrived at. Consequently, we see no reason to keep the matter pending only for issuance of a current disability certificate, which we do not find necessary at this stage.

Learned Counsel for the Hospital, who has filed First Appeal No. 664 of 2019, prays for adjournment.

List for final hearing on 19.02.2024.

34. An adjournment was sought on 26.03.2024 by the complainant and accordingly, the same was posted on 13.07.2024 when the matter was heard by one of us sitting singly. Since it captures the arguments that were advanced the same is extracted for this limited purpose only:

1. This is a medical negligence claim in a bunch of appeals arising out of the impugned order of the State Commission in Consumer Complaint No.10 of 2015 whereby the complaint has been allowed partly with the reliefs granted to the Complainant holding that the pathological reports were erroneous and that the consequential surgery on the basis of such reports was performed without confirming the same by conducting advance tests and observing medical protocols. The surgery was also negligent that caused consequential damage and loss to the Complainant.

2. The Complainant is a dentist who in the year 2006 had also undergone a renal surgery. On account of some skin problem on her right cheek she approached one Dr. Ravinder Tah who performed the surgery for excising a lesion and also sent the tissues for a biopsy.

3. The Dayanand Medical College and Hospital of Ludhiana (DMC) conducted a histopathology report and on 02.08.2014 tendered a report which is at Page 254 of appeal no.664/2019

4. The said report indicated malignant Melanoma and it also advised its confirmation by getting the same further investigated with a four marker indicator including S-100 Immunohistopathology test.

5. The Complainant applied before the Dayanand Medical College for providing the slides (Paraffin Blocks) for getting the reports as advised on 05.08.2014. This document is at page 220 of FA/476/2019.

6. The Complainant on 06.08.2014 on her own got all pathological tests done which were required for a surgery. These were pre-operative tests which are on record.

7. The Immunohistopathological Report from DMC was received on 07.08.2014 which confirmed Malignant Melanoma and surgery was advised.

8. The Complainant had already approached Dr. Satish Jain and Dr. Sumeet Jain who are the Appellants in Appeal No.664 of 2019 along with the Hospital, and the Complainant was advised to undertake the surgery and was accordingly admitted. Her case history was noted



which is at page 287 and the anesthesia preparatory notes were prepared which is at page 298. The surgery was planned and explained to the Complainant and her husband which document is at page 285. The consent was given by them for the surgery and also the high risk surgery which documents are at page 297.

9. The surgery was performed successfully and the operation notes dated 07.08.2014 are on record from page 288 to 290.

10. It may be pointed out that the Complainants brother who is abroad in USA seems to have been informed about the surgery planned and it is stated at the bar that the surgeon Dr. Sumeet and the brother of the Complainant Mr. Jaspreet Singh were well known to each other and were friends. Accordingly, the brother of the Complainant addressed a mail to Dr. Sumeet Jain on 06.08.2014 suggesting certain parameters to be observed in the performance of the surgery. According to Mr. Sharma, learned Counsel for the surgeons and the hospital, the said protocol was observed more carefully and minutely and the surgery went uneventful.

11. The patient recovered and was discharged on 11.08.2014. The discharge summary has been filed on record with an advice to visit the OPD after five days. The Complainant according to the learned Counsel for the Opposite Party did not turn up as advised and rather visited the Hospital after one month.

12. The complainant seems to have consulted some other person or on her own and she went in for a report on the biopsy slide from M/s SRL Labs. This report dated 10.09.2014 in respect of the same slide gave a contrary report indicating that there was no malignancy or any mitiotic activity. This report is at page 226 of FA/476/2019.

13. In the same compilation is an another report which the Complainant obtained from M/s Oncopath Labs on 23.10.2014 which also does not indicate any evidence of Mitiosis but it recommends excision.

14. The Complainant seems to have also dispatched the slide to M/s Tata Memorial Cancer Hospital, Mumbai and a report was tendered on 22.12.2014 which is at page 228 of the Complainants Appeal. According to the Complainant, this report does not indicate any malignancy. The Complainant seems to have approached one Dr. Handa through whom the slides were once again examined on 27.12.2014 and malignancy was confirmed. This document is at page 211 of FA/479/2019. It appears that another report was obtained from PGI Chandigarh on 03.01.2015 which is on the reference Dr. Handa by the same department, but by a different set of doctors. This report which is at page 229 of FA/476/2019 gives only a mild indication referring towards Mitiosis and again confirms the requirement of surgery.

15. The Complainant seems to have obtained another report from abroad namely M/s Pathology Consultancy Services, St. James Hospital Leeds, United Kingdom which also does not indicate any

malignancy but advises surgery. This report dated 11.10.2014 is at page 230 of FA/476/2019.

16. With all these documents, the **Complainant alleges that this entire procedure clearly smacks of a gross medical negligence at every stage**, both by those who conducted the pathological tests and the surgeons who did not take care to reconfirm the same and proceeded to perform the surgery.

17. The Complainant has also alleged consequential complications having arisen on account of an imperfect surgery causing nervous problems resulting in severe physical disabilities.

18. Accordingly the complaint was instituted on 16.01.2015. The complaint was entertained but notices were not issued initially and a direction was issued calling for a report for prima facie opinion about negligence. For this a request was made to the All India Institute of Medical Sciences where the matter was examined and a report was submitted to this Commission on 18.11.2015. This document is at page 1258 Volume V of FA/664/2019. It is relying on this report that notices were issued to the Hospital and the Doctors calling upon them to answer the complaint.

19. **Learned Counsel for the Opposite Parties** submits that this report was based on selective documents as neither the complainant provided all the documents, including the previous report which were concealed nor the full and complete facts were brought to the notice of AIIMS. Nonetheless, the report does not in any way confirm the Complainant's allegations.

20. It is urged that an affidavit of Dr. Brar was filed on 31.07.2017 before the State Commission which affidavit clearly corroborates the stand taken by the Opposite Parties/Appellants that the surgery had been performed after taking due caution and observing all precautions.

21. It seems that this Commission passed an order on 06.04.2022 requesting the All India Institute of Medical Sciences to submit a fresh report which was tendered on 02.06.2022. This report indicates that there was no evidence of Metastasis but the requirement of surgery has not been obviated.

22. It is broadly these ten reports and the inconsistencies therein that have been pointed out that needs to be considered.

23 Mr. Sharma urged that the Complainant has concealed material facts in the complaint itself and therefore the State Commission issued notices on the basis of incomplete information.

24. He then submits that the findings on consent by the State Commission are inferences drawn on its own imagination. He has invited the attention of the Bench to the findings recorded in para 95 to 106 of the Impugned Order.

25 It may be pointed out that the Learned Counsel has produced a certified copy of the affidavit of Dr. Brar. The said affidavit has been noticed in the paragraph 15 of the Impugned Order even though no findings are recorded in respect thereof. Nonetheless, the contention of the Learned Counsel is that Dr. Sumeet Jain was nowhere involved in the treatment of the Complainant nor did he perform the surgery.

26. He submits that the assumption of the Commission that the Opposite Parties had not provided the documents to the All India Institute of Medical Sciences is incorrect inasmuch as the first report of AIIMS that was obtained in 2015 by this Commission was at the preliminary pre admission stage when the Opposite Parties were not even put to notice as such those was no question of supplying documents then.

27 He then contends that insofar as the allegations made against the Opposite Parties about deterioration in the health of the Complainant resulting from nervous disorder are concerned, the same seems to have occurred or may have been caused after the Complainant had received treatment from other Hospitals including the surgery conducted at Johns Hopkins Hospital in the United States

28. He has then submitted that Sentinel Lymph Node investigation test was neither prevalent nor required when the surgery was undertaken as the neck and face surgeons did not prefer any such biopsy.

29. He then submitted that the disability certificate appended at page 817 dated 29.09.2017 is not in conformity with the medical records and is even otherwise erroneous as the calculations of the percentage seems to be on the basis of some formula which is not decipherable. He therefore submits that the disability certificate does not in any way reflect on the infirmities which are being pointed out by the Complainant. He has then urged that the reports regarding the nervous disorders impacting the eyes and other parts of the body may have occurred on account of the surgery performed at Johns Hopkins Hospital.

30. He then submits with the help of the observations made in the report regarding the eyes at page 822 of FA/476/2019 dated 25.06.2016 that the eyes had showed improvement. It is submitted that this report dated 25.06.2016 is after the Johns Hopkins surgery and it is quite possible that the infirmity or Epiphora might have occurred after the surgery at Johns Hopkins Hospital.

31. The Complainant, who is herself a doctor, proceeded to advance her submissions contradicting each of the arguments advanced by the Learned Counsel for the Hospital and the two surgeons Dr. Satish Jain and Dr. Sumeet Jain. She submitted that apart from the findings recorded in the Impugned Order and other issues which are recorded in detail, none of the submissions cannot be sustained with the approval in the report from the All India Institute of Medical Sciences on 02.06.2022.

32. However, her submissions need to be put in chronological order from the stage she having approached the surgeons to perform the surgery. She urged that Dr. Satish Jain is not an Oncologist Surgeon and he is a General Surgeon. She however approached Dr. Sumeet Jain who is a product of TATA Cancer Research and Hospital Centre and he was possessed of a qualification in Oncology. Looking to the qualifications and the paper published by Dr. Sumeet Jain, she in good faith contacted them as they were locally available and she was promised a successful surgery which was required to be performed. In order to confirm her faith in the doctors she on the basis of the pathological and histopathological reports, as well as the confirmatory report from Dayanand Medical College dated 02.08.2014 and 07.08.2014, she was under the impression that the pathological reports were made the basis of diagnosis, even though according to medical protocols the surgeons ought to have conducted advance tests in order to confirm the same. She however on her own had got the MRI done which was handed over to them.

33. She has invited the attention of the Bench to the reply affidavit filed by the Opposite Party No. 2 placed on record before the State Commission and contained in the paper book of FA/476/2019 from page 394 to 397. She points out that the Opposite Parties have admitted having seen the said MRI report and they have opined that the surgery was necessary after having taken notice of the pathological reports as well as the MRI which according to the said affidavit indicated a Stage 3 cancer

34. The Complainant submits that on the one hand the Opposite Parties have admitted and perused the MRI that was taken into consideration for proceeding with the surgery, and on the other hand the argument is being raised that the said MRI was not given. The MRI report does not indicate any adverse report or symptoms regarding Melanoma. Nonetheless, it is urged that the Opposite Parties themselves have taken it to be a report worth relying on for the surgery.

35. It is therefore submitted that these contradictory stand taken by the Opposite Parties itself demonstrate that they were negligent and were proceeding unmindfully.

36. As a corollary to this argument, the Complainant also submits that they proceeded with the surgery without their being any indication of the depth of the ulcers which are necessarily to be mentioned in the pathological or confirmatory reports. The said reports are totally absent and therefore the pathologists were clearly negligent in not indicating those markers which were necessary to draw the inference of the stage of cancer. This argument is being submitted contending that even the surgeons did not conduct any advance tests or seek any report with regard to the stage of the cancer. It is therefore submitted that the surgery proceeded without even noting as to what was the stage of the cancer and which by itself is a negligent conduct more so by persons claiming themselves to be Oncological Surgeons.

37 She then fortified her submissions by contending that neither the immunohistopathology report nor the other tests or any indication of the stage of cancer is mentioned in the discharge summary which is totally silent. It is urged that a discharge summary according to medical protocol has to contain the prognosis, the diagnosis, the treatment and the surgery notes as well as the conclusions. There are no surgery or operating notes mentioned therein and as a matter of fact it was after 19 months that when the matter proceeded before the State Commission that the operation notes were produced. It is submitted that the operation notes were not given to the Complainant and emerged only at the time of the assessment of the evidence before the State Commission.

38. She then contends that while performing the surgery the surgeons damaged her spinal accessory nerve as well as facial nerves to an extent that the Complainant has suffered permanent facial palsy and has also acquired a permanent disability in the right side of her shoulder. This is on account of the cranial nerve having being damaged and which stands confirmed by subsequent neurological assessment and nerve conduction studies. The said documents have also been referred to.

39. It has then been urged that the contention that the Complainant's claim is not founded on any basis of medical negligence is incorrect inasmuch as the Complainant after the surgery on 05.09.2014 got a PET scan conducted and the said scan report is categorically negative about any malignancy. Thus the surgery was a blind surgery that proceeded on the basis of gross incorrect pathological and confirmatory reports.

40. She then contends that in order to substantiate that she has suffered facial nerve disorder, five reports are available on record from Fortis Hospital, Ludhiana, Dayanand Medical College, Ludhiana, Post Graduate Institute, Chandigarh, SPS Apollo Hospital, Ludhiana and Mendanta Hospital. Out of these reports the other reports clearly demonstrate all the damages suffered in the eyes and the nose, and the lips that have been diagnosed long before the Complainant visited Johns Hopkins Hospital in USA. The report from various Hospitals dated 18.09.2014, from Dayanand Medical College on 09.10.2014, from the PGI, Chandigarh on 03.12.2014, and SPS Apollo immediately following thereafter, these four reports were all before the visit of the Complainant to the Johns Hopkins Hospital which was on 04.02.2015 (page 245 of the paper book). These documents have been filed from page 796 to page 820 of the paper book.

41. She has then contended that the report from the SRL Laboratory which is at page 252 dated 14.08.2014 categorically records that the tissues examined by them do not indicate any malignancy.

42 She has then urged that the World Health Organisation clarifies, which is at page 317, and clearly demonstrates that the diagnosis fell within the definition of benign disorder and which establishes that the Complainant was not suffering from any malignancy

43. She has then urged that the Opposite Parties committed negligence by not conducting Sentinel Lymph Node Biopsy which was available at the time of the surgery at various places throughout the country including Mumbai, Delhi, Varanasi and several other places. Had this been done, the same would have confirmed the pathological reports and an unnecessary surgery of the magnitude performed on the Complainant could have been very easily avoided.

44 She has then invited the attention of the Bench on the reports that were obtained by the State Commission in 2015 before issuing notice to contend that the said report was based on the four reports that had been tendered to it. Nonetheless with the subsequent reports from PGI as also the final report by the All India Institute of Medical Sciences that was summoned by this Commission clearly establish the fact that the pathological reports were all incorrect and without any basis and the surgery performed was a gross negligence causing irreparable damage to the Complainant whose sufferance cannot be compensated in simple terms and therefore the State Commission even though, has recorded all findings in her favour, yet the compensation awarded is inadequate. The mental trauma, the mental suffering, the physical pain and the lifelong deficiency that she has to face in society because of her facial deformities and physical infirmities need to be heavily compensated. She submits that her professional career was affected on account of these deformities and hence the damage should be compensated as claimed by her.

45 The Complainant has heavily relied on the report of All India Medical Sciences dated 02.06.2022 to substantiate all her submissions contending that all defences raised by the Appellant Opposite Parties stand negated with clear positive findings to the effect that the Complainant did not suffer from any malignancy thereby reflecting that the pathological reports were absolutely wrong and she has suffered damages, including nerve damage, which is evident from the report. She has pointed out that this Commission took pains to get the said report after orders were passed on 11.01.2022, 01.02.2022, 09.02.2022 and thereafter on 06.04.2022 and 22.04.2022.

46 She therefore submits that the final diagnosis by the All India Institute of Medical Sciences expert body leaves no room for doubt that the findings recorded by the State Commission do not suffer from any factual or legal infirmity.

47 She has also submitted that the consent obtained from the Complainant was not an informed consent as she had no knowledge nor was she informed of the complications and the risks that were likely to be caused due to the surgery that was to be performed on her. This lack of communication by the surgeons is absolutely vital and the defence set up by them is untenable.

48 She then pointed out that the defence of the surgeon Dr. Sumeet Jain that he was not present at the time of her treatment or performance of the surgery is a false stand taken inasmuch as the communications with him even post surgery and the messages as well as the directions by him leave no room for doubt that he was

very much involved and he had participated in the performance of the actual surgery along with his father Dr. Satish Jain. The contention therefore is that the entire defence set up is without any basis and it is now established beyond doubt that the Complainant has suffered on account of the gross negligence of all the Opposite Parties hence the appeals filed by them deserve to be dismissed and the appeal filed by the Complainant deserves to be allowed. She has rounded up her submissions by referring to the literature and the enclosure list in support of her contentions that substantiate her submissions.

49. The arguments could not conclude today as Learned Counsel for Dayanand Medical Institute, Mr. Sobti has sought an adjournment on account of the sudden demise of his spouse. It is only Mr. Sharma who has advanced his submissions for the Hospital and the surgeons which has been responded to by the Complainant in person.

50. The Dayanand Medical College are represented through learned counsel Mr. Khare and Ms. Namarata Chandorkar who pray that they may be permitted to advance the submissions to be conducted by Mr. Sobti on the next date. As the date is already fixed earlier, let the matter come up on 20.07.2024 (Saturday) at 10:30 AM.

35. Case was again heard on 20.07.2024 when further arguments were advanced as noted therein and are gainfully reproduced hereinunder:

1. The arguments were to be commenced by Mr. Sobti, learned Counsel for the Respondent No.5 to 8 in FA/476/2019 (Pathologists and the Principal of Dayanand Medical College, Ludhiana). Mr. Sobti, however, made a personal request that on account of the recent bereavement with the passing away of his spouse he may be excused from the hearing today and be permitted to advance his arguments on some other convenient date.
2. Faced with this, **the Complainant desired that she be permitted to further advance her submissions and conclude her arguments as it may not be possible for her to be physically on the next date of hearing** to which learned Counsel for the parties have no objection.
3. **Accordingly, in continuation of her arguments on 13.07.2024, she submitted that** before the State Commission, in the evidence of affidavit, she had categorically stated that there was no informed consent and communication with the Complainant regarding any possible and consequential risks involved in the surgery. She has produced a certified copy of the affidavit of evidence to substantiate her submissions.
4. It was pointed out by her that regarding the Nerve Conduct Study, she was examined at the Dayanand Medical College, Neurology Department and her disorders were noted which annexures have been pointed out. To the same effect, the examination and the diagnosis from the Post Graduate Institute Chandigarh and then from

Apollo Hospital have been read which are at pages 397, 402 & 405 of the said affidavit. It is therefore submitted that all these reports reflect that the diagnosis of nervous disorder was made much before the surgery that she availed of at Johns Hopkins Hospital, United States in February 2015. All these reports are of the year 2014 and therefore it is submitted that the contention on behalf of the Opposite Parties raising doubts about this disorder being caused by the surgery at Johns Hopkins Hospital is without any substance.

5. She has clarified that on the issue of margin of error in the performance of the Opposite Parties, there is no question of any margin as this is a case of a gross negligence of a totally wrong pathological report and a blind surgery. The error is from the first step till the last and therefore there is no margin available for any concession to the Opposite Parties.
6. Pointing out to the written synopsis filed on behalf of the pathologist and the Dayanand Medical College filed in FA/479/2019 at page 581, it is urged that the said written submission takes a stand which reflects as if the Dayanand Medical College did not release the Histopathology or the Immunohistochemistry Reports. The said recital in the written synopsis is at page 581 of FA/429/2019.
7. Pointing out to the findings recorded and the statements made, it is contended that the surgeons have gone to the extent of saying that the surgery was conducted on the basis of a report that was based on an incomplete specimen. It is submitted that the pathologists have contradicted this and the nature of the biopsy has been described as "Shave Biopsy". For this page 498 of the paper book of FA/476/2019 has been read.
8. It is next contended by her that it is claimed by the doctors and the pathologists as well as the medical college that all norms prescribed by the World Health Organisation and other authentic bodies are being observed as per their guidelines. Referring to the guidelines promulgated by the Royal College of Surgeons, United Kingdom, which according to the Complainant are a standard guideline that has been adopted and followed throughout the world, have been violated. She has referred to clause 3.1 and 5.2.1 of the said guidelines at page 278 and page 281 respectively to urge that these guidelines categorically require the measurement and size of the specimen that have to be examined for Biopsy. The specimens received must be measured with all three dimensions and all features that are being diagnostically important should be recorded. The maximum diameter and height of the Lesion must be recorded in milometers. The report from the Dayanand Medical College dated 02.08.2014 & 07.08.2014 nowhere records any such size or dimensions observed or recorded as per the said guidelines and hence negligence is evident.
9. It is then submitted that the specimen for Biopsy has been referred to as a Tiny Biopsy that has been referred to in the judgment of the State Commission at page 146. It is urged that the ISO Guidelines in this regard contained at page 369 clause 5.9.1(a) requires that if the quality of the sample received is unsuitable, the same should be indicated in the report. There was no such indication in the reports

that their specimen was tiny or inadequate nor any demand for a fresh specimen was made. It is therefore urged that the reports were absolutely unreliable and it is now established that they were tendered negligently.

10. The next infirmity pointed in the reports is non-recording of the stage of Cancer. For this the literature on record at page 282 (b) and page 290 has been read by the Complainant to point out that the pathological tests required mandatorily to mention the measurements including the thickness of Melanoma according to the Breslow Standards. Pointing out to the table at page 290, it is urged that no diagnostic tagging or coding of the Cancer was carried out nor is it mentioned in the reports. This therefore is yet another gross deficiency and the surgery was carried out with no diagnosis available.
11. The retention of the slides and its timeline according to ISO Guidelines, guideline no.5.4.7 has not been adhered to.
12. Apart from this, in spite of the fact that the guidelines require a double reporting in such cases at the behest of the pathologist themselves from an outside institution according to protocols, the same was not done and to the contrary the stand taken is that the Complainant should have got this examined. It is pointed out with the help of Annexure 46 at page 746 of the paper book that no double reporting was either attempted or got done to confirm the pathological reports.
13. The Complainant has then pointed out as per paragraph 60 of the order of the State Commission that there is a clear finding recorded about the manipulation attempted at the Post Graduate Institute, Chandigarh for obtaining a contrary report. While reading out the said paragraph, it is urged that the report which was given by the Chandigarh PGI on a review of the case confirmed the non-existence of malignancy. The other report relied on by the Counsel for the opposite Party was not a review report and was according to the Complainant sneaked out by manipulation as found by the State Commission. Hence the argument advanced that the PGI had also confirmed the existence of Melanoma is absolutely baseless and founded on a manipulated document.
14. It is then pointed out that the examination by the referral lab had to be checked by the Hospital that had referred the Biopsy for report. In the instant case, the Dayanand Medical College obtained a referral lab report from M/s SRL but neither it was confirmed or checked by it nor it was documented and therefore this was another violation of the ISO Guidelines 4.5.1 (page 245 of the paper book).
15. Over and above this, the slides kept lying with the referral lab from 13th August to 27th August for 20 days. This was yet another violation that has been taken into account by the State Commission and confirms the negligence on the part of the Opposite Parties. The story that the Complainant had taken it away hurriedly is without any basis.

16. It has then been pointed out that there is a standard performa to be filled up while reporting a Melanoma Biopsy. Reference has been made to Appendix D-I which is a format prescribed by the Royal College of Pathology which is at page 300 of the paper book. The list of information required under the columns has to be filled up in detail with each and every information with regard to the specimen received and the results found. No such performa was either filled up nor any information as required therein is contained in the reports. This was a clear violation of the guidelines and the performa referred to above. It is submitted that the guidelines of the World Health Organisation contained at page 318/322, United Kingdom Guidelines at page 308 and the National Health Guidelines as well as the ISO Standards at page 362 also make similar provisions to be followed while reporting a Biopsy. The contention is that none of these guidelines were followed and have been breached by the pathologists as well as the Hospital.
17. It is then urged that the diagnostic report that was received from the SR Laboratories by the Dayanand Medical College dated 12.08.2014 was straight away passed on to the Complainant without being accompanied by any recorded opinion of the pathologist on the said report. This violates the ISO Standards Guidelines no.5.6.4 (page 367). The contention is that once the report was received from a referral lab then it ought to have been forwarded along with its opinion thereon and the suggested line of action of which was never done by the pathologist. This again amounted to a negligence.
18. It is then urged that the markers which are stated to have been indicated in the IHC Report dated 07.08.2014 are not relevant for distinguishing between Cancer and Non-Cancer cells. The relevant markers are contained in a table at page 323 of the paper book and a perusal thereof would demonstrate that none of these markers are mentioned in the pathological reports. Consequently, this is another deficiency in the pathological reports of the Opposite Parties.
19. It is then submitted that strangely enough on the one hand the pathologists say that the reports tendered by them were not final which is contrary to their own stand as taken at page 369(d) of the Appeal. The contention is that the evidence led before the State Commission and the stand taken herein contradict each other. It is urged that if the report was not a final report then it should have clearly mentioned the same. There is no indication in the reports that they were interim or were subject to further confirmation. The stand therefore that the reports were not final is absolutely incorrect and false with a view to escape the liability regarding the lapse and deficiency committed by the Opposite Parties. The Complainant submits that if the reports were not final then the surgery ought not to have been performed.
20. It is then urged by her that no clinical history was taken by the pathologists and the guidelines contained in annexure 28 at page 307 were not followed. The same is the position with regard to clinical practice guidelines at page 362 about which a discussion has been made in the impugned order at page 144. The pathologists therefore

violated these guidelines as well before proceeding to issue the reports.

21. The Complainant has then invited the attention of the Bench to the three operation notes at page 438 of the paper book contend that the surgeons themselves have noted that there were no changes in the mole for which the surgery was planned to be carried out. In the absence of any such changes, it is urged that the surgery was not at all necessary. The same was confirmed when the report from Tata Memorial was received which is at page 228 of the paper book.
22. The Complainant therefore submitted that for all the aforesaid reasons the pathological reports cannot be relied on and ought not to have been relied on by the surgeons. Both of them negligently conducted themselves in a manner which is contrary to the discipline of medical practitioners and this fact now stands concluded with the two reports of the All India Institute of Medical Sciences, one tendered before that confirms the negligence of the surgeons and the other which was tendered on 02.06.2022 confirms the negligence on the part of the pathologist. The Complainant urged that in case any response is desirable she would join online if necessary to answer the submissions on behalf of the pathologists and the Medical College.
23. As noted above, Mr. Sobti had made a request for an adjournment and therefore let the matter be listed on Saturday, 31.08.2024 once again to proceed and conclude the matter.

36. On 31.08.2024, the arguments were recorded and the complainant was to appear in rejoinder. The order dated 31.08.2024 is extracted hereinunder:

These appeals came up for hearing on 08.08.2023, when upon a prima facie consideration of the dispute it was directed that the matter shall proceed and since an adjournment had been sought on behalf of the Hospital and the Doctors, who have filed FA/664/2019, the case was directed to come up on 13.07.2024.

The matter proceeded and the complainant who appeared in person had narrated the facts. Whereafter, Mr. Sharma, learned counsel for the Hospital and the Doctors also advanced his submissions. The complainant then narrated her part of the contentions in detail that was to be answered by the learned counsel for Dayanand Medical College. Mr. Sobti who sought an adjournment. Accordingly, the matter was posted for 20.07.2024.

On that day another request for adjournment was made by Mr. Sobti and accordingly as agreed between the parties, the complainant proceeded with her arguments and concluded the same with a request to respond to the submissions of the other side in rejoinder.

Mr. Sobti appearing on behalf of the Dayanand medical College and the Doctors with the help of his assistants and one of the doctors contended that the first document which needs to be

referred to is annexure P-27 at page 249 of FA/479/2019 filed by the Dayanand Medical College and others. This is the medical report of the Board constituted by the State Commission 16.04.2015, that gave its opinion at the stage when notices were not even issued to the Dayanand Medical College. This report was called for by the State Commission itself but the complainant had not disclosed the first PGI report that was concealed. According to Mr. Sobti reading of the said report of the Board dated 16.04.2015, does not even make out a prima facie case for entertaining the complaint. He submits that this report remained unchallenged. He then points out to the findings recorded in paragraph 60 of the impugned order of the State Commission to contend that if the entire exercise had indicated a serious doubt about the claim made and the evidence with regard to the pathological diagnosis, and the State Commission was of the opinion that there was some manipulations, then such an issue should not have been entertained in a summary jurisdiction and this was a fit case where in order to assess any evidence regarding manipulations or misrepresentation should have been gone into by a Civil Court.

He then pointed out to the opinion of the All India Institute of Medical Sciences dated 18.11.2015, which was asked for at the pre-notice stage and is placed at annexure P-24 at page 222-223 of the proceedings. It is pointed out that the said report was not based on the complete records as it was not received from the State Commission as recorded in the report itself. The opinion was again at the pre-notice stage on the basis of the material that was provided by the complainant, which again does not cast any doubt on the pathologist. He therefore submits even this evidence cannot hold the pathologist to be responsible in any way for giving an incorrect opinion as the opinion of AIIMS itself was based on half fed facts.

He then points out to the prescription of Dr. Ravindra Tah dated 28.07.2014, annexure P-1 page 186, indicating that there was a growth which had been excised and the same was sent for analysis to the Dayanand Medical College. He points out that the colour of the growth was recorded as reddish with a hollow and the duration was one year. The excision was to a limited margin whereafter the same material was examined by the pathologist and a report was tendered on 02.08.2014. **Mr. Sobti submits that this slide on the basis whereof the report of the pathologist from Dayanand Medical College was submitted has not been placed before the subsequent examining bodies at all.** He has pointed out to the receipts issued indicating that the examination was made by the pathologist at Dayanand Medical College for two of the marker tests. The rest of the markers tests were to be done for which the slides were sent to M/s. SRL Laboratories. For this he has invited the attention of the Bench to the document dated 04.08.2014 at page 191 of the paper book.

Mr. Sobti has advanced his submissions from this stage to vehemently urge that these **slides and blocks which were prepared and were returned back to the complainant on her written request** which she had made on 05.08.2014, and he has then taken Bench through the documents at pages 192, 193 and 195

of the paper book to substantiate his submissions. He submits that the slides were collected by one Mr. Harvinder on behalf of the M/s. SRL Laboratories. The contention is that the blocks and the slides were handed over, as is evident from the discharge register receipt referred to above and even assuming for the sake of arguments, though not admitting that they were given on 28.08.2014, yet **it was given back to the complainant which was not forwarded to AIIMS for any opinion. It is this slide which was withheld by the complainant in order to make out some case against the pathologist. He further submits that the slide having been collected by Mr. Harvinder was not dispatched and has not been examined by the AIIMS.** At this stage he has invited the attention of the Bench to paragraph 49 of the impugned order by the State Commission that the doubt expressed by the State Commission is contrary to the said evidence on record and if at all any evidence was required, this nature of examination can be made only by the Civil Court of competent jurisdiction and not in a summary jurisdiction exercised by the State Commission. The contention of Mr. Sobti is that the complainant being in possession of the slide and the blocks ought to have disclosed the very same slide, which was not done by her and hence any subsequent opinions relied on by the complainant cannot be given credit.

He submits that all this exercise had been undertaken and even assuming the contention of the complainant to have some substance, she herself being a doctor opted and consented for the surgery on 07.08.2014 itself. This was also supported by the Immunopathology report by the Dayanand Medical College, which is annexure P-9 at page 198. It is urged that the complainant has alleged she was taken into surgery without the marker reports. This argument contradicts her own consent and she having submitted herself to the surgery, which she did without even waiting for the report of the markers. Thus she cannot be heard to say that the Hospital and the surgeons had committed the surgery hastily.

It is in this background that Mr. Sobti then urged that there were serious doubts about the documents relied on by the complainant and then again an exercise was undertaken by this Commission on 11.01.2022, when the complainant was directed to produce all the slides as indicated in the said order for being examined once again by AIIMS. This was also followed by directions on 01.02.2022, as the slides had not been produced, and then on 09.02.2022 when the complainant admitted that she did not have the slide that was given by the Dayanand Medical College. Mr. Sobti submits that this admission itself demonstrates that the real slide which was sent by Dayanand Medical College was again not available and was not sent for any examination to the AIIMS. It is in this background that all the slides given by the complainant were collected and on 14.03.2022, orders were passed for sending all the slides to AIIMS.

He then contends that IA/2399/2022 dated 22.03.2022 was moved, at that stage by the answering respondents objecting to the incomplete status of slide and withholding of the same, which application remained pending. In the meantime, the report from AIIMS dated 01.06.2022 was received, which once again did not have the

occasion to view and assess the original slide that was given by the Dayanand Medical College.

During the course of the submissions, it was pointed out that a reply to the said objections had been filed by the complainant on 26.07.2026, which is on record. Thus, the contention of the complainant dated 14.03.2022 in her affidavit, the objections taken by the opposite parties through IA/2399/2022 and the reply thereto by the complainant on 26.07.2022 are on record.

Mr. Sobti submits that this issue pertaining to non-availability of the original slide or being withheld remained undisputed and in the meantime the report of AIIMS came without having an opportunity to go through the original slide, hence the medical opinion becomes seriously doubtful and he has invited the attention of the Bench to the written arguments dated 10.12.2021 para 13, 15 and 17 thereof.

The contention is that all these reports are post-surgery and in effect the complainant has attempted to get reports manufactured with the incomplete slides. Supplementing the arguments of Mr. Sobti, **the concerned doctor assisting him invited the attention of the Bench to annexure P-13 at page 205, which is a report dated 01.10.2014. He submits that after an examination, this report also advises a wider excision and therefore the distinction between the report of AIIMS dated 01.06.2022 is an opinion and such a difference of opinion cannot be in anyway said to be a negligence.**

He has further referred to **Rook's Textbook appended as annexure P-23 page 218 to contend that even assuming that the diagnosis was Spitz Naeveus, the same was also recommended to be treated as a Melanoma, even if it was a case of unknown malignancy.** He therefore submits that the standard textbooks also support the diagnosis made by the pathologist as even Spitz Naeveus is referred as something that should be treated as a Melanoma. He has then referred to the report of the PGI dated 27.12.2014 appended as annexure P-18 on page 211. The said report according to him also indicates that the tumour was Melanoma as mentioned in the report dated 16.04.2015.

It was then pointed out that the **PGI report dated 03.01.2015 at page 213 also indicates a suggestion of wide local excision for Spitz Naeveus, the clinical history and the morphology indicated therein therefore also suggested history.**

The article appended as P-26 at page 240 was then read out to urge that even if it is benign (page 234 & 244), then too even **excision is recommended.** He has then pointed out to annexure P-12 and P-17, the SRL biopsy paraffin block report at page 204 dated 10.09.2014 and to the Tata Memorial Report at page 210.

With the aid of the description at page 209 about Dysplastic Naeveus, it is urged that the **same may not be benign and can progress towards the malignancy.** Reference to page 119 about the finding of the State Commission has also been made and it is urged that at page 120 there is an incorrect recital and 'not cancer'. It

is urged that the AIIMS board has nowhere said this and consequently the complainants claim is unfounded.

It has then been pointed out that the risk of skin cancer has been observed in transplant recipient patients like the complainant, who has had a kidney transplant. For this reference has been made to annexure P-23 at page 221 of the paper book.

Mr. Sobti has then pointed out the report of the Dayanand Medical College, annexure P-2 at page 187 that the markers were referred to therein, which have been advised as per recommendations contained in the textbooks at page 200. Thus, there was no deficiency in indicating the markers which were required to be assessed. He then submits that annexure P-9 at page 198 indicates that the diagnosis is based on this finding that has been confirmed by AIIMS on the basis of Histo-morphological features. He then points out with the aid of page 117 that there are **three pathological and five reports in all** and has pointed out towards the page 117 of the paper book.

The submission is that the block was not available, as is evident from page 104 and therefore the thickness as alleged does not seem to have been reported. **It is reiterated that one slide was with the complainant and the block was with M/s. SRL, hence there was no deficiency in the report.**

It is then urged that the complainant never came post-surgery and the issue of TNM, which has been raised is incorrect and not based on any scientific findings.

Mr. Sobti then urged that all the reports do indicate that the **complainant required an excision**. The State Commission itself acted as an expert, which it could not have done and has arrived at inferences and conclusions particularly in paragraph 43 and paragraph 60, which can only be done by experts and not by an adjudicatory forum, in as much as the same involved an assessment of **medical records and not judicial approximation**. Conclusions have been arrived at **without cross examination of any of the pathologists** and consequently the conclusions drawn are erroneous.

A compilation of case laws has been handed down by the learned counsel on various issues which is to the following effect:

- a. C.P. Sreekumar (Dr.) Vs. S. Ramanujam, 2009 (4) CLT
- b. Dalip Singh Vs. State of Uttar Pradesh and Ors., 2016 (1) C.P.R. 437
- c. Kusum Sharma and Ors. Vs. Batra Hospital and Medical Research Centre and Ors. 2010 (2) CLT
- d. Mohinder Singh and Ors. Vs. Paramjit Singh and Ors. 2016 (1)L.A.R. 328
- e. Sanjay Pandurang Kalate Vs. Vistra ITCL (India) Limited & Ors. (2024)3 SCC 27
- f. Vinod Jain Vs. Santokba Durlabhji Memorial Hospital and Anr. II (2019) CPJ 99 (SC)

Learned counsel has then relied on certain medical literature to support his submissions, which is to the following effect:

- a. Article titled "Kamino Bodies" published in the **Journal of Oral and Maxillofacial Pathology** Volume 23, Issue 1 (January-April 2019).
- b. Article titled "Patient Age in Spitz Nevus and Malignant Melanoma" published in **American Journal for Clinical Pathology**, 2004 Volume 121, Pages 872-877
- c. Article titled "Melanoma: Staging and Follow-up" published in the **Dermatol Practical and Conceptual**, 2021; 11 (S1): e2021162S

Mr. Sobti has advanced his submissions at length and Mr. Sharma, learned counsel for the Hospital and the Doctors has also concluded his arguments. Thereafter, since no time is left and the complainant was to answer in rejoinder, the matter shall come up again on the date fixed.

Let the matter be listed on 07.12.2024.

37. However, on the administrative side several orders were received by this Commission from the Apex Court as well as different High Courts observing that complaints should be heard by Benches of 2 Members and consequently, work was again reallocated and all these appeals were directed to be listed before the Bench that was reconstituted keeping in view the observations made in the judgments of the Apex Court and the High Courts regarding the Coram of sitting. The order passed on 07.12.2024 is extracted hereinunder:

The complainant-appellant has joined online and so has Mr.B.B. Singh Sobti, learned Counsel for the Dayanand Medical College. Mr. Gola is also present online for the insurance company.

All other Counsels are present physically. The matter had to proceed as all the matters had been heard earlier, but in view of the recent reallocation of work through Benches, the case has to be placed before the Bench of two Members having jurisdiction in the matter. It would therefore be appropriate that this case is listed before the concerned Bench including the President of the Commission who has already heard the matter on earlier occasions on a working day at 2 PM.

As agreed between the parties, let the matter be listed before the Bench No.1 on 18.02.2025 at 2 PM. In the event the hearing does not conclude on the said date, it shall continue on the next date i.e.

19.02.2025. Learned Counsel for all the parties are therefore requested to organize their itinerary and arguments accordingly.

38. This is how the matter once again was argued in person by Dr. Kanwalpreet Kaur, the complainant on 19.02.2025 when the following order was passed :

The matter was heard at length yesterday and once again today. The complainant has advanced her submissions in rejoinder taking us through various documents. The arguments of Mr. Sharma could not commence today. Mr. Sobti also seeks accommodation for 15 minutes to advance his submissions. As agreed between the parties, let the matter come up once again on 13.03.2025.

39. Thus, the case was reheard on 13.03.2025 with the learned counsel for the OPs concluding their submissions and then again matter was finally heard on 19.05.2025 when the complainant also concluded the arguments with her rejoinder to the submissions made by Mr. Sobti for Dayanand Medical College and the Doctors and Mr. K. G. Sharma, who had advanced his submissions on behalf of Mediways Hospital and Dr. Satish Jain and Mr. Sumeet Jain. Learned counsel for the Insurance Companies were also heard. Learned counsel for all the parties have filed their respective written submissions as well and citations have once again been tendered by Mr. Jain, learned counsel for the Appellant - Kanwalpreet Kaur, which are mentioned below:

- a. Ravi Raj Vs. Fortis Healthcare – CC No. 479 of 2017 NCDRC
- b. Balram Prasad Vs. Kunal Saha (2014) 1 SCC 384
- c. Ashish Kumar Chauhan Vs. Indian Army (2023) 15 SCC 152
- d. V. krishnakumar Vs. State of Tamil Nadu (2015) 9 SCC 388
- e. X V Bhatia Global and Endosurgery Institute 2023 SCC Online NCDRC 212

- f. Reba Modak Vs. Sankara Nethralaya 2022 SCC Online NCDRC 528
- g. Maharaja Agrasen Hospital Vs. Rishabh Sharma (2020) 6 SCC 501
- h. Jyoti Devi Vs. Suket Hospital (2024) 8 SCC 655
- i. Atanu Dutta Vs. Mool Chand Khairati Ram Hospital and Ayurvedic Research Institute 2022 SCC Online NCDRC 889
- j. Vinay Srivastava Vs. Dr. P.S. Hardia 2013 SCC Online NCDRC 4
- k. Sitaram Bhartia Institute of Science and Research Vs. Vidya Bhushan Jain 2017 SCC Online NCDRC 973
- l. Spring Meadows Hospital Vs. Harjol Ahluwalia (1998) 4 SCC 39
- m. Nizam's Institute of Medical Sciences Vs. Prasanth S Dhanaka (2009) 6 SCC 1
- n. Malay Kumar Ganguly Vs. Dr. Sukumar Mukherjee (2009) 9 SCC 221
- o. Laxman Balkrishna Joshi (Dr.) Vs. Dr. Trimbak Bapu Godbole 1968 SCC Online SC 260
- p. Indu Sharma (Dr.) Vs. Indraprastha Apollo Hospital 2015 SCC Online NCDRC 11
- q. Chandigarh Clinical Laboratory Vs. Jagjeet Kaur NCDRC 2007 Manu/CF/0245/2007
- r. Samira Kohli Vs. Dr. Prabha Manchanda (2008) 2 SCC 1

40. The State Commission has dealt with the issues in two parts, the first being the contentions regarding the allegations of deficiency on the reports of the pathological tests rendered by the Dayanand Medical College and its doctors. The contentions have been noted on behalf of the complainant from paragraph 20 to 33 of the impugned order. We find that the State Commission has taken up the issue along with the negligence alleged against the surgeons as well alleging that the surgery was conducted in haste without assessing the pathological reports or seeking confirmation in respect thereof as per protocol.

The same has been contested by the pathologists and Dayanand Medical College and their contentions have been noted from paragraph 34 to 46 of the impugned order. The State Commission then proceeds to analyze the contentions and the evidence and recorded its opinion from paragraph 47 onwards holding the pathologists, including the Dayanand Medical College, opposite parties no. 1 and 5 to 8, liable for having provided an incomplete report and a wrong diagnosis with the conclusions recorded in paragraph 63 of the impugned order.

41. Regarding the surgery and the deficiencies alleged against the opposite parties no. 2, 3 and 4, who are the appellants in First Appeal No. 664 of 2019, the State Commission noted the submissions on behalf of the complainant from paragraph 64 onwards that has been responded to by the learned counsel for the said opposite parties from paragraph 82 to 92 of the impugned order. After having noted the arguments and the evidence, analysis and findings by the State Commission have been recorded commencing from paragraph 93 to 123 of the order and then recorded its conclusions in paragraph 124 to 126 thereof holding the pathologists as well as the surgeons to be medically negligent that was proved by the complainant.

42. The State Commission then proceeded to assess the quantum of compensation that has been discussed from paragraph 127 to 139 thereof and thereafter the conclusions and the relief granted have been recorded in paragraph 140.

43. It is the said layout of the impugned order that has to be proceeded with keeping in view the submissions that have been raised on behalf of the Judgment Debtors in their evidence in the respective appeals and also the issue of quantum, the enhancement whereof has been sought by the complainant in her appeal.

44. As noted above, the findings recorded by the State Commission are in two parts. The first is in respect of pathological tests that were carried out and the deficiency alleged therein. The State Commission has assessed the evidence in paragraphs 49 to 53 and then recorded its findings in paragraph 54 to 63. The same are extracted herein under:

49. *It is relevant to mention that the complainant took the report of cancer on 04.08.2014; which advised for performance of four markers. Thus, the complainant deposited the requisite charges for the same on the same day, vide receipt Annexure A-3. On 05.08.2014, she moved a written application to the Head of Department of Pathology, DMC with a request to give her the block and slide; who allowed the issuance of block and slide to her. However, the Technician-in-charge, DMC told the complainant that the block has already been dispatched to Mumbai one day before. This fact stands proved from the date of "Sample Drawn on" mentioned in Ex.C-19. The plea of the Pathologists that complainant was given the block and slide on 05.08.2014 on her application cannot be believed when the sample of the same was already drawn on 4th August by SRL Lab. Pathologists have placed on record a hand written record of dispatching the block on 05.08.2014, to which no authenticity can be attached. To the contrary, the complainant has put up a typed report obtained from SRL lab itself, which shows the drawn date of block. Opposite parties No.1 and 5 to 8 furnished different reason for not providing with tumour features has been given. They pleaded that the complainant had taken the block and slides away from them on 05.08.2014 and elsewhere the block and slides were shown or sent is not known to them and due to non-availability of block with them, they could not give these features. Their stand is that the surgery of the complainant was not conducted only on the basis of their report because she took the entire material*

of block and slides from them so that she could take second opinion from elsewhere. When the complainant pointed out this major fact of block being sent to SRL Lab, Mumbai, to opposite parties No.1 and 5 to 8, then they came up with a third concocted story for not providing the tumour features stating that Mumbai Lab and she resubmitted the block immediately to them. Thus, they have cooked up the story, stating that the pathologists did not have the block and slide with them, else they would have provided with stage and tumour features. The complainant proved that both these things were done on 04.08.2014, because she wanted to justify that when she came on 05.08.2014 and wrote the application for block and deposited charges for it, she did not get the block as it was delivered to SRL Lab Collecting Centre on 04.08.2014. The stand of the DMC Pathologists is that these 2 things were done on 05.08.2014, as they wanted to justify that complainant came on 05.08.2014 and after she wrote application and deposited charges for supplying the material, she was given block and slide and she simultaneously resubmitted it. The SRL Lab. Report of markers, Ex.C-19, clearly proves that the block was taken/Drawn on 04.08.2014 by SRL Lab. The receipt, A-3, issued by DMC Hospital for the charges deposited for markers is also dated 04.08.2014. In fact the complainant did not get any block or slide on 05.08.2014. The hand written application of complainant is dated 05.08.2014 asking for block and slide. In registers, Ex.R-5/5 and Ex.R-5/6, they have themselves written that block was taken by technician of SRL Lab. The complainant in fact never got the block and slide from pathologist till 28.08.2014. They were always having 3 slides with them (1 main slide which they themselves made from block and 2 slides which they made for IHC markers). These 3 slides were more than enough to narrate about the stage and features of cancer, which DMC pathologists never performed. They should, otherwise also, have retained the photographs/images of the same for further reference.

50. Thus, it stands proved that the complainant never got the block and slide from the pathologist. It is the categorical averment of the complainant that since the block was not issued to her, so she met Dr. Neena Sood, Head of the Department of Pathology, DMC to confirm the diagnosis of cancer, who told that she was 100% sure of the diagnosis and the complainant should worry about the spread of cancer in her body. Immediately on 05.08.2014, the complainant got MRI done for Head and Neck from Fortis Hospital, Ludhiana. The MRI report, Ex.C-25, was totally negative for the alleged cancer and it was opined therein

"No significant abnormality seen and early spinal spondylosis". On the basis of said report, Ex.C-1, issued by Pathologists of DMC, the complainant consulted for possible surgery in Mediways Hospital by Dr. Sumeet Jain, along with his father, Dr. Satish Jain and others. They, without confirming the melanoma and awaiting the reports of other markers, performed extensive surgery. Major part of the cheek and lymph nodes of the neck were taken out by way of neck dissection during the surgery and the complainant was discharged from the said hospital on 11.08.2014. After the surgery, all the tissues specimens were sent to Dr. Anita Borges of SRL Lab. Mumbai; who vide report Ex.C-26, reported that the entire tissues of the cheek and neck were free from tumour. The said report was shown to Dr. Sumeet Jain and Dr. Satish Jain; which was negative for tumour. It is a matter of negligence that the block of the patient, who was diagnosed with cancer, was lying in SRL Lab Ludhiana from 13.08.2014 till 27.08.2014 for about 15 days and nothing was done to ascertain the features of tumour even if the surgery was done. Later on, the complainant got the block of initial specimen from the DMC on 28.08.2014 and sent the blocks to the various labs, as detailed in facts. The said renowned Labs., vide reports Ex C-3 to Ex.C-7 clearly stated that the complainant was never suffering from skin cancer. Even the PET Scan/CT Report, Ex.C-27, done after surgery was also negative for cancer. Thus, it is clear that the Pathologists of DMC gave wrong report, Ex.C-1, stating that the complainant was suffering from malignant melanoma on her right cheek. On the basis of said wrong report of the pathologists only, an extensive surgery was performed by the surgeons; as a result of which the face of complainant has been paralysed/disabled for her entire life, as a result of which she has been prevented of the natural movements of entire face and right shoulder. As per Disability Certificate, Annexure A-1, issued by the Medical Board of PGI, Chandigarh, the complainant has suffered multiple disabilities. The permanent physical impairment for Face (Facial Palsy) and Right Upper Limb Weakness (Right Shoulder and Arm) has been quantified to be 46% only. Thus, the final report of the PGI, Ex.C-6/2, authenticated the reports, Ex.C-3 to Ex.C-7, in which it was diagnosed that it was not cancer. The report of AIIMS, Ex.C-28, also nowhere mentions that the complainant had cancer. It rather states that it is a rare skin condition and none of the Labs reported it as clear-cut case of Malignant Melanoma.

51. The complainant met Dr. Harpreet Kaur, a Pathologist in DMC, on

26.11.2014 approximately 4 months after her surgery, who admitted their only basis for diagnosis of cancer was the presence of atypia in the biopsy and nothing else. Atypia is also present in ageing cells, infection etc. Reference to the complainant's conversation with Dr. Harpreet Kaur was made. Transcript of talk with Dr. Harpreet is attached as Ex.C-20 along with the audio conversation, wherein the complainant had enquired from her why she did not give important tumour features. She replied as follows:

1. Biopsy was small,
2. Complainant should have come herself and asked for tumour features,
3. That the surgeon should have come and asked for thickness and how he performed the surgery without knowing it.

It is clearly indicated from the record that the Pathologists could not give tumour features or stage of cancer before surgery. They also did not give the stage and depth after the surgery of complainant. Block was received by them on 27.08.2014 from SRL Lab. Ludhiana, as according to the register record of SRL Lab annexed as Ex.C-77; which was delivered to the complainant on the next day i.e. 28.08.2014, as is evident from the register record of DMC hospital Ex.C-23; which shows delivery of one block and one slide on 28.08.2014. The block was given to her by DMC pathologists in a carefree manner. Reporting for all skin cancers is same irrespective of the type of skin cancer. However, their initial report of cancer, Ex.C-1, never showed any differential diagnosis of squamous cell or basal cell cancer and it stated only about melanoma cancer.

52. Still further, in the affidavit of Dr. Neena Sood (Professor & Head, Department of Pathology, DMC, Ludhiana) dated 07.04.2017, Ex.R-5/A, she claimed that they could not list the biopsy according to the standard protocol due to unavailability of block and slide with them. Later on, opposite parties No.1 and 5 to 8 alleged that the final histopathology of the specimen could not be given according the UK guidelines for listing of standard biopsy. There are three main standards of reporting a biopsy of skin cancer such as, a) Histopathological diagnosis; b) Clinical diagnosis; and c) Staging of cancer. Standard reporting of Melanoma skin biopsy has been clearly mentioned in the text book titled as "Royal College of Pathologists" - Standard Data Set. None of the above finds any mention in report of DMC dated 02.08.2014, Ex.C-1. The site of biopsy, size or

dimensions of biopsy in mm, type of biopsy and whether full or half is not mentioned in the report, Ex.C-1. As per Guideline 3.1 of Royal College of Pathologists, size of specimen received must be measured. As per Guideline 5.1, the site of origin and type of specimen are core clinical items for the pathology report. The 3 dimensional size of specimen and the maximum diameter and height of all the lesions must be recorded in mm. When the complainant contacted Dr. Harpreet Kaur after 4 months of surgery, she asked her that on what basis they diagnosed cancer in her, Dr. Harpreet replied that they saw the sole feature of Atypia in the complainant's biopsy. This can be proved from Ex.C-20, the transcript of talk with Dr. Harpreet. Atypia is not a sign of cancer. However, Atypia can be seen in ageing cells, inflammation and infection. Reference in this regard has also been made to Ex.C-21 and C-22.

53. No history of complainant was taken to make the clinical diagnosis of cancer. The literature 'Clinical Practice Guidelines – "The Management of Cutaneous Melanoma" -13 provides as follows:

"The history of change in a melanoma is usually measured in months. A very short history suggests haemorrhage into the skin or inflammation, while a very long history suggests a benign lesion".

For diagnosing melanoma, patient should present a history of change in size, shape and colour of growth, as per the golden rule of ABCDE (Asymmetry, Border irregularity, Color changes, Diameter changes and evolution of growth, as per the textbooks of pathology, Ex.C-12 and Ex.C-16. Opposite parties No.1 and 5 to 8 submitted that Dr. Tah, Plastic Surgeon, removed the lesion and sent the history along with the specimen but in the brief note given by the doctor, Ex.C-15, he has just written the duration of lesion and its colour. There is no mention about any changes seen in melanoma growth or whether it was increasing in size, shape, colour, ulceration or bleeding. The Pathologists of DMC diagnosed it to be cancer and they were duty bound to take the relevant history by making a clinical diagnosis of cancer, which they failed to perform while giving diagnosis of cancer, vide report, Ex.C-1.

54. DMC pathologists, in their report, Ex.C-1, gave a 4 line presentation of cancer, which is not acceptable according to the standard guidelines for reporting melanoma given by Royal College of pathologists, Ex.C-86, UK Guidelines, Ex.C-16 and WHO Guidelines Ex.C-11. No doubt, the Pathologists claimed that sometimes it is difficult to differentiate between cancerous and non-

cancerous lesions. However, this difficulty was never expressed by them while giving diagnosis of cancer. In this regard, the text book "Spitz Nevus and Atypical Apitzoid Neopalsm" Ex C-10, clearly provides as under:

"It is wise to admit the uncertainty and provide a differential diagnosis and micro-staging attributes that would apply if the lesion were interpreted as a melanoma"

55. Further in guidelines titled as BRISTOL CELLULAR PATHOLOHGY FORUM" under head "policy of double reporting" is defined as under:

Double reporting is defined as a form of secondary review whereby a biopsy diagnosed as malignant by one pathologist is reassessed by second pathologist.

So, in cases of diagnosis of malignant melanoma, it is mandated by Royal College of Pathologists to take second opinion as a guideline for pathologist that it is their duty to take second opinion. However, the pathologists in this case failed to take second opinion before giving their report. The Pathologists pleaded that the block was very small and only one slide was made from it. However, it has been proved on record that out of small block, multiple slides can be made. Dr. Harpreet herself submitted that multiple sections cut from the block can be taken with the help of knife. The DMC pathologists had cut two sections from the block for performing markers at DMC. Thereafter, the same block was used by SRL Mumbai for making slides for markers. Later on, the said block was sent to 2 more places i.e. Dr. Anita Borges in Mumbai and to Dr. Prashant Jani from Canada, who also cut slides from the same block, as is evident from the reports Ex.C-3 and Ex.C-4. Thus, it stands proved that the block was sufficient enough that 7-8 slides were made from the same block. The Pathologists further pleaded that Biopsy specimen was very tiny. However, this fact does not find any mention in their biopsy report and IHC Report. Moreover, all the five national and international renowned labs never mentioned that the specimen was small. Even if it is admitted that it was a small specimen for pathological report, they could have asked the complainant to give more tissue from her face. The Pathologists could also have requested Dr. Tah to take a repeat biopsy, which they never did. Dr. Harpreet admitted that when specimen comes to them, they do the grossing of the specimen. They see the length and

breadth of surface and measure it. She also stated that biopsy was of .6 x .4 x .4 cm. However, we find that the alleged grossing of the size of biopsy finds no mention in report Ex.C-1 nor pleaded in the reply.

56.Dr. Harpreet stated during arguments that the audio recording is edited and tampered by the complainant, as she has concealed the part where she is telling Dr. Harpreet Kaur that she is wife of renowned Dermatologist, so she should give her ₹50 lac. However, Dr. Harpreet failed to tell that which part of the audio recording is morphed. Moreover, this fact of demanding ₹50 lakh by the complainant is not mentioned in the reply of opposite parties No.1 and 5 to 8.

57.Pathologists did no conduct appropriate histopathological diagnosis to list proper features. They made no clinical diagnosis. They have not produced any record in this respect. They never did any prognostic markers, which their own textbooks recommend to differentiate between melanoma cancer and ASN. Cheek tissue was completely negative for cancer in the complainant. Had the ASN being malignant, it would definitely spread to the nearest node at least in the whole one year of its sitting on face. Whether an ASN lesion is benign or malignant depends on several Histopathological criteria which are presence of ulceration, large size, asymmetry, deep extensions, and brisk mitotic activity. According to these features, ASN can be graded as high risk or low risk. A progressively greater score will indicate risk of metastasis. The same has been described in the article, Ex.C-10. In fact, no such features were present in complainant. It never showed any changes or increase in diameter or ulcerated. It remained consistent. Even the entire tissue taken out from complainant's cheek was negative for cancer. This proves that AST in patient was benign AST. An AST which has malignant behaviour will always have worst histopathological criteria like greater diameter and ulceration. It will always spread to nearest nodes and the sentinel lymph node is mostly positive in malignant AST. It is also stated in the article, Ex.C-10, under the head 'Ancillary Studies". There are certain immunohistochemical markers like p 53; fatty acid synthase; D133 etc. which the pathologists use to differentiate between spitz nevus, ASN and melanoma cancer.

58.Another important aspect of the matter is that the Pathologists never considered the drugs being taken by the complainant and their dosage, while giving diagnosis of cancer. To the contrary, they have raised strong defence of

the complainant being immuno-compromised and being at increased risk of cancer. Immune- suppression is an independent risk of malignant melanoma, and the incidence of cancer is proportional to the level of immunosuppression. Immunosuppressive therapies lead to more progressive course of malignant disease and poor outcome. On the other hand, Dr. Harpreet Kaur and Dr. Vikram Narang, during arguments submitted that histopathology is the golden standard and backbone of their diagnosis making and the facts of person being immune-compromised or immune-competent does not affect their diagnosis. It is relevant to mention that Melanoma will not keep sitting on any human beings face for a year with no changes, especially in case of an immunosuppressant person. Melanoma is known to be a very aggressive cancer, which spreads very fast with very less survival rates. Even if it is localized, it has 100% relapse rates within two years of its removal. Patient has to be given radiotherapy. The mole on the face of the complainant never showed any changes, as is evident from Tata Memorial Hospital report Ex. C-5, which shows that it was a pinkish papule of 5 mm diameter with regular borders of one-year duration. It is also evident from the history taken by surgeon before doing the surgery that mole showed no changes in one year duration. About MRI being negative; pathologists also stated that it will not pick cancer in initial stages. However, the histopathological report will always show cancer, along with its Breslow thickness and stage even if the cancer is in early stage. AIIMS board also stated that it was a rare skin condition and not cancer. Moreover, it is clear from the pathology record that they never recorded and enquired from the complainant, as to which drugs she was taking for immune- suppression. Even they did not have any knowledge about the doses of these drugs being taken by the complainant for immune- suppression, as different drugs have different levels of immune-suppression. If they had cared or enquired for immune-suppression, they should have definitely recorded the medicines and their dosage taken by the patient in their diagnosis. It is matter of record that the complainant is on two drugs namely Tacrolimus and Mycophenolate Mofetil. In fact, malignant melanoma is disease of white people and has rare prevalence in Indian conditions. Whatever studies the pathologists and surgeons had quoted, are from the research done in USA and Europe. Thus, the Pathologists had failed to produce any evidence on record about the relationship of immune-suppression and malignant melanoma in Indian population. They had not provided any research done in India to prove that the patient, taking tacrolimus and mycophenolate drug, lands in Malignant Melanoma. Since the appearance of

the lesion on complainant's check for 1 year till the biopsy was done, the mole never showed any progressive outcome or changes. Thus, the patient being immune-compromised does not affect the diagnosis. In this respect, we are fortified by literature produced by the complainant titled as "Tacrolimus (Pan Graf) as de Novo Therapy in Renal Transplant Recipients in India" which provides as under:

"In conclusion, Tacrolimus is a safe and effective immune-suppressant in living related renal transplantation. It provides excellent graft and patient survival and is associated with a low incidence of acute rejection".

59. As per report dated 15.12.2014, Ex.C-6/1, the slide was of poor technical quality and the diagnosis is mentioned as:

'Skin (Cheek, Slide for review) – Compound Nevus"

Earlier, the complainant also approached PGI on 13.12.2014 and vide report, Ex.C6/2, the diagnosis was as under:

"Face (Slide for review) – Melanoma, malignant, NOS see above".

In the remarks column, the complainant was asked to provide the blocks to ascertain the exact Clark's level and Breslow's thickness. She further approached PGI on 03.01.2015 and as per report dated 03.01.2015, Ex.C-6, the diagnosis was as under:

Cheek:- Naevus, NOS Spitz."

60. It is the specific case of the complainant that Dr. Uma of PGI discussed the whole case with the complainant and took history of the lesion. After taking complainant's history and information of the lesion, she said that she would give the final report, after reviewing the slides with clinical history back up. As already mentioned above, she clearly mentioned on the report, Ex.C-6/2, that it is a review case. The previous 2 reports state that the complainant did not have any cancer. Thus, the allegation that the complainant concealed the report is wrong. In fact, the DMC pathologists furnished an incomplete report in the middle of an ongoing investigation and manipulated and projected it as a true copy, whereas in the original copy, Ex. C-6/2, it has been mentioned by PGI that it is a "review case". The copy provided by the DMC pathologists bears the signature of some other doctor than on the original true copy of the complainant. The report of the DMC pathologists is Ex.C-6/3. The

complainant's copy states that it is a review case and bears the signature of other doctor. Thus, the final report of the PGI is in agreement with the other 4 reports, in which the leading pathologists have diagnosed it as non-cancer. Rather, DMC pathologists and opposite parties No.2 & 3 took out an incomplete document in an ongoing investigation and changed the whole picture, by manipulation. The surgery of the complainant was done on the basis of DMC report and not of PGI report. If DMC pathologists are alleging that their findings are similar to PGI, then they must prove their diagnosis of Melanoma Cancer, as this cancer will definitely carry a certain stage, thickness and depth. These features can only determine the entire surgical management and the treatment of the patient as well. Their report, Ex C-1, gives a benign presentation of disease like the other reports got done from 5 renowned labs. Thus, PGI diagnosed the lesion as 'Spitz Nevus'. In article, Ex.C-10, titled as "Spitz Nevus and Atypical Spitzoid Neoplasm" at Page 165, definition of "Spitz Nevus" is given as under:

"Spitz nevi are benign melanocytic nevi composed of large epithelioid, oval, or spindled melanocytes arranged in fascicles".

Benign means non-cancerous. 'Spitz Nevi' is not a cancer or malignant lesion. Further "Spitz nevus" is classified as 'Benign (Non-Cancerous) Melanocytic tumors' in Book by Phillip, Edition 2006, Ex.C-11, titled as "World Health Organization Classification of Tumours-Pathology and Genetics of Skin Tumours". As per definition of "Spitz Naevus" given below, it is non-cancerous:-

"Spitz naevus is a benign proliferation of large spindled, oval or large round (epithelioid) melanocytes that begins in the epidermis, and evolves into compound or intradermal stages. This distinguishes it from some forms of blue naevus, in which the lesion is wholly intradermal from outset."

61. The Hon'ble National Commission in New Delhi in **Chandigarh Clinical Laboratory v. Jagjeet Kaur**, IV (2007) CPJ 157 (N.C.) held the petitioner responsible for giving wrong test report of the respondent. In Para Nos.4 & 5, it was held as follows:

4. We have no doubt that the petitioner is a qualified pathologist but the 'duty of care', required in such case to give a correct finding, which was not given in this

case, is a clear instance of medical negligence on the part of the petitioner.

5. The negligence stands proven in this case by the admitted fact that the petitioner gave the report of blood group of the complainant belonging to AB+ whereas in fact it was AB(-) which has not been disputed by the petitioner. Whether harm came to the patient or not would not be a criteria. It is the failure on the part of the petitioner to take due care to return a correct finding, that is at the heart of issue and in which the petitioner completely failed."

62. Likewise, Jharkhand State Consumer Disputes Redressal Commission, Ranchi in case Jagdish Prashad Singh v. Dr. A.K. Chatterjee First Appeal No.583 of 2007, decided on 23.10.2008, relying upon the above cited judgment of the Hon'ble National Commission held the pathologist responsible for giving incorrect test report and directed him to pay compensation on that count.

63. In view of our above discussion as well as in view of the ratio of the above cited authorities, it is clearly evident that opposite parties No.1 and 5 to 8 issued an incomplete report during ongoing investigation, as they failed to list any sign, symptoms or tumour features. They could not provide any clinical diagnosis and histopathological tumour features as well as the stage of cancer; which are the basic and characteristic signs of defining a malignancy. The report given by DMC, Ex.C-1, regarding cancer was wrong in view of the reports, Ex.C-3 to Ex.C-7, Ex.C-25 and Ex.C-27, as discussed in detail above. Such an act of the Pathologists and others certainly amounts to negligence and deficiency in service. Therefore, opposite parties No.1, 5 to 8 are liable to compensate the complainant for the deficiency in service and negligence in their profession, as a result of which the complainant has suffered immense mental as well as physical agony, besides huge financial loss.

45. While proceeding to consider the negligence on the part of the surgeons, the State Commission has first dealt with the issue of informed consent which findings have been recorded from paragraphs 95 to 106 that are extracted herein under:

INFORMED CONSENT:

95. The consent is a legal requirement of medical practitioners, not merely a procedural formality. It is most relevant in medical negligence case, specifically, when such case comes under judicial scrutiny. Except in medical emergency case, the informed consent must be taken before any investigation, procedure or treatment. In medical emergency, life-saving treatment can be given even in the absence of consent. Chapter 7 of Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002, Clause 7.16 of the Regulations reads as under:

"7.16 Before performing any operation the physician should obtain in writing the consent from the husband or wife, parent or guardian in the case of minor, or the patient himself as the case may be. In an operation which may result in sterility the consent of both husband and wife is needed."

In the area of medical negligence, the contentious aspects of medical care can be broadly categorized into three categories:

- A) *Diagnosis: means medical condition / status of the patient;*
- B) *Advice: treatment options reasonable alternatives and risk attending on various options; and*
- C) *Treatment.*

The material difference between these aspects of medical care lies in the degree of passivity on the part of the patient. The diagnosis and treatment are in the domain of doctor and the patient is a passive participant. When advice is being given to the patient, the patient assumes an active role. Then doctor's function is to empower and enable the patient to make a decision by giving him relevant, sufficient and material information. The patient must make choices and decisions. The patient must be informed about the options for treatment, its consequences, risks and benefits. Why doctor thinks particular treatment necessary and appropriate for the patient. The prognosis and what may happen if treatment is delayed or not given. Failing to furnish correct sufficient information when obtaining consent may be a breach of duty of care. It amounts to negligence, failure to inform the patient. The patient must be given a reasonable amount of time to consider the information to make a decision. The allowing of cooling off period is for the purpose to give time to think over the decision or take advice so that patient does not feel pressurised or rushed to sign. On the day of surgery, the patient may be under strain, mental stress or under influence of the pre-procedure drugs which may hamper his decision-making ability. The doctor

performing any procedure must obtain patient's consent, no one else can consent on behalf of the competent adult. The consent should be properly documented and preferably witnessed as such consent is legally more acceptable. The video recording of the informed consent process may also be done with a prior consent of the patient for the same.

96. *We would like to discuss with regard to the "Bolam Test". It was articulated in 1957, at that point of time emphasis was not on the principle of autonomy rather on the principle of beneficence. The doctor was considered to be the best person and the patient was kept in dark with regard to the risks and alternative treatment relating to the illness. Now there is a seismic shift in medical ethics and societal attitude towards the practice of medicine. Furthermore, the Medical Council had framed statutory regulations regarding the professional conduct, etiquette and ethics. This warrants legal tests to adjudicate the advice aspect of doctor patient relationship. The MCI Regulations as amended upto date clearly stipulate the need to respect the patient autonomy and doctor's obligation to adequately inform the patient for self-determination. Nature of the patient doctor relationship has to be examined in the light of education and access to the knowledge of ordinary citizen. In the light of these facts and statutory provisions, the "Bolam Test" can no longer be applied to a doctor's advice to his patient, unless it complies with the statutory provisions. The information given to the patient has to be examined perspective. The information disclosed is not limited to the risk related information. It should include: doctor's diagnosis of the patient's condition, the prognosis of that condition with and without medical treatment, the nature of the proposed medical treatment and the risks associated with it, the alternative to the proposed medical treatment, advantages and risks of the said treatment and the proposed treatment. The doctor must ensure that information given is "in terms and at a pace that allows the patient to assimilate it", thereby enabling the patient to make informed decision.*

97. *Three instances, where withholding of information is justified, are as under:*

*"a) **Waiver situation:** is when the patient expressly indicate that he does not want to receive further information about the proposed treatment or the alternative treatment.*

b) **Medical emergency:** when life-saving treatment is required and the patient temporarily lacks decision-making capacity. The "Bolam Test" would continue to apply.

c) **Therapeutic privileges:** when the patient has mental capacity, his decision-making capabilities are impaired to an appreciable degree such that doctor reasonably believes that the very act of giving particular information would cause the patient serious physical or mental harm. For example, the patient with anxiety disorder."

98. Now, we will examine, whether before undergoing surgery, the patient/complainant or her relatives were informed about the possible complications and risks and their informed consent was taken? It is true that every operation, as small as it may be, carries wide range of risks from the most insignificant to the most serious, may lead to fatal complications. Discussing all the complications with the patient and attending relatives is a necessity, so that he/she/they may make up his/her/their mind before undergoing the surgery.

99. Before commencing the treatment or procedure, now a days an 'informed consent' is required to satisfy the following conditions:

The consenting party i.e. patient or his/her family members must be aware of the nature and extent of complications and risks of the surgery. The consenting party must have understood the nature and extent of the complications and risks and the consenting party or his/her family members must have consented to the harm and assumed risk. Comprehensive explanation of the possible complications and risks and the extent of entire procedure and transaction, inclusive of all its consequences, must be explained to the patient or his/her family members."

100. In the present case, Consent Forms A & B, Ex.C-38 and Ex.C-38/A dated 07.08.2014 were got signed from Sh. Ravinder Singh, husband of the complainant. These Consent Forms are of only one page each. The person, who filled in the consent forms and explained to the complainant or his relative, has not been examined. The patient herself is a dental doctor and was adult person. Her Informed Consent was required to be taken. No details of the possible complications, likely to happen after the surgery, are given in these forms. The same do not qualify the ingredients of the legal Consent Form. Hon'ble National Commission recently in "**Sitaram Bhartia Institute of Science and Research v. Vidya Bhushan Jain and Ors.**" 017(2) CPR 609 (NC), held that before

undertaking the surgery, the doctor is required to take the 'Informed Consent' of the patient or his/her relatives. It was held in Para No.12 as follows;

"12. Now, the question arises whether before undergoing the procedure of Central Venous Line, the doctors of the opposite party hospital were under obligation to obtain consent from the respondent complainant or his family members? In the matter of **Samira Kohli Vs. Dr. Prabha Manchanda & Another** 1 (2008) CPJ 56 (SC), Hon'ble Supreme Court has extensively dealt with the concept of consent to be taken from the patient or his family members. In the said case, it has been held that patient has an inviolable right in regard to his body and he has a right to decide whether or not he should undergo the particular treatment or surgery. It was further held by the Hon'ble Supreme Court that unless the procedure is necessary in order to save the life or preserve the health of the patient and it would be unreasonable to delay the further procedure until the patient regains consciousness and takes a decision, a doctor cannot perform such procedure without the consent of the patient. In the instant case, as discussed above the insertion of catheter by Central Venous Line procedure being an invasive procedure carrying certain risk of complication including the injury to the jugular vein or bursting of the blood cells, the concerned team of doctor was legally required to obtain the consent of the patient."

101. Identical view was taken by the Hon'ble U.K. Supreme Court in *Montgomery (Appellant)'s supra*, wherein also the concept of the informed consent has been emphasized.

102. It is settled principle of law that the 'Informed Consent' of the patient/relatives is a necessity, which in the present case, does not appear to have been obtained from the patient or his relatives before conducting the extensive surgery. The consent taken from the husband of the complainant is just the general consent for anaesthesia and surgery, without explaining the complete risks and complications after the surgery.

103. In view of the law laid down in the above noted authorities, we are of the view that the 'Informed Consent' of the patient was required to be taken by the surgeons, before conducting the surgery on the patient. However, they failed to produce on record cogent evidence that the consent document was got signed

after making aware all the possible complications and that thereafter, the 'Informed Consent' of the patient or her husband or relatives was taken at the relevant time, as a pre-operative procedure.

104. It is a known fact that the patient was a high risk case and for conducting surgery, operating doctor is required to give the complete information and needs to appropriately counsel the patient and also prepare her for possible intra-operative complications much before surgery. The surgeon should explain about potential ramifications, including prolonged operative time, infection, prolonged indwelling catheter time. In this manner, the patient is encouraged to ask the surgeon about the possible complications and risks. Only thereafter, the patient/relative (s) may decide, whether the surgery is reasonable or not? To come to this conclusion and to reach at the decision, the patient will rely upon the information provided by the surgeon. The medical literature reveals that the complications narrated above generally arise at the time of surgery and after surgery, known as 'Intra-operative Complications' and 'Post-operative Complications' respectively. The informed consent forms Ex.C-38 and Ex.C-38/A have not been filled in by the doctor who explained the complications and risks involved. They are typed one and have blank spaces which have been filled in and signed by some person, may be a doctor. It has not come in evidence, who filled in the forms, nor that person has been examined nor has his/her affidavit been placed on record. Even his/her name has not been disclosed in the entire proceedings. So, we hold that there is no cogent evidence that before getting the signatures of the patient or her husband, on the Informed Consent Forms, those were read over and explained to the patient.

105. To sum up in nutshell, the doctors/surgeons must take the consent of the patient before commencing a treatment. No one can consent on behalf of a competent adult. The consent should be free and voluntary and be informed and based on intelligent Consumer understanding. The consent should be procedure specific. The consent obtained during the course of surgery is not a legally valid consent. The consent should be properly documented and witnessed. The surgical procedure consent is not sufficient to cover anaesthesia care. The fresh consent is necessary for a repeat surgery /procedure. All the above consents are subject to exceptions like emergency, medical emergency, therapeutic privileges and waiver situation. Simply going through the lists of risks and possible complications in the patient information sheet and consent addendum forms is

not sufficient. The doctor(s) who discussed with the patient must document it. The Medical Board of AIIMS also observed in Para No.7 of its report, Ex.C-28, that the standard practice is to take an informed consent explaining all the possible risks involved and taking adequate intra operative precautions to avoid such complications.

106. In view of the above discussion, we hold that in the present complaint, 'Informed Consent' of the patient or her relatives/family members, was not taken by opposite parties No.2 to 4 before undertaking the extensive surgery on the patient resulting into various types of deformities. Hence, opposite parties Nos.2 to 4 are deficient in duty of care and resultant medical negligence.

46. The State Commission then assessed the allegation of medical negligence against the original OP nos. 2 to 4, i.e., Mediways Hospital, Dr Satish Jain and Dr Sumeet Jain and assessed their negligence on the foundation that the pathologist had wrongly diagnosed the complainant to be suffering from Melanoma Cancer. It further examined the role of Dr Sumeet Jain and Dr Satish Jain. The State Commission has believed the version of the complainant to conclude that Dr Sumeet Jain was present during the surgery. These finding have been recorded in paragraphs 109 and 110 that are extracted herein under:

109. As already discussed in the FIRST PART- (PATHOLOGICAL ASPECT), after the Pathologists wrongly diagnosed the complainant to be suffering from melanoma cancer on the basis of incomplete markers' report, vide their report, Ex.C-1. The complainant approached opposite parties No.2 to 4, along with the relevant medical record and reports and she was operated upon in opposite party No.2- Mediways Hospital in an undue haste, without waiting for other markers' reports, on 07.08.2014. As emerged from averments of the parties, Dr. Sumeet Jain is an Onco-surgeon and has the expertise in the Niche treatment of Melanoma Cancer. He has employed in DMC and his thesis was on melanoma. It is the specific case of the complainant that she collected the DMC Pathology Report,

Ex.C-1, on 04.08.2014 and after being diagnosed with melanoma cancer, she contacted Dr. Sumeet Jain on 05.08.2014, with report, Ex.C-1 and MRI report, for taking the requisite treatment. He advised surgery and general blood tests were got conducted as per report Ex.C-34. Dr. Satish Jain, father of Dr. Sumeet Jain was working with Mediways and, thus, Dr. Sumeet Jain opted that he would conduct the surgery in Mediways Hospital. The complainant was told to come to Mediways Hospital on 07.08.2014. The file and other records regarding treatment and surgery of the complainant were prepared under the name of Dr. Satish Jain, as Dr. Sumeet Jain was not on the pay rolls of Mediways Hospital. Admittedly, the complainant was admitted in opposite party No.2-Mediways hospital on 07.08.2014 at 8.40 A.M. and extensive surgery was done on 07.08.2014, in which major part of the cheek and lymph nodes of neck were taken out during neck dissection. However, during surgery, many nerves of the face and shoulder of the complainant were damaged; as a result of which the complainant suffered facial paralysis for her entire life and the strength of her right shoulder and arm has also been reduced, causing her extreme professional loss, being right arm and being a dentist. The Disability Certificate pertaining to Facial Palsy and right arm weakness and chronic pain, issued by PGI, Chandigarh, is Annexure A-1.

110. The complainant specifically averred that she saw Dr. Sumeet Jain in the operation theatre in his full surgical gown and scrubs. She also averred that upto her discharge on 11.08.2014, Dr. Sumeet Jain used to meet in the evening up to her discharge from the hospital on 11.08.2014. On the other hand, Dr. Sumeet Jain pleaded that he did not conduct the surgery of the complainant and he just put a favourable word before surgery. The role of Dr. Sumeet Jain in conducting the surgery is very well be proved from the WhatsApp conversation and audio talk of Dr. Sumeet Jain with the complainant transcribed and placed on record as Ex.C-35 and Ex.C-24, respectively, which is reproduced as under:

WHATSAPP CONVERSATION, EX.C-35:

Dr. Sumeet Jain to complainant on 22.09.2014 at 17.11:
"I know u have multiple problems...understand the crises u r going through.. but I have talked to Jaspreet we need tackle problems one by one..functional recovery of shoulder and eye needs to be addressed first... because they r important for ur

day to day life.....At point of surgery pathology was unable to tell the size or depth of yr lesion...we can't have taken the risk of disease back by doing superficial surgery... that would have been disastrous and high potential risk of recurrence..."

Dr. Sumeet Jain to complainant on 22.09.2014 at 18:57:

"Look madam I understand all u say and I just see as my elder sister ...our aim was never to keep u in dark..What u r experiencing is still hard for me to explain. We do surgery in this area which r more complex than yrs and so far haven't experienced such problem....."

"We aimed to preserve every branch we can...facial nerve has numerous inter communications call pesansiermus...by and large...and generally other nerves compensate...if u wish and have faith in me just have a look at any figure of anatomy of facial nerve ...also look at where zygomatic branch travels..it's quite close to yr lower lid... away from yr surgical field..unless there is an abnormal course."

Complainant to Dr. Sumeet Jain on 22.09.2014 at 18:30:

"I acknowledge everything u say .I handed my life in your hands...placing u at level par with God. I still consider u a v intelligent doctor."

AUDIO TALK (Ex.C-24)

Dr. Sumeet (03:03): "One minute, listen to me, you told your point. Have you consulted about this that whether the surgery done was right or wrong have you ever talk about this to anybody. Give me 5 minutes. Have you talked to anybody about this ...?"

Dr. Sumeet (03:29): ...Because generally I have told about face that in the cross nerve innervations of the face, the branches are very small..To see them is near to impossible.

Dr.Sumeet(04:08): Yes there should not have been such a devastating effect. I have cleared this thing. You are not listening to me. I am understanding you, now you also understand me. As a Surgeon also learn some technical point from me. You have told your problem. Problem is there. I am not denying it okay .I have not denied, the problem is not there..I haven't denied that okay.

Dr. Sumeet: (06:43): Ok see its area. The nerve was coursing from here to here, supplying this part and this part. So I expect this nerve to be dominant enough to take care of your smile .Ok that's why we didn't expect such a lopsided smile because if it's been here then this nerve would have gone.

Dr. Sumeet (08:00): Now you tell me in the same setting did you ask anybody that they will take out Melanoma, , save the nerve, is there any Surgeon who told you are hundred percent safe in surgery. Did you talk to anybody?

Dr. Sumeet (10:22): See i listen to your mental trauma. U think..... Doing surgery is not a big mental trauma for surgeon? It's not a mental trauma for me.

Dr.Sumeet (11:48): Listen to me you contact any good surgical oncologist and ask him.

Complainant (11:52): Who was better than you. nobody was better than you. Ashish told.... you should have told me these things earlier.

Dr. Sumeet (12:00): If you think nobody is better than me, nobody better than me, you think the complication:.....

Complainant (14:01): Why didn't you take depth? Why didn't you take depth from histopathology?

Dr. Sumeet (14:06) I went there to ask the depth. They didn't tell me. What do I do?

Complainant (14:09): Why didn't they tell you then why did you operated? We didn't have knowledge of these things.

Dr.Sumeet (15:18): I didn't tell you so how could I tell him. I am telling you again, I didn't expect this to happen.

Dr. Sumeet (15:26): Whatever you want to do, you do. ok. from my side I did what best possible i could do to get you free of disease with minimal side effects.

Chachaji(19:25):: You should have told before surgery that this will happen and face will be disfigured .If you want to show to anyone else go for it because there are problems that might happen face and arm will be damaged . You didn't clear this thing even a bit.

Dr. Sumeet: Surgery is wrong, if it is Melanoma then I can protect you, listen to me listen to me listen to me (6 times) but if somebody disputes.

Thus, from perusal of above said e-mail conservation and audio talk of the complainant with Dr. Sumeet Jain, it is clear that Dr. Sumeet Jain, along with Dr. Satish Jain conducted the surgery upon the complainant and he was in regular touch with the complainant even after the surgery. He also admitted therein that he went to take the depth from DMC Pathologists, but they did not provide the same to him. The complainant got multiple problems for which Dr. Sumeet ain had no satisfactory explanation, which is evident from the aforesaid conversation, where he told the complainant, that he did not expect such complications to happen. The complainant had no sensation on the right side of face and asked Dr. Sumeet Jain several times about the status of the nerves, but

he just kept on saying that there is no damage to the nerves. Dr. Sumeet Jain also gave so many assurances to the complainant to redress the grievance of the complainant, during their above said conversation, from which it can well be inferred that he was very much involved in the surgery of the complainant. Dr. Satish Jain contended that after the surgery, the complainant never came back for follow-up treatment. On the other hand, the complainant specifically deposed in her affidavit, Ex. C-A that after the surgery she also met Dr. Sumeet Jain 7 times personally as per follow-up schedule. This fact further stands proved from the e-mail conversation and audio talk of the complainant with Dr. Sumeet Jain, Ex.C-35 and Ex.C-24 respectively, reproduced above. Thus, there is ample evidence on record to prove that surgery was performed by Dr. Sumeet Jain and the entire treatment, pre-operatively and post-operatively, as well as complete follow-up treatment of the complainant was also managed by him. The denial of conducting the surgery by Dr. Sumeet Jain is clear indicative of the fact that he was negligent, as he even did not own the surgery because he committed negligence and deficiency in service by not providing proper medical care, as per the standard medical protocol.

47. The State Commission then went on to assess the complications that arose after the surgery was conducted by discussing the surgeries undertaken by the Complainant to John Hopkins Hospital, USA. The observations regarding the same are in paragraph 111 to 113 that are extracted herein under:

111. It is relevant to mention that as per surgical report of SRL Lab. dated 14.08.2014, Ex.C-26, the tissues were taken out from cheek and neck of the complainant. This report was negative for cancer, as it is clearly mentioned on Page-3 of this report that there was no tumour present. The complainant also averred that she showed this report to Dr. Sumeet Jain at his residence. To clear her doubt, she sent the initial block of the lesion of her face to reputed laboratories of India and abroad, as detailed in facts of the complaint. The said laboratories, vide their reports, Ex.C-3 to Ex.C-7, did not report the lesion as cancer and rather reported it as "Nevus". Thereafter, the complainant got various nerve conduction studies of her face and shoulder done from reputed hospitals;

which vide their reports, Ex.C-43-A, Ex.C-43-B, Ex.C-43-C, Ex.C-45-A and Ex.C-45-B, clearly showed extensive nerve damage. As per report of Fortis Hospital, Ludhiana, Ex.C-43-A, there was marked reduction in CMAP amplitude on the right side, with preserved distal latency. Further in report of DMC, Ex.C-43-B, the impression was found as under:

*"Right Spinal Accessory Neuropathy
Right Facial Neuropathy."*

Likewise, the conclusion given in report dated 03.12.2014 of PGI, Ex.C-43-C is as under:

"NCS of the sampled nerves is s/o AXONOPATHY of the sampled nerves."

112. After the surgery, the complainant went to John Hopkins, Hospital (USA) for her treatment and as per report, Ex.C-44, it was found that the lower lip depressors of the complainant were weak, right side of face is thinner than left. It was further mentioned by the doctor that they were unable to locate the proximal and distal ends and the complainant may need a gracilis muscle transplant at later date. Further, in the report dated 17.06.2016, issued by Department of Neurology, SPS Hospitals, Ex.C-45-A, the below noted impression was given:

"The electrophysiological findings are suggestive of right facial and spinal accessory neuropathy"

113. Further, in report issued by Medanta Global Health Pvt. Ltd. Neuro Sciences dated 29.08.2016, Ex.C-45-B, the 'Interpretation & Conclusions' were given as below:

Motor Nerve Conduction Study: showed reduced CMAP amplitude in right suprascapular, dorsal scapular & long thoracic nerve. There were also reduced CMAP amplitude in right accessory (spinal) nerve comparison to left side. Rest of the tested nerves are bilateral median, ulnar, radial,

musculocutaneous, triceps, axillary, left dorsal scapular and long thoracic nerve.

F-Wave: were normal in all the tested nerves.

Sensory Nerve Conduction Study: showed normal SNAPs in all the tested nerves.

EMG: showed chronic denervation pattern in right APB, ADM, sternocleidomastoid, Orbicularis oculi & orbicularis oris muscle, CRD pattern was seen in right orbicularis oculi & orbicularis oris muscles. Incomplete recruitment, reduced pattern with sub maximum efforts in right biceps, deltoid, triceps & C6 paraspinal muscles."

Still further, the complainant suffered numerous problems in her the eye, as per prescription slip/reports issued by Medanta Hospital, Ex.C.49-A, Ex.C-49-B and Ex.C.49-C. She also suffered paralysis on the right side of the face and reduced blinking of the eye and as report, Ex.C-49-B, she was advised taping of eyelid at night.

48. The State Commission had initially called for an opinion from the All India Institute of Medical Sciences (in short, 'the AIIMS') that was tendered on 18.11.2015 and the same was again discussed and held that on a perusal of the said report, the onus shifted on the surgeon to explain as to why an extensive surgery was performed without confirming the diagnosis of cancer. The observations contained in paragraphs 115 to 117 are extracted herein under:

115. Now, we advert to "Expert Opinion". It is relevant to mention that the report was sought from AIIMS, New Delhi, who constituted a Medical Board of its senior Doctors and gave its report dated 18.11.2015, Ex.C-28; which is reproduced as under:

"A Medical Board was constituted by the Medical

Superintendent, AIIMS on the subject noted above. The Board consisted of the following members:

- | | |
|--|-------------|
| 1. Dr. M. Ramam
Professor, Deptt. of Dermatology & Venereology | Chairperson |
| 2. Dr. Manoj K. Singh
Professor, Deptt. of Pathology | Member |
| 3. Dr. S.V.S. Deo
Profession (Surgical Oncology) Dr. BRA-IRCH | Member |
| 4. Sr. Sushma Sagar
Addl. Profession, Deptt. of Surgery(TC) | Member |
| 5. Dr. Sudheer Kumar Arava
Asstt. Profession, Deptt. of Pathology | Member |
| 6. Dr. Sheetal Singh
Deptt. of Hospital Administration | Member |
| 7. Dr. Rahul Ranjan
Deptt. of Hospital Administration | Observer |

The meeting of the Medical Board was held on 10.11.2015 (Tuesday) at 3.30 P.M. in V.I.P. Consultation Room No.12, M.S. Office Wing, Ground Floor, AIIMS. All the Members of the Board were present. The proceedings were as follows:

1. The Chairman of the committee apprised Members of the committee regarding non-receipt of medical records from State Consumer Disputes Redressal Commission (Punjab) as requested through letter dated 01.10.2015. Hence, Members of the committee decided to submit reports as per the medical records available.

2. As per the medical records available, patient named Kanwalpreet Kaur had a removal of skin lesion on the face by Dr. Ravinder Tah on 28/7/2014 and the biopsy was reported by Dept. of Pathology, DMC, Ludhiana, as a skin lesion suggestive of malignant melanoma (type of skin cancer) and was advised further advanced pathology evaluation. However, the patient was operated by Dr. Sumeet Jain and Dr. Satish Jain on 07/08/14 in Ludhiana Mediways Hospitals, without

performing advanced tests and seeking second opinion and a more radical surgery was performed including removal of the part of skin of face and lymph nodes in the neck. Subsequently, patient claims that she was not provided with final pathology report and also suffered nerve damage in the face, neck and shoulder due to the second surgery. Medical tests enclosed confirm presence of nerve damage.

3. As per current practice guidelines it is recommended to perform advanced set of tests or seek a second pathology opinion to confirm the diagnosis before proceeding with final surgical treatment in such cases. However, in this case, as per available records surgeons Dr. Sumeet Jain & Dr. Satish Jain proceeded with surgery without confirming the diagnosis.

4. Pathology Review: No final pathology report was provided after the second surgery. And the aggrieved party got a review of the pathology report on the material obtained during the first surgery done from 4 labs. including India and abroad. There was no consensus on the final diagnosis and one of them reported it as clear cut case of malignant melanoma. However, two pathologists advised revision surgery due to unknown malignant potential of the lesion and involved margins. Even with the currently available best expertise in clinical practice it is sometimes difficult to differentiate between non-cancerous, borderline-cancerous and cancerous lesions. In these situations surgery is recommended.

5. A PET scan is not routinely recommended in suspected or very early stage melanomas.

6. As far as the removal of lymph nodes from the neck is concerned it is recommended to remove them surgically if they are clinically involved or if the primary lesion thickness is between 1 to 4 mm. Other option, if the expertise is available is to perform a sentinel lymph node biopsy procedure. The hospital record does not show any details pertaining to the neck node findings, why the nodes were removed and

availability of facilities to perform a sentinel node biopsy. Hence, it is not possible to comment on the need for neck surgery to remove the lymph nodes in this particular case.

7. As regards the complications of surgery are concerned, 5 to 10% of patients can develop nerve damage following such surgeries. The standard practice is to take an informed consent explaining all the possible risks involved and taking adequate intra operative precautions to avoid such complications. Sometimes, these nerves are deliberately removed to clear the cancer also. Since no operative details were provided by the surgeons it is difficult to comment on the cause and nature of complications patient has suffered in this case.

In summary, the Members of the committee were of the view that the patient seems to have a rare skin condition and the final diagnosis could not be arrived even after multiple expert pathology reviews. **In this case, Members of the committee were of the opinion that there was a need for surgery. However, extent of surgery performed and complications following surgery could not be commented due to non-availability of complete clinical details."**

The onus shifts upon the surgeons and they were required to explain, why such an extensive surgery was performed. It appears that doctors/surgeons intentionally withheld the best evidence available with them.

116. Thus, it is evident from the above report of AIIMS, New Delhi that Dr. Sumeet Jain and Dr. Satish Jain conducted the more radical surgery upon the complainant, without performing advanced tests and seeking second opinion. This fact further proves that no investigation was carried out by them to check whether there was any spread of cancer in the neck. MRI got done by complainant was shown to Dr. Sumeet Jain before surgery, which was negative for cancer. No PET Scan was done or advised by surgeon before conducting surgery. No Sentinel Lymph Node Biopsy was also done. The opposite parties pleaded that micrometastasis cannot be

detected by radiological investigations and, as such, they are not useful. However, to detect micrometastasis, the golden investigation which is being followed worldwide is necessary to be carried out before doing the procedure of Sentinel Lymph Node Biopsy. However, the surgeons took no steps to carry out this procedure before conducting surgery of the complainant. In this regard, Article "Management of Cutaneous Head and Neck Melanoma", Mark 3-D provides under head "Sentinel Lymph Node Biopsy" at page 1170 as follows:

"Sentinel Lymph Node Biopsy is considered the best staging modality with highest sensitivity and specificity of any modality currently available for head and neck melanomas and it is now recommended by AJCC melanoma staging committee for Complainants with T2 to T4 disease".

.....
"Elective neck dissection for N0 neck has failed to demonstrate any overall survival benefit and has been replaced by Sentinel Lymph Node Biopsy."

117. It is also relevant to mention that similarly, it has been observed in the report of AIIMS Board, Ex.C-28, reproduced above that for removal of lymph nodes from neck, other options if expertise is available, is to perform sentinel lymph node procedure. The hospital records do not show any details pertaining to neck node findings, why the nodes were removed and availability of facility of performing sentinel node biopsy. The biopsy report, Ex.C-26, of cheek and neck was negative for cancer. Since the primary site had no cancer, so the question of spreading the cancer to the sentinel lymph nodes and then to the lymph nodes of neck does not arise at all. It is also observed in the report of AIIMS Report that conducting of advance tests and taking second opinion is necessary to confirm the diagnosis before proceeding with the final surgical treatment. Dr. Satish Jain deposed in his affidavit that the complainant developed metastasis, but this fact does not find mention in his reply, discharge report or surgery notes. In his affidavit, Dr. Satish Jain further submitted that complainant developed a lesion on the lower outer side of the cheek within 10 days between the day Dr. Tah removed the initial lesion on 27.07.2014 and the day of surgery on 07.08.2014. However, no reasons have been given by Dr. Satish Jain for developing such lesion within that short span of just 10 days.

However, perusal of the photograph of the complainant clicked before surgery, Ex.C-29, shows that it was in fact a mole on her cheek. Dr. Anita Borges has stated in her report, Ex.C- 26, that a tiny nodule measuring into 0.2 X 0.2 X 0.1 cm is seen on the skin surface. Dr. Satish Jain has cleverly labelled this nodule as being satellite metastasis developed in 10 days.

49. The State Commission, thereafter, analyzed the deficiency in the referral note sent by Dr Satish Jain and also in the absence of any findings about metastasis in the discharge report or the surgical notes. The findings on a deficit discharge report have been recorded in paragraphs 118 to 121 that are extracted herein under:

118. It is a matter of common knowledge that whenever a Clinician/Surgeon sends any Biopsy sample after surgery to a pathologist, he will always write and send crucial information pertaining to the specimen sent. If there was presence of satellite lesion, Dr. Satish Jain must have mentioned it on his referral note sent to Dr Anita Borges along with the specimen. However, Dr. Satish Jain concealed the referral note, as there is no such note given on report Ex.C-26. On the other hand, Dr. Satish Jain has also claimed that the complainant was in initial stage of cancer and had no signs and symptoms of metastasis. Dr. Anita Borges has mentioned and numbered the "Nature of Specimen" in report, Ex.C-26, as follows:

"Wide Local Excision of right cheek lesion

Level I A Lymph Node

Level I B Lymph Node

Level II A Lymph Node

Level II B Lymph Node

Level III Lymph Node

Level IV Lymph Node"

119. The fact of satellite metastasis was not mentioned by Dr. Satish Jain, either in his Discharge Report or Surgical Notes. On the

other hand, the DMC pathologists have clearly deposed in their affidavits that the cancerous part was taken out by Dr. Tah and during 2nd surgery, wide local excision around the earlier surgery was given, which did not show any residual cancer. Satellite Metastasis means, tumour cells which have started spreading. In the affidavit of Dr. Satish Jain, it has been stated that finding of satellite metastasis has poor prognostic implication as majority of patients with such lesions develop disseminated metastatic disease, especially in lung, liver and brain. If satellite metastasis was present, the stage of complainant is upgraded to stage 3B, means the complainant is now in advanced stage of melanoma with sign and symptoms of metastasis. Majority of such patients will continue to develop metastasis and shorter interval between metastasis. Other options of management are needed. Therefore, Radiotherapy and other systemic treatments are given. In the report of AIIMS Board, Ex.C-28, it is duly mentioned that the hospital records do not show any details and no operative details were provided by the surgeons. In literature "Medical records and issues in Negligence" (Indian Journal of Urology), Annexure A-10, under head "Discharge Notes" it has been provides as follows:

Discharge Notes

This is a crucial piece of evidence regarding the inpatient treatment of a patient. It is important to give due importance to making a proper discharge summary as this is the summary document that will be kept by the patient which reflects the treatment received. The discharge summary should mirror the case notes of the patient records with a brief summary, relevant investigations, and operative procedures. The dates of admission, discharge, and surgery are useful when the sequence of events is an important issue in litigation later. It is also important to include instructions to be followed by the patient after discharge including dietary advice and date of next follow-up. The doctor can be held negligent if proper instructions are not given regarding the medications to be taken after discharge, physical care that is required, and the need for urgent reporting if an untoward complication happens before the advised time of review. As an urologist, it is

common to see patients who are not aware of stents that should have been removed at its appropriate time, though mentioned properly in the discharge summary. The discharge summary should be signed or countersigned by the consultant. A copy of this must be preserved in the case file for future use if required. Discrepancies in the summary given to the patient and what is kept in the hospital records can cause suspicion about tampering with the medical records. These discrepancies should be avoided at all costs as the benefit of this usually goes in favor of the patient.

120. It is also the specific case of the complainant that she had shown all the post-surgical reports to Dr. Sumeet Jain and Dr. Satish Jain, but they failed to make the same as part of record of Mediways Hospital. It is the duty of the doctor to preserve all the investigations done for a cancer complainant, before and after the surgery, as a record in the hospital. In this regard, Regulation 1.3.1 of Indian Medical Council 2002, reads as follows:

"Every Physician shall maintain Medical records pertaining to his/her indoor patients for a period of 3 years from the date of commencement of the treatment in a standard proforma laid down by the Medical Council of India."

121. Still further, there is no mention in the Discharge Report regarding consideration of the IHC report or post surgical notes, which the surgeon alleged that he used it as an investigation. The surgeon has admitted that he saw the extent of disease in MRI and used it as an investigation, but he failed to make it as a part of the record of the Hospital. Dr. Satish Jain has stated that the complainant has got the PET Scan done after surgery, which was duly shown to him but he failed to make it as part of record of the Hospital. It is also relevant to mention that there is no mention of save excision/incomplete biopsy or thickness or growth. Stage of cancer and why neck nodes were removed are also not explained. There is no mention in the discharge summary regarding damage to nerve during surgery or satellite lesion metastasis. Thus, it is proved that Dr. Satish Jain failed to mention the complete details of diagnosis and treatment in the Discharge Note, as provided in the above said literatures. Thus,

it can be said that Dr. Satish Jain violated Regulation 1.3.1 of Indian Medical Council 2002, reproduced above. In Original Petition No.146 of 1998 (**Vinay Srivastava v. Dr. P.S. Hardia**) decided by the Hon'ble National Commission on 02.01.2013 also, the medical record was not produced on the record and it was held in Para-23 as under:-

"23. This plea is mere palliative and does not delve deep enough to the roots of malady. The negligence on the part of OP stands established, for the following reasons.

To top it all, it is strange that the medical record of the patient/complainant is not produced by the Doctor. This is the first case where a Doctor is unable to produce the medical record pertaining to the patient. He wants to get away with the specious plea that he had given the record to the patient/complainant. This version does not suffice. The Doctor has given a fragile excuse. The Doctor is supposed to maintain the record of all the three operations. By no stretch of imagination, it can be said that the medical prescriptions/record (photocopies) placed at pages 20 to 33, in Part-II, furnish/complete the whole record. The original record was not adduced. Original record would have gone a long way to illustrate the position more clearly. The suppression of the record by the Doctor itself speaks volumes of negligence on the part of the Doctor. The Doctor is supposed to preserve the record for a period of three years at least.

50. It is on the basis of the aforesaid findings that the State Commission concluded that the best evidence was not forthcoming and therefore, without confirming the existence or spread of Cancer, the Surgery was performed negligently. Paragraphs 122 and 123, are extracted herein under:

122. Once the best material evidence is not forthcoming from the side of opposite parties No.2 to 4, an adverse inference is to be drawn against them that the complications occurred to the health of the patient only due to negligence and carelessness in performing the wrong

surgery upon the complainant by opposite party No.3 & 4 in opposite party No.2-Hospital, without getting conducted the prior medical tests and without taking second opinion to confirm the diagnosis arrived at by DMC. The onus shifted upon opposite parties Nos.2 to 4 to prove that they were not medically negligent while treating the complainant. In case "Malay Kumar Ganguly Vs Dr. Sukumar Mukherjee & Ors.", 2009(4) RCR (Criminal)-1(SC), Hon'ble Supreme Court observed in Para no.48, as follows:-

"48. In Nizam Institute of Medical Sciences Vs. Prasanth S. Dhananka & Others, 2009(3) RCR (Criminal)-124: 2009(3) RCR (Civil)-174: 2009(3) RAJ- 634:

[2009(7) SCALE-407], this Court held as under:-

"32. We are also cognizant of the fact that in a case involving medical negligence, once the initial burden has been discharged by the complainant by making out a case of negligence on the part of the hospital or the doctor concerned, the onus then shifts on to the hospital or to the attending doctors and it is for the hospital to satisfy the Court that there was no lack of care or diligence."

123. It is also relevant to mention that the complainant was discharged from Mediways Hospital without assessing or informing the degree of nerve damage on face, neck and arm. She was also not guided by the surgeons about the further treatment after the surgery. The other important aspect of the matter is that before performing the surgery upon the complainant, the surgeons were required to take second opinion to confirm the diagnosis, as per report of the AIIMS. They were also required to adopt Sentinel Lymph Node Biopsy Procedure as suggested by AIIMS. Adequate Intra-operative Precautions were also required to be taken in order to avoid complications during the surgery as supported by AIIMS. On the one hand, the surgeon in his affidavit deposed that accurate diagnosis cannot be made on the basis of incomplete biopsy and on the other hand, he himself proceeded with the major surgery without confirming the accurate diagnosis of cancer. Thus, he did not follow the standard protocol of medical profession. He did not confirm the spread of cancer in the neck and

conducted no investigation in this regard. He treated the complainant as an advanced stage without having any supporting evidence in hand before the surgery. He had no knowledge or primary tumour parameters, upon which whole surgical management was dependant. In this respect, literature, Ex.C-30, provides as under:

"The Goals of Surgery include:

a) *Histologic confirmation of the diagnosis, which ideally has been established through an appropriately planned biopsy (See "Pathologic characteristics of melanoma").*

b) *Obtaining complete and accurate micro-staging of the primary tumour to guide therapy. (See "Tumour node metastasis (TNM) staging system and other prognostic factors in cutaneous melanoma").*

c) *Appropriate excision of the margin around the primary site to minimize the risk of local recurrence without compromising additional staging manoeuvres (eg, sentinel lymph node biopsy potentially is less accurate after wide margin excision).*

d) *Optimal functional outcome and cosmetic results."*

51. The conclusions thereafter drawn are accorded in paragraphs 124 to 126 are extracted herein under:

124. In the present case, firstly there was wrong diagnosis of cancer by DMC and its Pathologists and secondly the Surgeons performed the extensive surgery in haste, without confirming the diagnosis and without conducting the requisite test, specifically advance tests as referred by AIIMS and investigations before doing the surgery; as a result of which the face of the complainant has been rendered paralytic, requiring surgeries for lifetime and constant pain in her right shoulder and arm, non-closure of eyelid may lead to blindness due to dryness, besides other major complications. After the wrong surgery, the face of the complainant has been paralysed for whole of her life and she is unable to work for long hours

at a stretch because of the constant pain in shoulder. She had to shut down her dental clinic/Private Practice after surgery because of the reduced strength. Besides this, she faces limitation in working continuously and has to halt between, due to pain and strength loss. Thus, the complainant has been prevented of her natural functions of the entire face and other parts of body and has been rendered handicap in that regard. As per Disability Certificate, Annexure A-1, issued by the Medical Board of PGI, Chandigarh, the complainant has suffered multiple disabilities. The PGI has assessed the overall permanent physical/mental impairment of the complainant, as per the settled guidelines, to be 46%.

125. In case *D. Uma Devi v. M/s Yashoda Hospital & Others*, F.A. No.1169 of 2014, decided on 11.04.2016, the Hon'ble National Commission held in Paras No.11 and 12 as under:

"11. In this context, we rely upon the judgment in **Laxman Balkrishna Joshi (Dr.) v. Dr. Triambak Bapu Godbole**, AIR 1969 SC 128, it was held that a doctor, when consulted by a patient, owes him certain duties. It was held as under:

"A person, who holds himself out ready to give medical advice and treatment, impliedly undertakes that he is possessed of skill and knowledge for the purpose. Such a person when consulted by a patient, owes certain duties, namely, a duty of care in deciding whether to undertake the case, a duty of care in deciding what treatment to give, and a duty of care in the administration of that treatment."

In the present case, the doctors at OP hospital, are qualified but, failed in their duty of care during ERCP procedure.

126. Thus, keeping in view above discussion and the evidence on record, preponderance of probability and inferences, we hold that the

complainant has been able to prove her case of medical negligence against opposite parties No.2 to 4. It is true that medical negligence cases do sometimes involve questions of factual complexity and difficulty and may require the evaluation of technical and conflicting evidence. However, in the present case, complainant has been able to discharge the onus of proving on a balance of probabilities, the medical negligence averred against opposite parties No.2 to 4. Thus, it stands clearly proved that opposite parties No.2 to 4 were grossly negligent while performing surgery upon the complainant on the incomplete and uncertain diagnosis of DMC and its Pathologists. They failed to adhere to the basic ethics of medical profession in dealing with the case of the complainant.

52. From the aforesaid findings there has been a prelude on the discussions on the evidence on record, but the contentions which have been raised on behalf of the pathologists as well as the surgeons regarding slides, blocks and reports thereon now need to be analyzed in the light of the fresh medical evidence that has been procured during the appeal by this Commission which is the report of the AIIMS dated 02.06.2022. After from the aforesaid medical report, it would also be appropriate to refer to the relevant literature that has been explained on behalf of the pathologist and the surgeons to explain the probability of the diagnosis, its existence and the protocol followed by the OPs for performing the surgery. The pathological analysis made before the surgery as also after the surgery have to be taken notice of.

53. We now refer to the various reports that form the foundation of the assessment regarding the allegations of negligence against the Pathologists and the Surgeons. To estimate the same for the purpose of a judicial approximation of the evidence, it would be appropriate to begin with the first

excision that was carried out on the complainant at Mediways Hospital by Dr. Ravinder Tah. The surgery conducted by him was of a growth in the shape of a mole on the right cheek (mid face) of the complainant. Dr. Ravinder Tah in his surgical notes recorded that the complainant had a renal transplant 7 ½ years ago and was on Immunosuppressant drugs. Describing the excision carried out by him, he noted that there was a small growth on the face since one year that was "radish with hallow". The excision was carried out with a limited margin and the excised growth was sent for histopathological examination to the Dayanand Medical College & Hospital, Ludhiana. The first report dated 02.08.2014 is extracted hereinunder:

Dayanand Medical College & Hospital, Ludhiana

PATHOLOGY REPORT

Surg. Path. No. 14-6802	D.O.R: 28.7.14 Date of Report: 2.8.2014
Name: Kanwal Preet	Age & Sex: 37 F CR No: Pvt.
Consultant: Dr. R. Tah	Ward/Bed No: 5940048.
Material submitted: Skin biopsy	
HISTOPATHOLOGY REPORT	

Skin biopsy shows prominent junctional activity with presence of nests of large cells having vesicular nuclei, prominent nucleoli and moderate amount of cytoplasm. An occasional mitotic figure seen. These cells are present in papillary dermis as well. MHD lymphocytic infiltrate also noted. The overlying epidermis is unremarkable.

Impression: Histomorphological features suggestive of Malignant Melanoma.

Advised: IHC-HMB-45, S-100, Melan-A & CK for confirmation.

To be reviewed after IHC findings.

*Dr. Neena Sood, MD
Prof. & Head*

*Dr. Harpreet Kaur, MD
Professor*

*Dr. Vikram Narang, MD
Asstt. Prof.*

54. It is to be noted that the number assigned to the report is 14-6802 that was received for skin biopsy.

55. It is the case of the Dayanand Medical College and its doctors that in order to confirm the said impression a clear advice was given for an Immunohistochemistry report with four markers namely (i) HMB-45 (ii) S-100 (iii) Melan-A and (iv) CK for confirmation.

56. The markers of HMB-45 and Melan-A were sent for examination outside as no facilities were available at the College.

57. It seems that a MRI was conducted and the report dated 05.08.2014 from Fortis Hospital, Ludhiana is extracted hereinunder:

250-

ANNEXURE - A 20

NAME	Ms. KANWALPREET KAUR	AGE/SEX	36 YRS / F	UHID	
REFD. BY		DATE	05-08-2014	IPID	

MRI BRAIN AND NECK (Plain & Contrast)

MRI of the brain and neck was performed on a PHILIPS MRI/TIVA 1.5 TENS machine using a dedicated brain coil before and after injection of IV contrast.

Few non specific punctate hyperintense foci on T2W/T2 FLAIR images without diffusion restriction in subcortical white matter are seen in bilateral parietal regions. No evidence of calcification/hemorrhage is seen. No enhancement seen on post GAD images.

No abnormal intensities are seen in rest of the bilateral cerebral hemispheres.

No abnormal meningeal/parenchymal enhancement is seen.

No abnormal intensities are seen in basal ganglia, thalami, brainstem and cerebellum.

The ventricular system and extraventricular subarachnoid CSF spaces are unremarkable.

No midline shift seen.

The visualized calvarium, major cerebral blood vessels, cranial nerves, orbits and paranasal sinuses are unremarkable.

MRI NECK

Bilateral pyriform sinuses and aryepiglottic folds are unremarkable.

True and false vocal cords are unremarkable.

Free margin of epiglottis is unremarkable.

Paraglottic fat is unremarkable.

Continued...

A UNIT OF FORTIS HOSPITALS LIMITED

Legal Office: Escorts Heart Institute and Research Center, Connaught Place Road, New Delhi-110 025.
Tel: +91-11-2625000, 2625001, Fax: +91-11-2625002
CIN No.: L1514DL1996PLC076704

Ace

251

No evidence of significant lymphadenopathy.

Overlying soft tissues are unremarkable.

On whole spine screening:-

There is straightening of spinal curvature.

Distraction is seen at L5-S1 level.


The visualized vertebrae show normal height. No antero or posterolisthesis seen.

The visualized inter-vertebral discs are normal in height and signal intensity.

OPINION:- MRI FEATURES ARE SUGGESTIVE OF:-

- NO SIGNIFICANT ABNORMALITY SEEN.
- EARLY SPINAL SPONDYLOSIS.

Please correlate clinically.


DR. SANDEEP S. CHAWLA
MD (Radiodiagnosis)
PMC Reg No. 33931
Consultant Radiologist

DR. SANDEEP K. SANDHU
MD (Radiodiagnosis)
PMC Reg No. 32874
Head of the Deptt. Radiology

58. The Immunohistochemistry reports for S-100 and CK (Cytokeratine) were tendered by the Dayanand Medical College on 07.08.2014 on the paraffin block that was prepared for it with the same number of 14-6802. The said report dated 07.08.2014 is extracted hereinunder:



Dayanand Medical College & Hospital, Ludhiana

IMMUNOPATHOLOGY REPORT

I.H.Path. No. 595-596/2014

Histopath. No.: 6802/14

Dated: 07.08.2014

Name of Patient : Kamal Preet

Age & Sex : 37 years female

C.R.No. : 0

Consultant : Dr.R.Tah

Pvt./OPD/Ward : C.C.

Receipt No.: 619102

Material submitted : Paraffin block for S-100 & Cytokeratin

IMMUNOHISTOCHEMISTRY REPORT

MARKERS

RESULTS

S-100

Positive in tumor cells

Cytokeratin

Negative in tumor cells

Impression - IHC findings are consistent with Malignant Melanoma. *

** The test is performed using Novocastra / Dakoanti body and Ultra vision one detection system kit **

** Primary Antibodies used for S-100 - ISS04, CK-5D3 and LP 34**

Dr. Mrs. Neena Sood, MD / Dr. Mrs. Harpreet Kaur, MD
Professor & Head Professor
Deptt. Of Pathology

*Consistent - means accurate
not containing any contradiction*

Note :

1. Results declared may vary on account of chemicals/ kits used and may contain human error.
2. Please correlate clinically.
3. Patient's identity not verified.

Phone No.
0161-4687624

DEPARTMENT OF PATHOLOGY (ISO 9001-2008 Certified Lab)

59. The HMB-45 and Melan-A reports were sent to SRL Diagnostics and were awaited, but in the meantime the surgery was performed at Mediways by Dr. Satish Jain on 07.08.2014 itself.

60. The pre-operative samples which had been sent after the excision by Dr. R. Tah to the SRL Diagnostics were examined and the report was tendered on 12.08.2014. The said diagnostic reports on the two markers referred to above on the same paraffin block is extracted hereinunder:

DIAGNOSTIC REPORT**ANNEXURE - A-6****SRL**
Diagnostics
Incorporated in Maharashtra

CLIENT CODE : C000040975

CLIENT'S NAME AND ADDRESS :
DAYANAND MEDICAL COLLEGE AND HOSPITAL
TAGORE NAGAR, CIVIL LINES,LUDHIANA 141001
PUNJAB INDIA
161-4687643 161-2302620SRL LIMITED (Formerly known as Super Religare Laboratories Limited)
PRIME SQUARE BUILDING, PLOT NO 1, GAIWADI INDUSTRIAL
ESTATE, S V ROAD, GOREGAON (W)
MUMBAI, 400062
MAHARASHTRA, INDIA
Tel : 022-6780 1177/1-800-222-660, Fax : 022 - 67801212
CIN : U74899D_1995PLC070603
Email : srl.mumbai@srl.in

PATIENT NAME : MS KANWALPREET W/O RAVINDER SINGH

PATIENT ID :

ACCESSION NO : 0002NH022761 AGE : 37 Years SEX : Female DATE OF BIRTH :

DRAWN : 04/08/2014 00:00

RECEIVED : 08/06/2014 04:45

REPORTED : 12/08/2014 14:47

REFERRING DOCTOR : DR. R TAH

CLIENT PATIENT ID : 2014619102

CLINICAL INFORMATION :

REF ACC#Q037NH001084

Test Report Status **Final**

Results

HISTOPATHOLOGY**HMB-45 IHC, TISSUE/PARAFFIN BLOCK**

HMB-45(IHC)

FOCAL WEAK POSITIVE IN CELLS AT DERMO-EPIDERMAL JUNCTION AND
IN SUPERFICIAL DERMIS.**MELAN-A**

MELAN-A

DIFFUSELY POSITIVE IN CELLS NESTS AT DERMO-EPIDERMAL JUNCTION
AND IN SUPERFICIAL DERMIS.**Comments**

RECEIVED ONE PARAFFIN BLOCK REFERENCE NO. 14-6802 OF SKIN BIOPSY.

IHC carried out on formalin-fixed paraffin-embedded sections.
All positive controls show appropriate positive immunostaining.
Negative control slide does not show immunostaining.

Detection system used is - HRP POLYMER.

Our panel of histopathologists at Mumbai Reference Laboratory include : Dr. Simi Bhatia, Dr. C. S. Soman, Dr. Kamlakar Patole, Dr. Rajiv Joshi, Dr.
Geeta Verma, Dr. Purnima S. Lad, Dr. Asawari Ambekar**Test Method(s)**

HMB-45 IHC, TISSUE/PARAFFIN BLOCK-

The clone for "HMB-45" antibody is "HMB-45".

****End Of Report****Please visit www.rivworld.com for related Test Information for this accession
Dr. Kamlakar Patole, MD
Senior Histopathologist

61. A perusal of the report would indicate that the sample had been drawn on 04.08.2014, which is prior to the surgery on 07.08.2014. It was received in the laboratory on 08.08.2014 and the report was tendered on 12.08.2014 with the comments that one paraffin block reference no. 14-6802 of skin biopsy had been received. The other details are mentioned therein. It is pertinent to mention that the complainant had made a request on 05.08.2014 before the Dayanand Medical College to provide her with a copy of the block and slide of the no. 14-6802 for second opinion. The application has been filed on record with an endorsement of the concerned doctors directing issuance of slide and block both. The endorsement is of 05.08.2014 and the fee for issuance of the said block and slide has been charged on the same date, the receipt whereof for a sum of Rs. 470/- has also been filed on record.

62. According to the Dispatch Register, the copy whereof has been filed on record, the said block and slides were delivered to the complainant, according to the endorsement made therein, on 28.08.2014.

63. The complainant was discharged on 11.08.2014 recording that the local wide excision of the face (right side) with mid neck delevel – 1 to 4 done under General Anaesthesia on 07.08.2014. The said Discharge Summary also indicates the specimen that were sent by Mediways Hospital for Histopathological reports separately.

64. The samples which were extracted by Dr. Satish Jain were received at SRL Diagnostics on 12.08.2014 and the reports were tendered on 14.08.2014, which is extracted hereinunder:

0002NH032106

Name : Ms. KANWAL PREET

Path No : 14W-12120

Age : 37 years Sex : Female

Collected on :

Referred By : Dr. SATISH JAIN

Accessioned on : 12-Aug-14 3:06PM

Reported on : 14-Aug-14

Nature of material: 1) Wide local excision of the right cheek lesion
2) Level I A lymph node
3) Level I B lymph node
4) Level II A lymph node
5) Level II B lymph node
6) Level III lymph node
7) Level IV lymph node

****This report contains 4 pages ****

GROSS APPEARANCE:

1) Wide local excision of the right cheek lesion : -

Received an unoriented wide local excision specimen measuring 2.5 x 2 x 1 cm with overlying elliptical piece of skin measuring 2.2 x 1.2 cm.

A linear suture mark is seen measuring 1.2 x 1 cm with a tiny nodule measuring 0.2 x 0.2 x 0.1 cm seen on the skin surface.

The lesion has been sliced serially & submitted entirely.

Sections : 1A to 1N) Lesion (A - with skin nodule, F to I - with skin showing linear scar)

2) Level I A lymph node : -

Received a single lymph node measuring 1.5 x 1 x 1 cm. Cut section is grey white & submitted entirely.

Sections : 2A & 2B

3) Level I B lymph node : -

A salivary gland measuring 2.5 x 1 x 1 cm seen. 5 lymph nodes are dissected, larger node measuring 1.2 x 1 x 1 cm. The cut section is grey white to brownish.

Sections : 3A to 3C

Name : Ms. KANWAL PREET

Path No : 14W-12120

Age : 37 years Sex : Female

****This report contains 4 pages ****

4) Level II A lymph node : -

Received 8 lymph nodes, largest node measuring 0.8 x 0.5 x 0.5 cm. The cut section is grey white.

Sections : 4A & 4B

5) Level II B lymph node : -

Received 16 lymph nodes (including the tiny lymph nodes), largest node measuring 1.2 x 1 x 1 cm. The cut section is grey white.

Sections : 5A to 5D

6) Level III lymph node : -

Received 9 lymph nodes, largest node measuring 1.2 x 1 x 1 cm. The cut section is grey white.

Sections : 6A to 6E

7) Level IV lymph node : -

Received 6 lymph nodes, largest node measuring 1 x 0.8 x 0.5 cm. The cut section is grey white. Submitted entirely.

Sections : 7

MICROSCOPY:

1) Wide local excision of the right cheek lesion : -

Benign intradermal naevus of the right cheek.

Signs of previous surgery are noted in the form of reparative myofibroblastic proliferation in the dermis.

(P.T.O.)

Name : Ms. KANWAL PREET

Path No : 14W-12120

Age : 37 years Sex : Female

****This report contains 4 pages ****

2) Level IA lymph node : -

A single lymph node, showing few pigment laden macrophages in the 'T' zone suggestive of dermatopathic lymphadenitis.

No tumor is seen.

3) Level IB lymph node : -

5 lymph nodes, all are free of tumor (0/5).

4) Level IIA lymph node : -

8 lymph nodes, are free of tumor (0/8).

5) Level IIB lymph node : -

16 lymph nodes (including the tiny lymph nodes), all are free of tumor.

6) Level III lymph node : -

Dermatopathic lymphadenitis of a lymph node; however all 9 lymph nodes are free of tumor.

7) Level IV lymph node : -

6 lymph nodes, all are free of tumor.

(P.T.O.)

This sample has a different pathology number.

65. A PET (Positron Emission Tomography) scan was carried out at Fortis Hospital, Ludhiana on 05.09.2014 and is extracted hereinunder:

NAME	MS. KANWALPREET KAUR	AGE/SEX	37 YRS / F
REFD. BY	DR. DAMANDEEP SINGH	PATIENT ID	PET/2032/14
		DATE	05/09/2014
<u>WHOLE BODY PET/CT REPORT</u>			

Clinical Indication: - Known case of melanoma, post surgery and right neck dissection on 7-8-14.
Patient is referred for FDG PET/CT for staging.

Technique:- Whole body images (Skull top to mid thigh) were acquired in 3-D mode 60 min after IV injection of ^{18}F -FDG using a dedicated Time of Flight (TOF) PET/CT scanner. Water was given as negative oral contrast. IV contrast was given. Reconstruction of the acquired data was performed so as to obtain fused PET-CT images in transaxial, coronal and sagittal views. CT findings are only read in correlation with PET findings. CT scan of specific region with specific protocol is advised if clinically indicated.

Findings:-

HEAD AND NECK:-

Brain:-The cerebral parenchyma exhibits normal attenuation with no obvious focal abnormal FDG uptake. Grey-white differentiation is well preserved. No obvious midline shift seen. No obvious focal abnormal FDG uptake is noted in brain stem and cerebellum. (It may kindly be noted that all brain metastasis / brain lesions may not be apparent on PET/CT scan. MRI correlation is advised where clinically indicated).

Oral cavity, pharyngeal and laryngeal region:- No evidence of any obvious FDG avid mass lesion / focal abnormal FDG uptake in the oral cavity, pharyngeal and laryngeal regions.

Note is made of focal FDG uptake in bilateral palatine tonsils (SUV_{max} 5.0) – likely physiological / infective. Faint FDG uptake noted in subcentimetric and enlarged bilateral level II and III cervical lymph nodes – likely reactive in view of palatine tonsil uptake.



HOSPITAL
Ludhiana

Fortis Hospital
Chandigarh Road, Ludhiana
Tel : +91-161-5111111
E mail: contact@ludhiana.fortishealthcare.com
Website: www.fortishealthcare.com
Emergency : +91-161-5111111

Salivary glands show normal physiological FDG uptake.

Note is made of faintly FDG avid (SUVmax 2.2) skin thickening and subcutaneous fat stranding in the right malar region – likely post surgical changes. Follow up is advised.

Thyroid:- Both lobes of thyroid appear normal in size with no obvious FDG avid hypodense / hyperdense lesion / focal abnormal FDG uptake.

No significant hypermetabolic cervical lymphadenopathy is seen.

THORAX:-

Lungs:- A tiny soft tissue density nodule / pleural tag is noted in the apical segment of right upper lobe. A tiny non-FDG avid calcified nodule is noted in the posterior basal segment of right lower lobe – likely calcified granuloma. Rest of the pulmonary parenchyma is unremarkable in appearance bilaterally. No evidence of any obvious FDG avid mass lesion / FDG avid nodule in the bilateral lung. Trachea and main stem bronchi are unremarkable.

No obvious pericardial and pleural effusion noted.

Esophagus:- Esophagus appears unremarkable with no evidence of any obvious FDG avid focal wall thickening / FDG avid mass lesion / focal abnormal FDG uptake. Mild diffuse FDG uptake noted in esophagus - likely physiological.

Few non-FDG avid subcentimeter-sized (SAD) paratracheal, aortopulmonary window and subcarinal lymph nodes are noted. Calcified subcentimetric, subcarinal and left hilar lymph nodes are also noted likely due to old Koch's.

Breast:- Bilateral breast parenchyma appears normal with no obvious FDG avid mass lesion / focal abnormal FDG uptake.

No significant hypermetabolic axillary lymphadenopathy is seen.

ABDOMEN AND PELVIS:-

Stomach:- Stomach appears unremarkable with no evidence of any obvious FDG avid focal wall thickening / FDG avid mass lesion / focal abnormal FDG uptake. Mild diffuse FDG uptake noted in the

सुदृढः

1. The first part of the document is a list of names and addresses, which appears to be a directory or a list of contacts. The names are written in a cursive script, and the addresses are listed below them.

Uterus, cervix & bilateral adnexa:- Uterus, cervix & bilateral adnexa appear unremarkable with no obvious FDG avid focal mass lesion / focal abnormal FDG uptake.

Few non-FDG avid, subcentimeter-sized mesenteric, paracaval, aortocaval and paraaortic lymph nodes are noted – likely reactive.

No evidence of free fluid in the abdomen / pelvis.

MUSCULOSKELETAL SYSTEM:-

Muscles:- Normal physiological FDG uptake is noted in the visualized muscles.

Skeleton system:- No obvious focal abnormal FDG uptake/ obvious FDG avid discrete lytic / sclerotic lesion seen in the visualized bones. Mild diffuse FDG uptake noted in the axial and proximal appendicular skeleton is likely physiological. Diffuse mild physiological FDG uptake in bone marrow can mask small lesions due to early marrow metastasis / marrow involvement. MRI / histopathological correlation is advised if clinically indicated.

No focal abnormal FDG uptake seen in rest of the body.

Physiological tracer distribution in the brain, bilateral palatine tonsils, heart, liver, kidneys, bladder and intestine is noted.

Continued....

66. There is one separate report on 1 paraffin block of 6802 number of skin biopsy dated 10.09.2014. The histopathological report is extracted hereunder:

ANNEXURE-A-11

SRL
Diagnostics
Pathology Laboratory

Centre of Excellence : Histopathology

SURGICAL PATHOLOGY REPORT

0002NI002131

Name : Ms. KANWAL PREET Path No : 14W-13144

Age : 37 years Sex : Female Collected on :

Referred By : -- Accessioned on : 02-Sep-14 2:58PM

Reported on : 10-Sep-14

Nature of material : 1 paraffin block (6802/14) of skin biopsy

****This report contains 1 page ****

MICROSCOPY:

The biopsy reveals an atypical epithelioid nevus. The lesional nevus cells show cytologic atypia, but no mitotic activity.

The lesion reaches the lateral margins of excision. The base is free.

IMPRESSION:

Skin biopsy : -

Atypical epithelioid nevus.

**** End of Report ****

67. Another report was obtained from M/s. Oncopath Diagnostics on the reference of Dr. Ravi Saini by Dr. Prashant A. Jani, an Oncopathologists. This report dated 23.10.2014 is extracted hereinunder:

OncoPath Diagnostics

Reference Centre for Cancer Pathology

Name : Dr Kanwalpreet Kaur

Histopath No. : S14-1385

Age / Sex : 37 Year / Female

Received on : 09/10/2014

Referred By : Dr Ravi Salni

Reported on : 23/10/2014

SURGICAL PATHOLOGY REPORT

SPECIMEN : One referral block labelled as 6802/14.

CLINICAL HISTORY : A small pimple sized lesion on right side of the cheek just below zygoma present since one year.

MICROSCOPY : Sections examined from the skin biopsy shows compound nevus with moderate marked atypia in junctional and dermal component.
There is no evidence of any mitosis.
Occasional upward migrating melanocytes noted.
Lesion is noted at one of the lateral margins.

FINAL DIAGNOSIS : Compound nevus with marked atypia. //

COMMENT : Re-excision recommended.

End of Report

Authorized By

Prashant A. Jani

Dr Prashant A. Jani
MB, FCAP, FRCPC

Chief OncoPathologist

To view online Report please visit on www.oncopathdx.com. Your Username : Kanw4186 and Password : Kanw4186

Note : 1. Slide / Block can be issued only on advice of the referring consultant after a minimum of 48 hours
2. Gross specimen will be retained only for a period of 4 weeks after the date of reporting

68. The next report that the complainant seems to have obtained from Tata Memorial Centre dated 22.12.2014 is extracted hereinunder:



TATA MEMORIAL CENTRE

TATA MEMORIAL HOSPITAL

Dr. Ernest Borges Marg, Parel, Mumbai - 400 012, INDIA

Tel: 91-22-2417 7000 (Extn.: 4380) • Fax: 91-22-2414 6937 • E-mail: pathology@tmc.gov.in • Website: http://tmc.gov.in



Certificate No.: M-0085

DIAGNOSTIC SERVICES - DEPARTMENT OF PATHOLOGY

Case No.	RII/51102	Requisition No.	FZZ/SPII/057774	Path No.	051288/CL
Name	Ms KANWALPREET KAUR				
Sex / Age	F / 37	Category / Status	I / Out Patient		
Referred By	DR. KANWALPREET KAUR		Referring To Doc/Unit: A JAMBHEKAR		
FINAL HISTOPATHOLOGY REPORT					22/12/2014

Site.
Previous Path No 051288/CL

Nature of Material Received 1 stained slide (6802)

Impression

Right cheek lesion (1 paraffin block):


Skin shows a melanocytic lesion comprising of basal intraepidermal nests and also a superficial dermal component.
The melanocytes are arranged in nested pattern and display cytologic atypia.
Minimal lymphocytic infiltrate is noted in the dermis.
Mitoses are not seen.
Single cell permeation in the epidermis is absent.
Lesion extends upto the margins of this excision.
Clinical presentation of a pinkish papule of 5mm diameter with regular borders of one year duration is noted.

Differential diagnoses considered are:

1. Dysplastic nerve-epithelioid variant
2. Spitz nerves.

Possibility of dysplastic nerves is favoured.

Dr. PRIYANKA GUPTA
Resident Pathologist
Entered By RUPALI N CHITNIS
16.12.2014 12:19:54


Dr. M R RAMADWAR
 Pathologist

END OF REPORT

Regd dtm	: 06/12/2014 / 13:54:05
Collected dtm	: / /
Recd dtm	: 06/12/2014 / 14:27:15
Comm dtm	: 22/12/2014 / 15:01:02

"The report relates only to the sample submitted."

"All Samples/Slides/Blocks Submitted For Evaluation Will Be Retained By The Hospital Under Normal Circumstances."

HISTOPATHOLOGY

Page 1 of 1

69. A similar examination of slide no. 3157 was carried out at the Department of Histopathology, PGIMER, Chandigarh. The report dated 03.01.2015 is extracted hereinunder:

DEPARTMENT OF HISTOPATHOLOGY
Research Block-A, 5th Floor, PGIMER, Chandigarh
SURGICAL PATHOLOGY REPORT

Biopsy No: S-26530/2014

Name: KANWALPREET
KAUR

Age: 38y

Sex: F CR No:
201405271831

Clinician: Prof. S. Handa

Location: SKIN OPD

Address: 13/12/2014

Report Date: 03/01/2015

Clinical Diagnosis: ? Dysplastic compound nevus

Additional Info: Previous biopsy number S-25788/2014

Gross: Received one slides (No. 3157) for review.

Micro:

Slide examined shows mildly acanthotic epidermis with nests of large cells within the epidermis, dermis and at the dermoepidermal junction. The cells have abundant eosinophilic to clear cytoplasm and prominent nucleoli. Few bizarre and multinucleated cells are also noted. There is prominent junctional activity with focal telangiectatic vessels seen in papillary dermis. Few of the cells are seen lying singly scattered in the dermis, bordered by lymphomononuclear infiltrate. In addition few of the cells show eosinophilic globules within cytoplasm forming Kamino bodies. Occasional mitotic figures present and no increase in mitotic activity is seen, Overall features are of compound melanocytic lesion with epithelioid morphology. In view of clinical history and morphology, a possibility of spitz naevus is considered

Diagnosis:

Check:- Naevus, NO Spitz

Remarks:

Advice- Wide local excision with follow – UP.
S-25788/2014

SA/UMA/NAHAR

70. The complainant appears to have sent Digital slides to M/s. Pathology Consultancy Services that tendered a report on an examination by Dr. Sara Edward, a Consultant in Dermatopathology at St. James University, Leeds, United Kingdom. The said report dated 11.10.2014 is extracted hereinunder:

Pathology Consultancy Services
Web Based Pathology Consultation
Surgical Pathology, Cytopathology, Haematology Second Opinion
Panel of National & International Pathology Experts
(A Unit of Tissue Path & Immunohistochemistry Lab)

Name: DR. KANWALPREET KAUR

Receiving Date: 09/10/2014

Age: 37 Sex: F

Time: 6:00PM

Reporting Date: 11/10/2014

Time: 12:30 PM

Referred by: DR. RAVINDER TAH Hospital:

Material Submitted: DIGITAL SLIDES FOR OPINION

LAB No: PCS/H-2014-3157

Report

Opinion by Dr. Sara Edward

Microscopic Findings:

Microscopy shows an asymmetrical compound melanocytic lesion. The predominant component is junctional, where the cells are arranged as variably sized nests. Cleaving of the nests in relation to the epidermis is noted. The epidermis is hyperplastic with down growths into the underlying dermis. Kamino bodies are prominent. The dermal component is minimal. Both the junctional and dermal melanocytes show epithelioid morphology with ample cytoplasm. Many congested blood vessels and multinucleated giant cells are seen. Dermal mitoses are not seen. There is a variable infiltrate of lymphocytes in the dermis.

This is a compound melanocytic lesion showing predominant Spitzoid morphology. Such a morphology, architecture and the presence of Kamino bodies are in favour of a Spitz Naevus. However, the irregular infiltration of the lymphocytes in the dermis is very unusual and for such a lesion in this age group of the patient. There is no obvious evidence of malignancy.

Opinion: Skin of cheek-Spitzoid tumour of uncertain malignant potential.

A wider excision of the lesion is recommended for the above reasons and also because the lesion reaches the margins of the biopsy.

71. As noted in the opening paragraphs of this Order, this Commission came to the conclusion that an expert opinion is necessary in the background

that the State Commission had sought a medical opinion from AIIMS that was tendered on 18.11.2015 before it on the basis of medical records. This Commission noted that the slides and blocks were not made available to AIIMS and therefore in order to ensure a fair adjudication and confirm the final diagnosis, it was necessary to seek a fresh opinion from AIIMS consisting of specialists in Oncology and Pathology. Accordingly, directions were issued to dispatch the blocks and slides to AIIMS under the order dated 11.01.2022. Since there was a correction in the number of the slides, the same was rectified on 01.02.2022 and orders were passed for sending the entire material to AIIMS. As noted in the said order dated 01.02.2022, the Complainant had submitted the slides and blocks but it was open to the learned Counsel for the Parties to appear before the Registrar on 09.02.2022 for verifying the slides and blocks that were to be sent in terms of the order dated 11.01.2022. It was further mandated that in case the Opposite Parties (the Appellants in the other Appeals) have any slide or block, they may submit before the Registrar with due acknowledgment.

72. In order to keep the decks clear, we may point out that the Order dated 11.01.2022 refers to the 10 reports that were already available and were before the State Commission. The direction given on 11.01.2022 in paragraph 7 is as follows:

"7. Accordingly, the Complainant is directed to submit the following within 3 weeks or at the earliest:

a) All the slides (H & E, IHC) of Surg.Path.No.14-6842 [listed at Sr. No: 1,2,3,4,6 & 8]

b) All H & E slides and paraffin blocks of the surgically resected

specimen which was repaved by SRL Diagnostics – Ref Path No: 14W-12120”

73. The direction with regard to the production of blocks and slides were recorded in the order dated 01.02.2022 which is once again reproduced hereinunder:

“Learned Counsel for the Appellant in F.A. No.479/2019 has brought our attention to I.A. No.640/2022 about the typographical mistake in the number of the slide which erroneously mentioned as 6842 instead of 6802 in the Order dated 11.01.2022. Same was confirmed by the Complainant and other Counsel also. Therefore, the correction is made accordingly. It is further read as Surg.Path.No.14-6802. I.A. No.640/2022 is disposed of.

In pursuance to the Order dated 11.01.2022, the Complainant has filed number of slides and blocks in the sealed cover to the Registrar of this Commission. The entire material is to be sent to the AIIMS for further opinion.

To avoid any controversy, we deem it appropriate that let the parties or their Counsel shall be present before this Commission on the next date and verify and confirm the material which was to be sent to the AIIMS.

The parties or their Counsel are directed to appear before the Registrar of this Commission on 09.02.2022 at 11.00 A.M. The Registrar is directed to open the sealed cover, verify the slide and blocks as per our Order dated 11.01.2022 as per Chart. Thereafter, it will be sent to AIIMS for expert's opinion.

In case, if the Opposite Parties have any slide or block of the instant case, they may bring on 09.02.2022 and submit before the Registrar with due acknowledgment.

List the matter on 09.02.2022 before the Registrar for further proceedings.”

74. Accordingly, both the parties appeared before the Registrar for the verification of the slides and a report was tendered by the Registrar for perusal by the Bench. This report dated 09.02.2022 is crucial which is extracted hereinunder:

ANNEXURE-P1 13

IN THE NATIONAL CONSUMER DISPUTES REDRESSAL COMMISSION NEW DELHI

FIRST APPEAL NO. 476 OF 2019

(Against the Order dated 31.08.2018 in Consumer Complaint No. 10/2015 of the State Consumer Disputes Redressal Commission, Punjab at Chandigarh)

With

IA/10933/2019 (Deletion of Parties)

Kanwalpreet KaurAppellant

VS.

Dayanand Medical College & Ors.Respondents

APPEARANCE

For the Appellant

Mr. Ujjwal Jain, Advocate
Mr. Shikhar Upadhyay, Advocate
Ms. Kanwalpreet Kaur, In Person

For the Respondent Dayanand Medical College

Mr. S.S. Saini, Advocate, for R-1
Mr. Ritesh Khare, Advocate
Mr. Akhilesh, Advocate
Dr. Vikram Narang, Authorized Representative

For the Respondent Medivays Hospital

Mr. K.G. Sharma, Advocate for
Dr. Satish Jain, Authorized Representative
Dr. Sumeet Jain, Authorized Representative

Dated: 09th February, 2022

REPORT

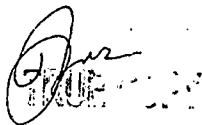
On 28.01.2022, in compliance with the directions given in the Order dated 11.01.2022, the Appellant Ms. Kanwalpreet Kaur has deposited Slides and Blocks, which were sealed in her presence and kept in the safe custody by the undersigned, as recorded in the Proceedings dated 28.01.2022 by the undersigned.

Thereafter, vide Order dated 01.02.2022, the Hon'ble Bench was pleased to inter-alia observed as under:

"To avoid any controversy, we deem it appropriate that let the parties or their Counsel shall be present before this Commission on the next date and verify and confirm the material which was to be sent to the ALIMs.

The parties or their Counsel are directed to appear before the Registrar of this Commission on 09.02.2022 at 11.00 A.M. The Registrar is directed to open the sealed cover, verify the slide and blocks as per our Order

Sd/-
09/02/2022



dated 11.01.2022 as per Chart. Thereafter, it will be sent to AIIMS for expert's opinion.

In case, if the Opposite Parties have any slide or block of the instant case, they may bring on 09.02.2022 and submit before the Registrar with due acknowledgment.

List the matter on 09.02.2022 before the Registrar for further proceedings."

In compliance with the directions given in the above quoted Order dated 01.02.2022, both the Parties are present before the undersigned with their Learned Counsel. The envelope, which was sealed on 28.01.2022 in the presence of the Appellant, is shown to the Appellant. She does not express any doubt on the sealing or any kind of tempering. This is being opened in the presence of all the Learned Counsels, Authorized Representatives and the Parties.

The sealed envelope contains one small sealed envelope and two sealed boxes. The same have been shown to the Appellant. She is satisfied with the sealing. The letter dated 13.01.2022, which is signed by the Appellant and by the undersigned on 28.01.2022, has been shown to the Appellant and all the Counsels, Authorized Representative, present today.

First a small sealed envelope is opened which contains the Block containing the handwritten number S14-1385. This tallies with Sr. No.6 of the Chart mentioned in the Order dated 11.01.2022, which reads as under:

6	23.10.2014	Oncoputh Diagnostic, Pune	by	On Block 6B02/14
		Dr. Prashant Joshi; HP No: S14-1385		

The Learned Counsel for the Appellant Mr. Ujjwal Jain and the Learned Counsel for the Respondent No.1-Dayanand Medical College & Ors., Mr.S.S.Saini alongwith Dr.Vikram Narang, Authorized Representative of OP-1, have seen it and agreed that the Block is the same as mentioned in Sr. No.6 of the Order dated 11.01.2022.

The sealed Box containing 33 Parafin Blocks of Cheek and Neck Tissues taken out in Local Excision and Neck Dissection has been opened in the presence of the Learned Counsels, Authorized Representative and the Appellant. The 33 Blocks have been seen/verified by Dr.Vikram Narang.

S. No. 14/14

Dr. Vikram Narang

Dr. Vikram Narang has arranged these Blocks numberwise as under:

1A to 1N = 14
2A to 2B = 02
3A to 3C = 03
4A to 4B = 02
5A to 5D = 04
6A to 6B = 05
7A to 7C = 03
Total = 33

All these Blocks are seen by the Learned Counsel appearing for both the sides.

The Appellant has confirmed that these are the Blocks that were deposited by her on the last date of hearing i.e. on 28.01.2022. They are again put in Polythene Cover.

With the permission of the Parties, Authorized Representative and Learned Counsels, another sealed Box containing 33 Slides of Cheek and Neck Tissues with Local Excision of Cheek and Neck Dissection in 3 boxes (1 Box containing 12 Slides, 1 Box containing 12 Slides, and 1 box containing 9 slides) are taken out and shown to the Appellant for verification.

The Appellant has seen and made a statement that she has verified and confirmed that the boxes are the same that were deposited on the last date of hearing i.e. on 28.01.2022. She has confirmed that the slides deposited by her in the 3 boxes as mentioned above are intact.

Dr. Vikram Narang has arranged these Slides numberwise as under:

1A to 1N = 14
2A to 2B = 02
3A to 3C = 03
4A to 4B = 02
5A to 5D = 04
6A to 6E = 05
7A to 7C = 03
Total = 33

Dr. Vikram Narang has re-arranged the Slides into the three small boxes. After arranging the Slides, the Appellant has seen them and closed these 3 boxes.

The reference to the 33 Slides is mentioned in Para No.3 of the Order dated 11.01.2022, which reads as under:

S. Narang
4/1/2022

[Signature]

"3. Thereafter, on 7.8.2014 at Mediway's Hospital, the surgeon Dr. Satish Jain (and/or) Dr. Sumeet Jain operated her for "local wide excision face (Rt) with MND level - I to IV under GA" and the surgical specimen was sent for HPR study to SRL Diagnostic at Mumbai. The SRL Dign. registered as Path No: 14W-12120 the specimen consists - Total 7 specimens: one wide local excision of Rt. cheek and other 6 lymph nodes at level: I A, I B, II A, II B, III & IV J. The surgical pathology (HPB) was reported on 14.08.2014."

Both sides have agreed that the requirement of the Blocks as mentioned in the above quoted Para No.3 have been deposited.

Para No.4 of the Order dated 11.01.2022 reads as under:

"4. We note that, the Complainant took second opinion on HPE report of the 1st biopsy Surg. Path.No.14-6842 from the various Pathologists in India (and/or) abroad; but unfortunately, no consensus was arrived on the final diagnosis of Malignant Melanoma. The different Institutes opined as below:

Sr.	Reported on	Opinion from	Material reporting	for
1	02.08.2014	DMC and Hospital, Ludhiana	H & E, advised- IHC	
2	07.08.2014	DMC and Hospital, Ludhiana	IHC - CK & 5100	
3	12.08.2014	SRL Diagnostic Laboratories, Mumbai	IHC: HMB-45 & MELANA. No H&E opinion	
4	10.09.2014	SRL Diagnostic Laboratories, Mum Path.No 14 W-13144:Dr.Anita Borges	On Block- H & E opinion	
5	11.10.2014	Pathology Consultancy Services, Noida, by Dr.Sara Edward, Leeds	On Digital slides	
6	23.10.2014	Oncopath Diagnostic, Pune by Dr.Prashant Jashi: HP No: S14-1305	On Block 6802/14	
7	05.12.2014	PGIMER, Department of Histopathology, Chandigarh	Slide for review	
8	06.12.2014	Vata Memorial Centre, Mumbai	On stained Slide- 6802 1 paraffin block	
9	27.12.2014	PGIMER, Department of Histopathology, Chandigarh	On slide	
10	03.01.2015	PGIMER, Department of Histopathology, Chandigarh	On Slide	

As against Sr. No.1, Mr.S.S.Saini, Learned Counsel for OP No.1 - Dayanand Medical College, Ludhiana, states that Block has been submitted, but the Slide is not submitted.

B. A. of Ludhiana

[Signature]

As against Sr. No.2, Mr.S.S.Saini, Learned Counsel for OP No.1 -Dayanand Medical College, Ludhiana, submits one Slide bearing number 595, 96/14. It is also mentioned in the Slide CK595 96 6802/14 KANWALPREET. On the top of the Slide, it is mentioned as S-100.

The Complainant has refused to see the Slide. Learned Counsel for the Complainant has seen the Slide. It is taken on record.

Thereafter, the Complainant has submitted that this is not her Slide.

As against Sr. No.3, Mr.S.S.Saini, Learned Counsel for OP No.1 -Dayanand Medical College, Ludhiana, states that it is not submitted.

As against Sr. No.4, both the Parties have agreed that Block is submitted, Slide is not submitted.

As against Sr. No.5, both the Parties have agreed that it is not submitted.

As against Sr. No.6, both the Parties have agreed that Block is submitted, Slide is not submitted.

As against Sr. No.7, both the Parties have agreed that Slide for Review is not submitted.

As against Sr. No.8, both the Parties have agreed that Blocks are submitted, Slides are not submitted.

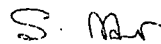
As against Sr. No.9, both the Parties have agreed that Slide is not submitted.

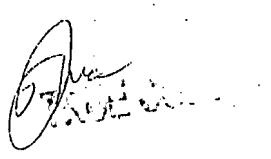
As against Sr. No.10, both the Parties have agreed that Slide is not submitted.

A Slide submitted by the Learned Counsel for the Respondent No.1 - Dayanand Medical College, Ludhiana, IHC-CK&S100 number 595-596/14 is received with the objections of both the Parties. Both the Parties have made the objections on the yellow Envelope in which the said Slide is sealed in the presence of the both the Parties. This has been done in Bench No.5 after the directions of the Hon'ble Bench to accept the said Slide.

Now, there are 4 sealed envelopes with the undersigned.

The Report is submitted before the Hon'ble Bench for kind perusal.


(S.HANUMANTHA RAO)
JOINT REGISTRAR



75. The Commission had passed orders on 09.02.2022 that has taken notice of certain facts regarding the submission and collection of the blocks and slides as directed earlier. The contentions of the parties were noted. It may be pointed out that the Complainant Dr. Kanwalpreet Kaur took objection to the slide presented by the Opposite Party-Dayanand Medical College. The objection was taken through I.A. No. 1157 of 2022 submitted by an affidavit sworn two days' earlier on 09.02.2022. The objection narrated in IA/1157/2022 filed by the Complainant/Appellant Dr. Kaur is extracted hereinunder:

1

BEFORE THE HON'BLE NATIONAL CONSUMER DISPUTES
REDRESSAL COMMISSION, NEW DELHI

I.A. NO. 157/2022

IN

FIRST APPEAL NO. 476 OF 2019

IN THE MATTER OF:

KANWALPREET KAUR

.....APPELLANT

VS.

DAYANAND MEDICAL COLLEGE & ORS.

.....RESPONDENT

APPLICATION ON BEHALF OF THE APPELLANT I.E.
KANWALPREET KAUR THEREBY SEEKING APPROPRIATE
DIRECTIONS FROM THIS HON'BLE COMMISSION PURSUANT TO
SUBMISSION OF THE SLIDE(S) BY THE RESPONDENT NO. 1 I.E.
DAYANAND MEDICAL COLLEGE

MOST RESPECTFULLY SHOWETH:

1. That the present matter is pending adjudication before this Hon'ble Commission and is next listed on 09.02.2022.
2. That this Hon'ble Court vide its order, dated 11.01.2022 has directed the complainant to deposit the slides and blocks, which is to be sent ultimately to the AIIMS for its opinion so as to facilitate this Hon'ble Commission in respect of the issue in controversy.
3. That the complainant herein in compliance to the said order dated 11.01.2022 has submitted its blocks and slides to the Ld. Registry of this Hon'ble Commission and same was sealed and kept with the Ld. Registry of this Hon'ble Commission.

2

4. Thereafter, the matter was taken up and heard on 01.02.2022, wherein this Hon'ble Commission while dealing with a specific request of the Respondent No. 1 i.e. Dayanand Medical college to submit their slide to the Ld. Registry was pleased to issue direction to the Respondent to submit their slides to the Ld. Registry on 09.02.2022. Pursuant to which the Respondents upon witnessing the blocks and slides submitted by the complainant before the Ld. Registry has also submitted slide purportedly in their possession. //

5. That the present Application has been filed by the Complainant in the captioned appeal thereby seeking directions from this Hon'ble Commission in as much as the slide submitted by the Respondent No. 1 i.e. Dayanand Medical College for the purpose of sending for opinion of the AIIMS, shall be rejected and be not sent to AIIMS, for its opinion on the ground that the Complainant/Applicant herein is doubtful of the slide submitted by the Respondent No. 1. That the above said suspicion and doubtfulness is based upon the foregoing facts, which are just and necessary at this stage to be brought to the notice of this Hon'ble Commission.

6. That the Respondents throughout their submissions before the Hon'ble State Commission from period running from year 2015 to 2019 have stated that they do not have any sort of material in the form of block/slides in their custody. For this purpose, Applicant herein seeks to refer and rely upon following submissions of the Answering Respondents at different stages of the present case, which are as follows:-

- a. First Appeal dated 13.02.2016, which was filed by the Answering Respondents.

Relevant extract is herewith annexed and marked as **ANNEXURE A - 1.**

- b. Evidence Submission dated 07.04.2017, which was filed by the Answering Respondents.

Relevant extract is herewith annexed and marked as **ANNEXURE A - 2.**

- c. Written Submissions dated 12.03.2019, which was filed by the Answering Respondents.

Relevant extract is herewith annexed and marked as **ANNEXURE A - 3.**

7. In view of the stand taken by the answering respondent in all the above-mentioned documents/ pleadings, it is submitted that the slide submitted by the respondent No. 1 is highly doubtful and therefore shall not be sent to the AIIMS for its opinion.

8. That the Answering Respondents all throughout the present case have maintained a similar stand, of not possessing any kind of block/slide with them. Therefore, for this reason alone the slide submitted by the respondent ought to be rejected and should not be sent to the AIIMS for its opinion.

9. That, even while arguing the matter before the Ld. State commission and upon being quizzed by the counsel of the answering respondent, a similar stand was taken by the answering respondent of not possessing any material/ slide/

4

block etc. in respect of the case of the Complainant and everything has been already handed over to the complainant.

10. That the Applicant further seeks to refer and rely upon the contents of the judgment/ order dated 31.08.2018 passed by the Hon'ble State Consumer Disputes Redressal Commission, Punjab, Chandigarh, wherein at para 45, has been recorded that the "Answering Respondents do not have any material with respect to the slides/block in their possession.

"45. It was, thus, contended that there are no guidelines to retain slide, specimen, photograph or digital images by the laboratory in the case, where slide and specimen are requested by the patient to be taken away for second/further opinion. The Pathologists of DMC followed the standard guidelines and issued the material to the patient for obtaining the second opinion by keeping the record relating to giving back the said diagnostic material to the complainant.

49.

They pleaded that the complainant had taken the block and slides away from them on 05.08.2014 and elsewhere the block and slides were shown or sent is not known to them and due to non-availability of block with them, they could not give these features. Their stand is that the surgery of the complainant was not conducted only on the basis of their report because she took the entire material of block and slides from them so that she could take second opinion from elsewhere."

.....

Copy of the judgment dated 31.08.2018 is attached herewith and marked as ANNEXURE A - 4.

5

11. Thus, the submission of the Respondent No. 1 came to the utter shock for the Applicant wherein they sought to place on record the slide in their possession, which otherwise has been refused by the respondent all throughout the present proceedings.
12. Further, it is the case of the Applicant that no authenticity and validity can be attributed to this new fact of submitting block/slide after 8 years of span.
13. It appears from the facts and developments of the present case that the respondent while taking leave from this Hon'ble Court to submit the slide in their possession and its consequent submission to the Ld. Registry is trying to mislead and manipulate the outcome of this Hon'ble Court thereby trying to get an opinion from AIIMS on a manipulated/ adulterated slide in their possession, under the garb of the orders of this Hon'ble Commission.
14. That the Applicant herein is apprehensive that the Respondents by their acts are trying to deviate the present proceedings and its outcome to the prejudice of the complainant appellant.
15. That the present application is bona fide and in the interest justice. That grave and irreparable loss and injury will be caused to the Applicant if the present Application is not allowed and the purported slide handed over by the

6
respondent is not withheld then same may prejudice the Applicant.

16. That the contentions, averments and submissions in the preceding paras of the present Application are without prejudice to one another. The Applicant further craves to leave to raise further contentions if some more new facts are brought to the light.

PRAYER

In the light of above facts and circumstances, the Applicant herein humbly prays that this Hon'ble Court may be pleased to:

- (a) Allow the present application thereby issuing direction in as much as the slides and blocks submitted by the Applicant shall not be sent to the AIIMS in terms of the order dated 11.01.2022 passed by this Hon'ble Commission;
- (b) Pass any other order as may deem fit

THROUGH

For *Praveen Upadhyay*
RRG & ASSOCIATES
COUNSEL FOR THE PETITIONER
C - 14, LOWER GROUND FLOOR
CHIRAG ENCLAVE
GREATER KAILASH - I,
NEW DELHI - 110048,
PHONE NO. 011 - 40567342
EMAIL: rrg.rrgassociates@gmail.com

DATE: 09/02/2022
PLACE: New Delhi

76. This Commission passed orders on 09.02.2022 to the following effect:

"1. Today this matter was placed before the Registrar to receive the material in pursuance to Order dated 11.01.2022. Accordingly, the Jt. Registrar Mr. S. Hanumantha Rao has received the items (blocks and slides in sealed cover) and prepared the list. He brought it before the Bench at 3.30 p.m. for further directions. The parties/their Counsel are also present.

2. To seek an expert medical board opinion (Histopathology Review) from AIIMS, vide Order dated 11.01.2022, we have specifically asked the Complainant to furnish the H & E slides and blocks as detailed in the table/chart.

3. **Today the Complainant submits that the one H & E slide No.14-6802 issued by DMC is not with her, but paraffin block of the same primary lesion (biopsy of mole) is available and handed over to the Joint Registrar.** She submitted that slides may be prepared from the said block for further opinion.

4. On a query from the bench about the availability of H & E stained slides from different laboratories wherein she took opinion from 4 centers by sending the paraffin block. She submits, the slides may be available with the concerned laboratories, but they are not issuing the slides for want of their record.

5. It is evident from the record that the Complainant took Histopath opinion on the basis of said paraffin block from different centers in India as listed below. Certainly, H & E slides were prepared from said paraffin block at the following centres:

- (1) SRL Diagnostic Laboratories, Mumbai (Path. No.14 W-13144)
- (2) Oncopath Diagnostic, Pune (HP No.S14-1385),
- (3) Tata Memorial Centre, Mumbai,
- (4) The slide which was reviewed at PGIMER, Chandigarh on 27.12.2014 & 03.01.2015.

6. The Complainant shall file the H & E slides from the above centers. For easy facilitation, we direct those labs/centers shall issue the H & E slide(s) of the patient Ms. Kanwalpreet Kaur at the earliest within 8 days from her requisition.

7. The Pathologists/ Chief Administrator of concerned laboratories shall certify the correctness of H & E slides. One IHC slide of DMC was handed over to the Joint Registrar by the Pathologist of DMC. The Complainant and her Counsel have serious objection to take the said slide on record.

8. The Joint Registrar is directed to preserve all the items (slides/blocks) properly in the sealed cover as per list maintained by him.

9. Four weeks' time is granted to the Complainant to produce all the available H & E slides as mentioned above.

10. List on 14.03.2022 at 11 a.m. before the Registrar for the compliance and then before the bench at 2 p.m. for further direction."

77. As noted above the Appeals were listed for verification and for production of the slides by the Complainant before the Registrar. On 14.03.2022, the following proceedings were drawn before the Registrar:

"The Hon'ble National Commission, vide its order dt.09.02.2022 had granted four weeks' time to the complainant-Ms. Kanwalpreet Kaur, to produce all the available H& E slides, before this Commission.

Vide the said order, it was also directed to list the appeals on 14.03.2022 at 11 am before the Registrar for the compliance and then before the Bench at 2 pm for further direction.

Proceedings before the Registrar usually, commence at 11 am, and it is already 12.25 pm. Neither the appellant in FA/476/2019, Ms. Kanwalpreet Kaur, nor any counsel on her behalf has put in appearance before the Registrar.

However, the staff of the Registry was sent to her, to put in a word to the appellant Ms. Kanwalpreet Kaur, who was sitting in Hon'ble Bench No.5 at that time, to appear before the Registrar, but she has stated that she has some other matter in the said Bench and did not appear before the Registrar.

On enquiry, it is confirmed from the Assistant Registrar (FA Section), that no H & E slides were either produced before her or before the Registry.

Further, the Registry has reported that in FA/479/2019 (Item No.2), the Ld.Counsel for the appellant has filed an application bearing number (A/1951/2022 seeking appropriate directions from this Commission to the respondent No.1 i.e. Ms. Kanwalpreet Kaur to produce the original block and slide bearing nos. 14-6802.

List the matters before the appropriate Hon'ble Bench, today (14.03.2022) at 2 p.m. in terms of the order dt.09.02.2022, for further directions.

Later on Mr. Shikhar Upadhyay, Advocate for Ms. Kanwalpreet Kaur put in appearance and he has been apprised of today's proceedings."

78. The Opposite Party/Appellant-Dayanand Medical College and other Doctors filed I.A. No.2399 of 2022 alleging inconsistent and incorrect stands taken by the Complainant and also clearly doubting the submission of the blocks and slides by her. It was also stated in the said application that Dr. Kanwalpreet Kaur be directed to submit the original slides bearing no.S-26530/14 and 6802/14 on the basis of which the original diagnosis of malignant melanoma was made. A direction was also sought for submission of slide number 3157 as well as the slide on the basis whereof Dr. Uma Nahar gave her opinion. The prayer was to allow the physical verification of each

and every slide submitted by the Complainant/Appellant. The contents of I.A. No.2399 of 2022 are reproduced as under:

1

**BEFORE THE HON'BLE NATIONAL CONSUMER DISPUTES
REDRESSAL COMMISSION, NEW DELHI**

I.A. NO. _____/2022

IN

FIRST APPEAL NO. 476 OF 2019

IN THE MATTER OF:

KANWALPREET KAUR

.....APPELLANT

VERSUS

DAYANAND MEDICAL COLLEGE & HOSPITAL AND ORS.

.....RESPONDENTS

Application on behalf of the Respondents no. 5, 6 and 7 raising the objections in compliance of the order dated 14/03/2022 with regard to the slides of the different laboratories submitted by the appellant on 14/03/2022 before this Hon'ble Commission

And

Also for initiating appropriate action against the appellant/complainant Kanwalpreet Kaur for making false statement and taking totally false and inconsistent stand and pleas before this Hon'ble Commission, which not only calls for stern action against her but also makes her complaint not sustainable and as consequences of the same the original complaint of the complainant Kanwalpreet Kaur and her appeal be dismissed by allowing the appeal of the answering respondents who are appellants in First Appeal no. 479 of 2019

Respectfully sheweth:

1. That the Respondents are constrained to prefer the present first appeal bearing F.A. No. 479/2019 challenging the Impugned order dated 31/08/2018 passed by the Hon'ble State Consumer Disputes Redressal Commission, Punjab, in consumer complaint no. 10/2015.

- 2
2. That all the facts stated in the first appeal no. 479 of 2019 by the respondents are in detail and the same are not repeated herein for the sake of brevity. The Respondents crave leave and permission of this Hon'ble Commission to refer and rely upon the contents of the appeal at the time of hearing of the present application of the Respondents.
 3. That the present Appeal is pending adjudication before this Hon'ble Commission and is listed for 06/04/2022 alongwith first appeal no. 479/2019 and the other appeals filed by the other Opposite Parties, for further directions in this matter.
 4. That it is humbly submitted that after hearing the arguments of the parties, this Hon'ble Commission vide order dated 23/12/2021 was pleased to reserve the matter for order. Thereafter the order was pronounced by this Hon'ble Commission on 11/01/2022, whereby this Hon'ble Commission has sought opinion from the medical board of experts from All India Institute of Medical Sciences (AIIMS) consisting of specialists in Oncology, Department of Pathology (Surgical Pathology Division) and related branches to review all HPE Slides (H&E and IHC Slides) of the first biopsy no. 14-6802 of DMC & H and the blocks and slides from the surgical specimen (wide excision and the lymph nodes i.e. pathology no. 14W-12120 of SRL Diagnostics).
 5. That the Appellant Kanwalpreet Kaur in compliance of the said order dated 11/01/2022 submitted the blocks and slides prepared from the surgical specimen (wide excision and the lymph nodes i.e. pathology no. 14W-12120 of SRL Diagnostics), before the Ld. Registrar of this Hon'ble Commission and the same were sealed and kept with the Ld. Registrar of this Hon'ble Commission. In addition to the above slides and blocks the appellant Kanwalpreet Kaur also submitted a block purported to be prepared from the first biopsy by DMC & H, which is bearing some different number and in different box. The original block prepared by DMC & H was bearing no. 14-6802 and the same number is also mentioned by the different laboratories in their histopathology reports and due to this reason the respondents

strongly objected the authenticity of the said block and raised the objections before the Ld. Registrar as well as this Hon'ble Commission on 09/02/2022.

6. That the appellant Kanwalpreet Kaur purposely withheld the original slide no. 14-6802 prepared from the first biopsy by DMC & H from this Hon'ble Commission inspite of admitting the same in her possession before this Hon'ble Commission on 23/12/2021 and at the same time she denied the availability of the block and submitted before this Hon'ble Commission that the block had finished as a number of laboratories cut the slides from the said block and presently she is not having any block with her.
7. That not only this the appellant Kanwalpreet Kaur at the first instance withheld all other slides of different laboratories and submitted only one block before this Hon'ble Commission on 09/02/2022 purported to be belonging to her first biopsy. This fact was brought to the notice of this Hon'ble Commission by the Ld. Registrar of this Hon'ble Commission on 09/02/2022 and the Ld. Registrar also brought to the notice of this Hon'ble Commission that the appellant has not fully complied with the order dated 11/01/2022 passed by this Hon'ble Commission. Upon which this Hon'ble Commission vide order dated 09/02/2022 again directed the appellant to submit H & E Slide alongwith certificates of the said laboratory certifying the correctness of the H & E Slide and further directed to list this matter on 14/03/2022 at 11:00 AM before the Ld. Registrar for compliance of the order and then list this matter before the Hon'ble Bench at 2:00 PM for further direction.
8. That in compliance to the order dated 09/02/2022 the appellant was required to appear before the Ld. Registrar of this Hon'ble Commission on 14/03/2022 at 11:00 AM. But the appellant clearly refused to appear before the Ld. Registrar of this Hon'ble Commission inspite of sending the messengers by the Ld. Registrar. Thus the appellant has defied the order of this Hon'ble Commission and did not submit any slide before the Ld. Registrar only with

4

malafide intention to avoid the physical verification of the said slides by the respondents before Ld. Registrar.

9. That however the appellant submitted five H & E slides, two IHC slides and one digital slide in the shape of CD before this Hon'ble Commission on 14/03/2022 and the respondents raised serious objections before this Hon'ble Commission on 14/03/2022 and for proper adjudication of the objections raised by the respondents, this Hon'ble Commission directed the respondents to submit their objections within seven days, vide order dated 14/03/2022 and in compliance of the order dated 14/03/2022 the respondents are submitting the following objections with regard to the H & E slides submitted by the appellant:

A. That the Appellant on specific query of this Hon'ble Commission on 09/02/2022, categorically stated before this Hon'ble Commission that the slides in question may be available with the concerned laboratories, but they are not issuing the slides for want of their record. The answer to the query raised by this Hon'ble Commission to the appellant was recorded in para no. 4 of the order dated 09/02/2022. The submission of the appellant before this Hon'ble Commission on 09/02/2022 was totally wrong, which is now also proved from the certificates issued by the different laboratories which says that the slides in question were issued to the appellant by those laboratories far back in the year of 2014 and 2015 and inspite of having those slides with the appellant, she made a false statement before this Hon'ble Commission.

B. That in the present case two laboratories i.e. DMC & H and Post Graduate Institute of Medical Education & Research (PGIMER) vide their reports dated 02/08/2014 and 27/12/2014 respectively opined that the appellant is suffering from malignant melanoma on the basis of two slides i.e. slide no. 6802/2014 prepared by DMC & H and slide no. 26530/2014 submitted by the appellant before Post Graduate

Institute of Medical Education & Research (PGIMER) but the appellant withheld both the slides i.e. 6802/2014 and 26530/2014 only with malafide intention to avoid the true and correct opinion.

- C. That a number of slides were in possession of the appellant since the year of 2014 and 2015 and if she can keep the other 8 slides in safe condition, how she can lose only two slides on the basis of which the exact opinion of malignant melanoma was given by the five doctors of two different laboratories i.e. DMC & H and PGIMER.
- D. That in table at page no. 2 of the application, the appellant with sole intention to mislead this Hon'ble Commission, under the heading reporting diagnosis alleging that the Oncopath Diagnostic Lab Pune made diagnosis as Compound Naevus. It is crystal clear from report dated 23/10/2014 of the said laboratory that the said laboratory made the diagnosis as compound naevus with marked atypia, which is totally different than the diagnosis alleged by the appellant.
- E. That according to the email received by the respondents from Oncopath Diagnostic Laboratory, the said laboratory issued the slide to the appellant on 23/10/2014. A true copy of the email received by the respondents received from the said laboratory is annexed as **Annexure-A**. However in the certificate submitted by the appellant no correctness of the slide, which is now submitted by the appellant before this Hon'ble Commission is certified except merely mentioning the number as per their record.
- F. That Tata Memorial Centre in its certificate dated 18/02/2022 clearly stated that the slide was issued to the appellant on 22/12/2014 but in the said certificate there is nothing with regard to the authenticity of the slide submitted by the

appellant before this Hon'ble Commission on 14/03/2022. Further the slide was issued to the appellant on 22/12/2014 and the certificate issued to the appellant by Tata Memorial Centre on 18/02/2022 without the physical examination of the slide.

- G. That as per letter no. Histo 000441 dated 05/03/2022 of Head of Histopathology Department of Post Graduate Institute of Medical Education & Research, Chandigarh, this laboratory as per its record issued two slides bearing no. S-26530/2014 and S-25788/2014 to the appellant on her request on 02/01/2015 as permitted by Professor Nandita Kakkar. But the appellant with mala fide intention withheld the slide bearing no. S-26530/2014 and submitted only one slide bearing no. S-25788/2014 before this Hon'ble Commission on 14/03/2022. A true copy of the letter dated 05/03/2022 is annexed herewith as **Annexure-B**. It is further submitted that the slide bearing no. S-26530/2014 is the same slide on the basis of which Post Graduate Institute of Medical Education & Research, Chandigarh made the final diagnosis of the appellant as malignant melanoma and thus concealing the said slide by the appellant is totally mala fide and is just to avoid the true and correct opinion. It is further submitted that in order dated 11/01/2022 and 09/02/2022 the appellant was specifically asked to submit the slide bearing no. S-26530/2014, but the appellant withheld the said slide intentionally by defying the orders passed by this Hon'ble Commission.
- H. That when on 14/03/2022 this Hon'ble Commission raised query to the appellant as to from where she prepared the slide no. 25788/2014, which is now being submitted by the appellant before this Hon'ble Commission, the appellant submitted before this Hon'ble Commission that the same was prepared by her friend and submitted the same to PGIMER for opinion, which clearly raises the suspicion with regard to the

7

authenticity of the slide no. 25788/2014. No number of slide is mentioned in the report dated 05/12/2014 of PGIMER and in the said report the slide was unlabelled when it was submitted to PGIMER on 04/12/2014. Further the authenticity of the said slide is also doubtful as the appellant failed to disclose before this Hon'ble Commission from which block the slide in question was prepared and why the original block from which the slide in question purported to be cut, not submitted directly to PGIMER for cutting the slide and to give the opinion. Further the authenticity of the said slide is also doubtful from the fact that none of the laboratory diagnosis the case of appellant as compound naevus except the report dated 05/12/2014 issued by PGIMER, which is totally different from the opinion of all other laboratories. It is further submitted that no authenticity certificate as directed by this Hon'ble Commission vide order dated 09/02/2022 submitted by the appellant before this Hon'ble Commission and thus on this account also the authenticity of the said slide is totally doubtful.

- I. That the appellant submitted a digital slide in the shape of CD before this Hon'ble Commission on 14/03/2022, which is an electronic evidence and any type of electronic evidence cannot be accepted and taken on record without furnishing the certificate under section 65-B of the Indian Evidence Act, 1872, which is to be furnished by the person who prepared the said electronic evidence/document.
- J. That it reveals from the report dated 11/10/2014 given by Pathology Consultancy Services that the digital slide was prepared from the original slide bearing no. 3157/2014 as the same number i.e. Lab No.: PCS/H-2014-3157 received on 09/10/2014 but the appellant did not submit the original slide no. 3157/2014 before this Hon'ble Commission and it further reveals from the email dated 8/10/2014 that the glass slide

8

was scanned and digital slide was prepared at Pathology Consultancy Services, Noida and the said laboratory sent back the glass slide to the appellant through courier. But inspite of receiving the glass slide no. 3157/2014 from the Pathology Consultancy Services the appellant withheld the said slide from this Hon'ble Commission only with intention to avoid the true and correct opinion.

- K. That it is further submitted that the emails dated 08/10/2014 and 10/10/2014 sent by Pathology Consultancy Services cannot be treated as authenticity certificate of the alleged digital slide as in none of the email the slide number is mentioned.
 - L. That the appellant with sole intention to mislead this Hon'ble Commission at page no. 5 of the interim application used the report of Ld. Joint Registrar as authenticity certificate, which cannot be treated as the authenticity of block no. S14-1385 in any manner whatsoever and the compliance of order dated 09/02/2022 requiring the authenticity certificate of each laboratory.
 - M. That as per letter of Head of Histopathology Department of PGIMER which is annexed as Annexure-B with these objections, two slides bearing no. S-26530/2014 and S-25788/2014 were issued to the appellant by PGIMER on 02/01/2015. Whereas Dr. Uma Nahar of the same laboratory gave her opinion on 03/01/2015. If all the slides were issued to the appellant on 02/01/2015 by PGIMER then on basis of which slide Dr. Uma Nahar gave her opinion on 03/01/2015. This fact clearly establishes that there is some other slide which is used by Dr. Uma Nahar for her opinion but the said slide has been totally concealed by the appellant.
10. That the appellant is misleading this Hon'ble Commission by frequently changing her statements with the sole intention that the

true and correct opinion should not come on record before this Hon'ble Commission.

11. That the respondents bonafidely filed the present objections in compliance of order dated 14/03/2022 in the interest of justice and the respondents will suffer irreparable loss and injury, which cannot be compensated by any means if the application of the respondents is not allowed and the appellant is not directed to submit the original slides bearing no. 3157/2014, 26530/2014 and 6802/2014. Since there is no authenticity of the slide no. S-25788/2014, which according to the own statement of the appellant was prepared outside by her own friend, the same slide should not be sent for expert opinion to AIIMS.
12. That further it will be great prejudice to the respondents if they are not allowed to physically verify each and every slide submitted by the appellant before this Hon'ble Commission and thus it is warranted that the respondents be allowed to physically verify each and every slide before this Hon'ble Commission before sending the same for opinion to AIIMS.

PRAYER

In view of the above submissions made by the Respondents, the Respondents respectfully prays that this Hon'ble Commission may be please to:

- A. The Application of the Respondents be allowed in the Interest of justice;
- B. The Appellant be directed to submit the original slides bearing no. S-26530/2014 and 6802/2014 on the basis of which originally diagnosis of malignant melanoma was made;
- C. The Appellant be also directed to submit the slide no. 3157/2014 from which the digital slide was prepared by the Pathology Consultancy Services;

10

- D. In addition to the above slides, the Appellant be also be directed to produce the slide on basis of which Dr. Uma Nahar gave her opinion vide report dated 03/01/2015;
- E. The Respondents be allowed to physically verify each and every slide submitted by the Appellant before this Hon'ble Commission;
- F. An appropriate action be initiated against the appellant/complainant Kanwalpreet Kaur for making false statement and taking totally false and inconsistent stand and pleas before this Hon'ble Commission, which not only calls for stern action against her but also makes her complaint not sustainable and as consequences of the same the original complaint of the complainant Kanwalpreet Kaur and her appeal be dismissed by allowing the appeal of the answering respondents who are appellants in First Appeal no. 479 of 2019;
- G. Pass such other and further orders as this Hon'ble Commission deems fit in the facts and circumstances of the present case.



RITESH KHARE

Advocate for Respondent No. 5 to 7
Office at B-165, Ground Floor,
Jangpura-B, New Delhi-110014
Mobile No. 8130136366
Email: adv.ritesh@gmail.com

Place: New Delhi

Date: 22.03.2022

79. Simultaneously, a reply was filed by the Opposite Party-Dayanand Medical College and Others to the I.A. No:1157 of 2022 filed by the Dr. Kanwalpreet Kaur objecting to the same and also detailing the facts with regard to the transmission of the blocks and slides alleging that she had intentionally and purposely not produced the original slide no.6802 and original block prepared by DMC from the first biopsy. The reply filed by the Dayanand Medical College and the Doctors to the Application of the Complainant-Dr. Kanwalpreet Kaur is extracted hereinunder:

1

**BEFORE THE HON'BLE NATIONAL CONSUMER DISPUTES
REDRESSAL COMMISSION, NEW DELHI**

I.A. NO. 1157/2022

IN

FIRST APPEAL NO. 476 OF 2019

IN THE MATTER OF:

KANWALPREET KAUR

...APPELLANT

VERSUS

DAYANAND MEDICAL COLLEGE & HOSPITAL AND ORS.

.....RESPONDENTS

**Reply on behalf of the Respondents No. 1, 5 to 8 to the
Application filed by the Appellant Kanwalpreet Kaur in the
present case**

Respectfully sheweth:

Preliminary Submissions:

1. That the answering Respondents are constrained to prefer the first appeal bearing F.A. No. 479/2019 challenging the impugned order dated 31/08/2018 passed by the Hon'ble State Consumer Disputes Redressal Commission, Punjab, in consumer complaint no. 10/2015.
2. That all the facts stated in the first appeal no. 479 of 2019 by the respondents are in detail and the same are not repeated herein for the sake of brevity. The answering respondents craves leave and permission of this Hon'ble Commission to refer and rely upon the contents of the appeal at the time of hearing the application filed by the appellant.
3. That the present appeal is pending adjudication before this Hon'ble Commission and is listed for 06/04/2022 alongwith first appeal no. 479/2019 and the appeals filed by the other opposite parties, for further directions in this matter.

4. That it is humbly submitted that after hearing the arguments of the parties, this Hon'ble Commission vide order dated 23/12/2021 was pleased to reserve the matter for order. Thereafter the order was pronounced by this Hon'ble Commission on 11/01/2022 whereby this Hon'ble Commission has sought opinion from the medical board of experts from All India Institute of Medical Sciences (AIIMS) consisting of specialists in Oncology, Department of Pathology (Surgical Pathology Division) and related branches to review all HPE Slides (H&E and IHC Slides) of the first biopsy no. 14-6802 of DMC & H and the blocks and slides from the surgical specimen (wide excision and the lymph nodes i.e. pathology no. 14W-12120 of SRL Diagnostics).
5. That the appellant Kanwalpreet Kaur in compliance to the said order dated 11/01/2022 submitted the blocks and slides prepared from the surgical specimen (wide excision and the lymph nodes i.e. pathology no. 14W-12120 of SRL Diagnostics), before the Ld. Registrar of this Hon'ble Commission on 09/02/2022 and the same were sealed and kept with the Ld. Registrar of this Hon'ble Commission. In addition to the above slides and blocks, the appellant Kanwalpreet Kaur also submitted a block purported to be prepared from the first biopsy by DMC & H, which is bearing some different number and in different box. The original block prepared by DMC & H was bearing no. 14-6802 and the same number is also mentioned by the different laboratories in their histopathology reports and due to this reason the answering respondents strongly objected the authenticity of the said block and raised the objections before the Ld. Registrar as well as this Hon'ble Commission on 09/02/2022.
6. That the appellant Kanwalpreet Kaur purposely withheld the original slide no. 14-6802 prepared from the first biopsy by DMC & H, from this Hon'ble Commission inspite of admitting the same in her possession before this Hon'ble Commission on 23/12/2021 and at the same time she denied the availability of the block and submitted before this Hon'ble Commission that the block had finished as a

number of laboratories cut the slides from the said block and presently she is not having any block with her.

7. That on 15/12/2021 the answering respondents made a specific submission before this Hon'ble Commission that at this stage the slides and the block on the basis of which the report dated 02/08/2014 was given by DMC & H and the slides and blocks prepared from the subsequent surgery specimen (wide excision and lymph nodes) may be sent by this Hon'ble Commission for further opinion of an expert to decide the controversy in the present case and the appellant Kanwalpreet Kaur strongly objected the said submission of the answering respondents on the ground that she is not having any block, which was handed over to her by DMC & H on 28/08/2014 and further submitted that the said block had finished as a number of laboratories prepared the slides by cutting the said block and at present she is not having any block bearing no. 14-6802 with her, which was prepared from the first biopsy and handed over to her by DMC & H. However at that time the appellant Kanwalpreet Kaur clearly admitted before this Hon'ble Commission that she is having only the slide no. 14-6802 prepared from first biopsy and handed over to her on 05/08/2014 by DMC & H. The similar stand was also taken by the appellant on 23/12/2021 when the arguments in the present case were concluded.
8. That keeping in view the stand taken by the appellant Kanwalpreet Kaur, this Hon'ble Commission vide its order dated 11/01/2022 directed the appellant Kanwalpreet Kaur vide para no. 7 of the order dated 11/01/2022 to produce the slides (H & E, IHC) of Surg. Path. No. 14-6802, listed at serial no. 1, 2, 3, 4, 6 and 8 of the table mentioned in para no. 4 of the said order and she was further directed to produce all H & E Slides and paraffin blocks of the subsequent surgical resected specimen, which was repaved by SRL Diagnostics-Ref Path No:14W-12120.
9. That vide order dated 11/01/2022 the appellant Kanwalpreet Kaur was never directed to produce the block prepared by DMC & H from

4

the first biopsy bearing no. 14-6802. Rather the appellant was directed to produce the original slide of first biopsy bearing biopsy no. 14-6802, in view of her stand taken before this Hon'ble Commission.

10. That however on 09/02/2022, the appellant Kanwalpreet Kaur changed her entire stand which was taken by her on 15/12/2021 and 23/12/2021 before this Hon'ble Commission and submitted one block with different number and different box purportedly issued by DMC & H without any authenticity certificate of any laboratory and further wrongly submitted before this Hon'ble Commission that she lost the original slide no. 14-6802 prepared from first biopsy and handed over to her on 05/08/2014 by DMC & H.
11. That the appellant Kanwalpreet Kaur intentionally and purposely not produced the original slide no. 14-6802 and the original block no. 14-6802 prepared by DMC & H from the first biopsy, so that the correct and actual opinion should not come on record. Not only this, the appellant Kanwalpreet Kaur at the first Instance also withheld the slides of the other laboratories. Thus the appellant only with mala fide intention objecting the IHC marker slide produced by the answering respondents before this Hon'ble Commission, so that no slide pertaining to the first biopsy should come on record. With this sole intention she also withheld the slides of first biopsy on the basis of which the answering respondents as well as Post Graduate Institute of Medical Education & Research (PGIMER), Chandigarh opined that the appellant was suffering from malignant melanoma.
12. That the mala fide intention of the appellant was reflected firstly when she did not approach the answering respondents to collect the IHC marker slide and secondly when she intentionally failed to respond to the IA No. 640 of 2022 filed by the answering respondents for issuance of directions to the appellant to collect the said slide from the answering respondents at her convenience and submit accordingly. This Interim Application was decided by this Hon'ble Commission vide order dated 01/02/2022 and at the time of

hearing of the said interim application, the appellant never raised any objection with regard to the IHC marker slide. Vide order dated 01/02/2022 this Hon'ble Commission instead of directing the appellant to collect the said slide from the answering respondents and to submit the same before this Hon'ble Commission, directed the answering respondent to bring the said slide on 09/02/2022 and submit before the Registrar with due acknowledgement.

13. That the present application filed by the appellant objecting the IHC marker slide submitted before this Hon'ble Commission by the answering respondents is merely an abuse of the process of law and is also amount to misrepresentation of facts and is the result of concocted story of the appellant framed by her with mala fide intention to keep the material (block and slides) away from this Hon'ble Commission on the basis of which the answering respondents as well as Post Graduate Institute of Medical Education & Research (PGIMER), Chandigarh gave their opinion.
14. That the slide in question is pertaining to the two markers done by the answering respondents and the answering respondents gave their report on 07/08/2014 with respect to two markers i.e. S-100 and Cytokeratin. The said slide was prepared from the original block no. 6802/2014, which is clearly indicated on the report dated 07/08/2014 given by the answering respondents and thus questioning the authenticity of the said slide is totally meaningless when on the basis of the said slide the answering respondents already gave their opinion vide report dated 07/08/2014 with regard to the two markers carried out by them in their hospital.
15. That the appellant has not approached this Hon'ble Commission with clean hands and mislead this Hon'ble Commission by twisting the actual facts of the case by frequently changing her own stand before this Hon'ble Commission.

Reply on merits:

1. That the objection raised by the appellant herein questioning the authenticity of the IHC Marker Slide submitted by the answering respondents before the Ld. Registrar on 09/02/2022 on the ground that it was the stand of the answering respondents that they have no material with them as submitted in the first appeal dated 13/02/2016 filed by the answering respondents before this Hon'ble Commission. In this regard it is submitted that the answering respondents filed their first appeal before this Hon'ble Commission in the month of March 2019 against the impugned order passed by the Hon'ble State Consumer Disputes Redressal Commission, Chandigarh on 31/08/2018. Since the impugned order was passed by the Hon'ble State Commission on 31/08/2018, the question of filing the first appeal on 13/02/2016 by the answering respondents does not arise at all. No appeal can be filed against the non-existing order.
2. That before the Hon'ble State Commission as well as this Hon'ble Commission it is the stand of the answering respondents that they were not having the original slide and the block, which were issued to the appellant on 05/08/2014 and 28/08/2014 respectively and as such it was not possible for the answering respondents to give the complete report. The answering respondents were having only one slide of IHC Markers i.e. S-100 and Cytokeratin with them and on the basis of marker slide the complete report cannot be given. To give the complete report the original slide as well as the block are required. To prove this fact the answering respondents submitted the medical literature i.e. American Journal of Dermatopathology, 36(9): 757, September 2014. Copy of which is also appended with the First Appeal No. 479/2019 filed by the answering respondents before this Hon'ble Commission as Annexure P-22.
3. That the answering respondents even in ground no. 2 of the First Appeal clearly submitted that the appellant came to the hospital of the answering respondents on 04/08/2014 and on 04/08/2014 the histopathology report dated 02/08/2014 was supplied to her and she

7

was further informed about the necessity of four markers out of which two markers namely S-100 and Cytokeratin (CK) were to be carried out in the hospital of the answering respondents and the other two markers namely HMB-45 (IHC) and Melan-A are to be carried out by outside laboratory. The appellant deposited the charges of all four markers on 04/08/2014 vide receipt no. 2014-619102. On deposit of the charges of all four markers, the answering respondents prepared slide for two markers i.e. S-100 and Cytokeratin in DMC & Hospital on 05/08/2014 and sent the remaining block to SRL Diagnostic Laboratory, Bombay through the local centre of the said laboratory for carrying out the other two markers i.e. HMB-45 and Melan-A. On 05/08/2014 the appellant submitted an application for issuance of the slide and block for second opinion and upon receipt of such request of the appellant the original slide no. 14-6802 prepared by the answering respondents for histopathological examination was handed over to the appellant on 05/08/2014. The answering respondents cut section from the original block for carrying out two markers to be done at the respondent's hospital and after cutting the said section, the block was sent to SRL Diagnostic Laboratory, which was received back by the answering respondents on 27/08/2014 and the same was handed over to the appellant on 28/08/2014. It is further submitted in ground no. 2 that the findings of the Hon'ble State Commission to the effect that the appellants were having three slides with them and these slides were more than enough to narrate about the stage and features of cancer are wrong and against the facts as it is the admitted case of the appellant that she took away the main slide from the answering respondents on 05/08/2014. It is further submitted that from the IHC Slide, stage and features of the cancer cannot be given. For the purpose of staging multiple sections are required to be cut from the block, which was not available with the answering respondents after 05/08/2014 as the same was lying with the SRL Diagnostic Laboratory till 27/08/2014. It is further pleaded in ground no. 2 of the appeal filed by the answering

respondents that from the slide of IHC markers, the staging of the melanoma cannot be given as observed in American Journal of Dermatopathology (Annexure P-22).

Thus from the above ground, it can be clearly observed that since the very beginning it was the case of the appellant that they are having one slide of IHC markers i.e. S-100 and Cytokeratin (CK) and as per the available medical literature the staging and features of the cancer cannot be given as observed in Annexure P-22. Therefore the objection raised by the appellant with regard to the possession of the marker slide with the answering respondent is totally wrong and baseless.

4. That the appellant has not attached the complete annexures and annexed only the extract of the documents suitable to her. For the correct appraisal of the facts the complete document is required to be submitted.
5. That the objection raised by the appellant with regard to IHC marker slide submitted by the answering respondents before this Hon'ble Commission on 09/02/2022 is also baseless on the ground that on one hand the appellant saying that after 05/08/2014 the answering respondents were not having any material i.e. block and slide of the first biopsy, but on the other hand it is the case of the appellant that the report of two markers i.e. S-100 and Cytokeratin (CK) was given by the answering respondents on 07/08/2014. If after 05/08/2014 the answering respondents were not having any material with regard to the first biopsy then how it was possible for the answering respondents to give their opinion with regard to the above said two markers on 07/08/2014. Thus the report dated 07/08/2014 given by the answering respondents itself falsify the objection of the appellant.
6. That the appellant through the present Interim Application trying to deviate the proceedings of the present case and intending that the correct and true opinion should not come on record and thus she is

9

misleading this Hon'ble Commission by twisting the facts suitable to her.

7. That the submissions made by the answering respondents through the present reply are without prejudice and further craves the leave of this Hon'ble Commission to raise further contention at the time of deciding the present Interim Application if new twisted facts are brought by the appellant before this Hon'ble Commission.

PRAYER

In view of the above submissions made by the answering respondents, the answering respondents respectfully prays that this Hon'ble Commission may be please to:

- A. Reject the objections raised by the appellant through the present Interim application by dismissing the interim application of the appellant and the marker slide submitted by the answering respondents on 09/02/2022 before this Hon'ble Commission be taken on record and be sent for opinion to All India Institute of Medical Sciences (AIIMS) so that the correct opinion should come on record, in the Interest of justice.
- B. Pass any other order or direction as found suitable on the basis of facts and circumstances of the present case.



RITESH KHARE

Advocate for Respondent No. 1, 5 to 8
Office at B-165, Ground Floor,
Jangpura-B, New Delhi-110014
Mobile No. 8130136366
Email: adv.ritesh@gmail.com

Place: New Delhi

Date: 22.03.2022

80. The Complainant also filed a reply to I.A. No. 2399 of 2022 filed by Dayanand Medical College contending that they have raised a totally false plea only to create a confusion and that all blocks and slides have been submitted, verified and confirmed before the Registrar on 09.02.2022. This reply was filed on 26.07.2022 after the report from AIIMS dated 01.06.2022 had been received. The said reply is extracted hereinunder:

BEFORE THE HON'BLE NATIONAL CONSUMER DISPUTES
REDRESSAL COMMISSION, NEW DELHI
IA NO. ~~1351~~ OF 2022
IN
FIRST APPEAL NO. 478 OF 2019

IN THE MATTER OF:

KANWALPREET KAUR

.....APPELLANT

VS.

DAYANAND MEDICAL COLLEGE & HOSPITAL AND ORS.

.....RESPONDENT

**REPLY ON BEHALF OF THE APPELLANT I.E., KANWALPREET KAUR
TO THE APPLICATION FILED BY THE RESPONDENTS IN THE
CAPTIONED APPEAL**

Most respectfully sheweth:

1. That the present matter is pending adjudication before this Hon'ble Commission and is next listed on 26.07.2022.
2. That the present appeals are arising out of the order dated 31.08.2018 passed by the Ld. State Commission wherein the Commission was pleased to award a sum of Rs. 55,00,000/- (Fifty – Five Lakhs Only) in favour of the Appellant and as against her treating doctors, pathologists and their respective insurers.
3. That the Appellant herein for the purpose of reply to the present Application seeks to refer and rely upon the factual conspectus as narrated in the captioned appeal pending before this Hon'ble Commission and same is not repeated herein for the sake of brevity.
4. At the outset, it is submitted that the Applicant vide its application under reply is objecting to the slides submitted by the Appellant in proceedings conducted on 14.03.2022 before this Hon'ble Commission.

- 2
5. That the present application by the applicant is merely an abuse of the process of law, and for filing the same the Applicant has resorted to utter falsehoods, misrepresentations of facts and tactics to suit their own malafide intent. That the allegations put forth by the Applicant with respect to the block submitted by the Appellant are wrong and hence denied.
 6. It is submitted that the authenticity of the block of the primary lesion already stands confirmed and acknowledged by the opposite party in the presence of their counsel Mr. S. S. Saini in the proceedings dated 09.02.2022 conducted before Ld. Joint Registrar, which were video graphed by the office staff on the oral directions of Ld. Joint Registrar. In this regard, it is pertinent to state that the Ld. Joint Registrar while conducting the said proceedings dated 09.02.2022 categorically showed the block to opposite parties, which were identified by the opposite party. That the reliance is placed upon the Registrars report annexed as **Annexure- P1** at page no. 4 and 5, wherein it has been clearly mentioned against the Serial No.1, 4, 6 and 8 that the opposite parties agreed that the H&E slide (6802/14) were issued by them to the complainant and was from the same block, which has already been submitted by the complainant. Moreover, opposite parties had also confirmed that the slides prepared by Dr. Anita Borges, Onco Lath Lab and Tata Memorial center are extracted out from the same block. In view of the above stated facts, it is clear that present objections raised by the opposite party are superficial in nature and is a product of an afterthought and have been made in counter blast to the objection of the complainant herein.
 7. Further, it is pertinent to state that the proceeding dated 09.02.2022 before the Ld. Joint Registrar was video graphed by 2 (two) personnel) and documented by the Jt. Registrar, the opposite parties are objecting to the evidence collected by the Hon'ble Commission itself.

- 3
8. It is necessary for the complainant to advert to the following facts for the purpose of the present objections, which are as follows:-
- a. That the Block 6802/14 was renumbered by Onco Path lab -to S14-1385, as per their own lab records and the same has also been mentioned on the certificate of authenticity issued by Onco Path lab is herewith marked and annexed as **Annexure - P2**.
 - b. Furthermore, the reliance has been placed upon the e-mail dated 05.03.2022 on behalf of the Opposite parties to Onco Path Diagnostics annexed at Annexure-A, Pg 12 of their Application dated 22.03.2022 on behalf of the Opposite party No. 5, 6, 7 raising objection in compliance of the order dated 14.03.2022, wherein Opposite Party No. 6 has herself referred to block as (14-6802) reviewed at their Centre as vide no. (S14-1385).
[Other party annexure]-
9. That the Applicant has approached this Hon'ble Commission with unclean hands and is engaged in a cynical attempt to mislead this Hon'ble Commission by intentionally and deliberately presenting the facts in a distorted manner.
10. That the allegations put forth by the Applicant with respect to the slides are wrong and hence denied.
- a. In respect of the objections raised by the Respondents in as much as in relation to holding of the slides is totally baseless and wrong. In this regard, it is submitted that Oncopath Diagnostics prepared slide from block no 6802/14. The slide was reported on 23.10.14 and sent to the complainant. The same slide was then sent to Tata Memorial Hospital who reported the slide on 23.12.2014.
 - b. It is further submitted that the complainant pursuant to her mail addressed to Tata Memorial Hospital sought for delivery of her slides which is herewith marked and annexed as **Annexure - P3**. Thereafter, in response to the said email, Tata Memorial Hospital at the first instance asked the Complainant to collect the said slide but later

4

on said that there was printing mistake on the report dated 22.12.2014 and they have received outside stained slide No. 6802 of Ms Kanwalpreet Kaur, Case No. RH/511-02, Pathalogy No. 51288/CL on 06.12.2014. further stated that the slide has been returned to the patient on 22.12.2014. as per record. (Certificate issued by Tata Memorial Centre has already been submitted to the Commission).

- c. That the present exercise was carried by this Hon'ble Commission to collate all the material for the purpose of sending it for fresh opinion, within a period of 2 months.
 - d. Pursuant to which the present complainant submitted 6 (six) slides and a digital CD along with the "Certificates of Validity".
11. That complainant herein has submitted all slides in support of their respective "certificates of validity" therefore, allegations of the opposite parties are bereft of any merit and is liable to be dismissed at the very threshold.
12. That the allegations put forth by the Applicant with respect to the inconsistent statements made by the Appellant at various stages are wrong and denied.
- a. The slides were obtained from SRL Lab Mumbai along with the certificates in the previous months and same has already been submitted to the Hon'ble Commission. The slides that are issued to Onco Path Lab are the same slide that were sent to Tata Memorial.
 - b. That the Applicants have manipulated the case with malafide intentions as to the delivery of slides to PGI Hospital stating that Complainant has not deposited the slides, whereas it is stated that the PGI Institute delivered 2 slides- 25788/2014 and 26530/2014 to the Appellant. Out of these slides, one slide- 25788/2014 is submitted to the Commission already. The other slide no. 25788/2014

is the same slide as issued by the opposite parties and renamed as 6802/14.

- c. The confirmation for the same can be sought from the authentication certificate issued by the Pathology Consultancy Services. [Copy of the certificate issued by the Pathology Consultancy Services is herewith annexed and marked as **Annexure- P4**]. In the stated certificate, the Pathology Consultancy Services have clearly mentioned that they received a slide numbered 6802/14 for digitalization and renumbered it as 3157/14 as per their lab records to get opinion from Dr. Sara Edwards.
- d. It is humbly submitted that when the Appellant got this slide back from Pathology consultancy services, she submitted the same slide to PGI Institute. It can be clearly seen from their review report that they have received slide number 3157 for review. Copy of the review report is herewith annexed and marked as **Annexure- P6**. The Respondents have been repeatedly construing stories that the Appellant has not submitted 3 slides i.e., 6802/14 issued by Respondents, 3157/14 issued by Pathology Consultancy Services and 25788/14 issued by PGI Institute. Moreover it has been confirmed through authenticity certificated issued by Pathology consultancy Services that all 3 (three) slides as mentioned above actually a single slide that has been renamed at several instances. (Kindly refer **Annexure P-4**).
- e. That it is submitted that 6 slides and a digital CD has been submitted before the commission along with all authenticity certificates. The complainant had always maintained that the Appellant is not in possession of one slide and said can be verified vide order dated 09.2.2022, passed by this Hon'ble Commission wherein the it has been documented -

"The complainant submits that one slide no. 14-6802 is not with her but the paraffin block of the same primary lesion is available and handed over to the

- joint registrar. She submits that the slides may be prepared from the said block for further opinion"
- f. Furthermore, the Respondents have submitted that the Appellant has termed the diagnosis as 'Compound nevus' by Onco Path diagnostics which is in fact is "*compound nevus with marked atypia*". Pursuant to this it is submitted that the report by Onco Path Diagnostics is submitted along with the slide and no manipulations have been done on the said report. Furthermore, the compound nevus with marked atypia still stands as a "*benign nevus*" which can be confirmed anywhere in literature of pathology and opposite party seems to be unaware about the same. Copy of the literature of pathology is herewith annexed and marked as **Annexure- P8**. Wherein it is clearly mentioned that compound nevus with atypia is a "differential diagnosis" of compound nevus. As far as atypia is concerned, it has been supported and mentioned distinctively in literature that atypia does not mean cancer. Atypia is present in aging cells of the body, or may be present at a site for repeated trauma or inflammation. Copy of the same is herewith annexed and marked as **Annexure- P9**.
- g. The Respondents have submitted that in the certificate issued by the Onco Path Lab, correctness of slide is not certified. It is humbly brought to the notice of the Hon'ble Commission that the report prepared by AIIMS Board dated 2.6.22 states that all slides submitted ALL TOGETHER, show same morphology and it is the most valid certificate which confirms the authenticity of all slides submitted by the complainant. Additionally, the certificate of correctness issued by the Onco Path Diagnostics (Please refer **Annexure- P2**) clearly states that they made a slide out of block 6802/14 and numbered the slide as S4-1385. The slide bearing the same number is submitted to the commission already.
- h. That the Respondents have raised the same issue that Tata Medical Centre has not mentioned the correctness of slide

in their certificate. In this regard, the certificate of correctness is submitted through application dated 14.03.2022 to the Honorable Commission. Moreover, the Respondents can verify the correctness of the slide by verifying it through Tata Medical Centre and bar security code present on the slide can be scanned for their satisfaction.

- i. The Respondents again have raised the same issue that that the Appellant did not submit the 2nd slide issued by PGI Institute- numbered 26530/14. This has already been explained before that it was the same slide (6802/14) issued by opposite parties. The slide was renumbered as 3157/14 by the Pathology Consultancy Services and further the same slide was again renumbered as 26530/14 by PGI Institute. (Please refer **Annexure- P4**)
- j. That the Respondents have submitted that the slide prepared from the block by the Appellant's friend is untitled and it is uncertain from which block the slide was prepared. In that regard it is pertinent to submit that when the Appellant was wrongly diagnosed of cancer in 2014, the only concern for the patient was regarding confirmation and verification of the said disease. Thus, she got testing's done from multiple test labs. Pursuant to such, Appellant was in desperate need to know her health status and a patient in such a state would never submit a slide which is not from her block or get someone else's slide tested. The authenticity of slides have also been confirmed by AIIMS Board Consultants report wherein it is clearly mentioned that all slides shows the same morphology.
- k. That the Respondents have also stated that the diagnosis of 'Compound nevus' given by PGI Institute does not match any other diagnosis provided from other labs. In this regard it is humbly submitted to the commission that the sample submitted by Oncopath Lab reported as 'compound nevus' is similar to the diagnosis of PGI

8

Institute (Copy of the reports have already been submitted to the Commission).

1. That as far as *mala fide* intentions of the Applicants are concerned, stating that PGI Institute had given the diagnosis as 'Melanoma', it is submitted that PGI has nullified its diagnosis of 'Melanoma' and re-viewed the same sample as 'Spitz Nevus'. Copy of the relevant part is herewith annexed and marked as **Annexure- P6 and P7**. The allegations put forth are completely denied.

- o That there is a possibility of same report to found in Applicants record, nevertheless it stands cancelled and invalidated by PGI as is re-reported as 'Sptiz Nevus'.
- o That the alleged report submitted by the Applicants which claims diagnosis by PGI as 'Melanoma' is a forged document (Copy of the forged document is annexed and marked as **Annexure- P5**) as it is pertinent to note that it is signed by Dr. Radotra who is a different doctor than the Dr. A Das whose signature can be found on the original report of complainant. **(P-6)**
- o That it is clearly mentioned by the PGI consultant in the report **(P-6)** that it is a "review case" which cannot be found on the forged report **(P-5)** by the Applicants.
- o That Applicants have submitted that the slide which was reported by Dr. Uma Nahar was a different slide altogether. However, it is pertinent to note that the review is performed on the same sample/slide which can be confirmed by the Biopsy Number and the CR number. Furthermore, it was mentioned on the report by Dr. Uma Nahar that "Slide to be reviewed with clinical history back up" which cannot be found on the forged report.

- 3
9
- o That the entire forgery committed by the Applicant have been distinctively and comprehensively described by the State Commission in their judgement order at page 60.
 - m. The opposite parties have submitted that no certificate is issued for the digitalized CD by the complainant. It is humbly submitted that the same has already been annexed as **Annexure- P4**.
 - n. The opposite parties have stated that the digital slide was prepared from the slide number 3157/2014 and the complainant has not submitted that slide. In this regard it is submitted that the slide no.1357 is the same slide which was issued by the opposite parties to the Complainant. The same can be verified from the certificate issued by the Pathology Consultancy Services annexed as **Annexure P-4**.
 - o. That the Respondents have constantly been raising the issue that email sent by the Complainant to Pathology Consultancy Services cannot be treated as authenticity certificate. (Please refer **Annexure- P4**)
 - p. The Respondents have also stated that the joint registrars report submitted is not authentic and the authenticity certificate pertaining to each laboratory is required. It is submitted to the Hon'ble Commission that the Respondents were shown the block of the primary lesion comprehensively by the Jt Registrar. The Respondents and their counsel took their time to examine the block and have consented that it is the same block which they issued to the complainant. The same was then documented by the joint registrar in his typed report and videography. The report by the joint registrar states clearly on page 4 and page 5 (Annexed as **P-1**) that the opposite parties consented that--

"The 'H&E slide' issued to the complainant by the opposite parties was prepared from the same block as submitted by the complainant (as against serial no.1)

16

The slide prepared by Dr Anita Borges is from the same block which the complainant submitted (as against serial no. 4)

The slide prepared by Onco Path Lab is from the same block which the complainant submitted (as against serial no.6)

The slide prepared by Tata Memorial Centre is from the same block which the complainant submitted (as against serial no.8)


- q. The Opposite parties have submitted that the slides by PGI were issued to the complainant on 02.01.2015 and Dr Uma Nahar gave her diagnosis on some other slide on 03.01.2015. It is submitted that Appellants are requested to check the diagnosis report by Dr Uma Nahar. The biopsy no. and the CR no are same as the one present on the previous report (kindly refer to Annexure **P6 and P7**). The same slide as issued by the opposite parties bearing no. 6802 was submitted to Dr Uma on the basis of which she reviewed the case from malignant melanoma to Spitz nevus. Moreover the same has been confirmed through report given by AIIMS Board consultants on 02.06.2022
13. That the respondent have been making erroneous statements with the malafide intention to mislead the Commission and deviate them from the actual concern wherein the respondents themselves have created 4 different slides out of 1 slides given to them.
14. The Complainant has complied with all instructions from the Honorable Commission but she unfortunately is still being targeted, tormented and harassed by the opposite parties. It is prayed accordingly.
15. Moreover, that the Complainant have till date incurred Rs. 1,87,52,220/- of medical cost and has suffered mental agony. [The receipts medical expenses incurred by the Complainant till date is annexed as **ANNEXURE P10** and was also annexed as **ANNEXURE 69 and 70** in FA 476/2019.]

PRAYER

In view of the above said submission, it is humbly prayed to the Hon'ble Commission to:

- a. Reject the objections raised by the Pathologists
- b. Pass any such order as may deem fit.

THROUGH


ADVOCATES FOR THE APPELLANT
RRG & ASSOCIATES
C - 14, LGF, CHIRAG ENCLAVE
GREATER KAILASH - I
NEW DELHI - 110048
011-40563742
rrg.rrgassociates@gmail.com

PLACE: NEW Delhi
DATE: 26/07/2022

81. These replies and applications had been exchanged except the reply of the Complainant which arrived in January 2022 and as noted above orders were passed on 22.04.2022 by this Commission sending the matter to AIIMS for its opinion which arrived vide a report dated 01.06.2022.

82. There is no substantial force in the arguments of Mr. Sobti on behalf of the Dayanand Medical College regarding the correct blocks and slides having not been provided by the complainant as we find that the blocks and slides that were tendered for an analysis are neither proved to be tampered or otherwise defective. The complainant had not produced one slide, but the paraffin block had been submitted before the Registrar of this Commission pursuant to the orders and which was verified and recorded and then dispatched to AIIMS. Even assuming for the sake of arguments that one of the slides as alleged had not been produced, the fact remains that the paraffin blocks that were collected from different sources and the slide produced by Dayanand Medical College may have reflected a different assessment in the findings recorded but none of the sources have indicated any tampering or manipulation of the blocks or the slides. We cannot assume a doubt about the correctness of the blocks and the slides on a suspicion that has been cast by Mr. Sobti and has been contended through the application I.A. No. 2399/2022 filed by him.

83. The said doubts that have been cast by Mr. Sobti can be better analysed by reflecting on the orders passed by this Commission on 06.04.2022 and 22.04.2022 extracted hereinabove. The order dated

06.04.2022 indicates the submission of the slides and the blocks tendered by the complainant. When doubts were expressed and the objections were taken by the OPs-1, 5 to 8, it was observed by the Commission in the order dated 22.04.2022 that since there was a difference of opinions, the Commission was unable to arrive at any final opinion in the matter and therefore an expert medical opinion was required from AIIMS as the previous opinion before the State Commission had not been tendered on the basis of the examination of the blocks or slides and had been given only on the basis of the medical record. The Commission in its order dated 22.04.2022 listed the paraffin blocks and slides that were available. The paraffin block of the subsequent surgery of the wide excision by the OPs-2 and 3 was also sent along with all the reports from different laboratories and the previous opinion of AIIMS dated 23.11.2015. It is correct that the complainant on 09.02.2022 had stated before the Commission that slide no. 14-6802 issued by DMC was not available with her. It is also correct that the said slide does not appear to have been forwarded as it had not been submitted by the complainant, but it is also clear from the order dated 22.04.2022 that one paraffin block no. 14-1385 that was prepared from 14-6802 was available and that was sent to AIIMS. The paraffin block therefore was available and it is not the case of the OPs-1, 5 to 8 that the block was tampered. Apart from this, all the slides prepared from the primary lesion and the report given by DMC was available as noted in the order dated 22.04.2022. Mr. Sobti has hammered this point that has been recorded by us in the order dated 31.08.2024 and therefore to this extent his

argument deserves to be accepted that the slide no. 14-6802 had not been tendered by the complainant as indicated above.

84. Regarding the handing over of the slide and blocks, the requisition dated 05.08.2014 was allowed and the slide and block was released in favour of the complainant by the Dayanand Medical College. However, it appears from the documents particularly the Register of delivery that the same seems to have been delivered to the complainant on 28.08.2014. This aspect was examined by the State Commission in paras 49 and 50 of the impugned order where the transaction of the Block and Slides back to the complainant was discussed and it was held that the block was received at the SRL Lab on 04.08.2014 and therefore it could not have been taken or received by the complainant on the very next day on 05.08.2014 as it had been despatched to the lab from where the reports came later on. The same seems to have been received back and delivered to the complainant.

85. Thus, the complainant has received the block and the slide and she was in possession thereof at least on 28.08.2014. As noted above, the said slide from DMC bearing no. 14-6802 which came into the possession of the complainant was not produced by her as noted in the order dated 09.02.2022 and does not seem to have supplied even later on, but the opinion prepared on the basis of the said slides were provided coupled with the block that was prepared from 14-6802. In these circumstances, the suspicion and doubt cast by Mr. Sobti on the genuineness of the material that was sent to AIIMS for a report, in the probabilities as discussed above, does not arise.

86. We are therefore unable to accept the argument that the correct slide had not been sent to AIIMS for an assessment when the paraffin block from which the slides had been prepared was available and has been noted by AIIMS while tendering its report dated 01.06.2022 before this Commission. Similarly the complainant has filed objections through I.A. No. 1157/2022 to the slide submitted by the OP No. 1, 5 to 6. For the same reasons we do not find any good reason to entertain those objections. Once the said material has been comprehensively assessed by the expert body of AIIMS, there is no further need to undertake a forensic investigation by this Commission or doubt the availability of the correct material. We are therefore not inclined to investigate this matter any further. The two IA's filed one by the complainant appellant I.A. No. 1157/2022 and the other by Mr. Sobti I.A. No. 2399/2022 are therefore consigned with the said observations. We therefore proceed on the foundation that the report of AIIMS has been tendered after not only perusing and assessing the relevant slides and the paraffin block but also the respective pathological, histopathological and other confirmatory reports that were placed before it relating to the pathological examinations pre-surgery as well as post-surgery of the complainant.

87. We may further point out that the blocks and slides pertaining to the pre-surgery period were made available and in addition thereto the slides prepared post-surgery were also made available to AIIMS. Thus, AIIMS had the advantage of assessing the entire material together with the conflicting reports as suggested by the learned counsel to arrive at their independent

findings. No doubt regarding the material has been expressed by AIIMS. In the circumstances, the contention that the report of AIIMS is based on some misrepresentation on account of the absence of any material or any incorrect material available has to be rejected.

88. From the aforesaid facts it is evident that both the parties had taken objection to the submissions of the blocks and slides by either side and then on 22.04.2022 a Bench of this Commission passed the order for sending the specimens to AIIMS. It is therefore clear that the report of AIIMS dated 01.06.2022 was arrived on the basis of the material that was tendered by both sides.

89. The Complainant urges that there is no evidence of any necrosis or mitosis nor was there any evidence of metastasis.

90. On the other hand, Mr. Sobti, learned Counsel for Dayanand Medical College has urged that the Complainant failed to produce the original slides that had been received by her from the Dayanand Medical College and therefore this failure on the part of the Complainant which also stands noted in the proceeding before the Registrar on 09.02.2022 and 14.03.2022 casts a serious doubt on the material submitted by her and also the absence of the correct blocks and slides which had been taken in her possession the examination whereof was necessary.

91. We have considered the submissions raised on this issue and what we find on an overall consideration of preponderances is that the reports that were taken into consideration by the State Commission from various sources

may have been at variance, but when the issue of its re-examination by AIIMS was taken up, the parties had been called upon to submit their materials and accordingly the Complainant had tendered it before the Registrar. The verification of the said slides and its arrangement has been recorded in detail in the proceedings before the Registrar on 09.02.2022 extracted hereinabove. The same was done in the presence of all the parties even though the Complainant raised her objection to the tendering of the slide by the OP-Dayanand Medical College yet this Commission did not take any view doubting the submission of the said slide and sending it to AIIMS for examination. The Opposite Party-Dayanand Medical College and the Doctors tendered their objections thereafter on 22.03.2022 which was also before this Commission when orders were passed on 22.04.2022.

92. The Commission therefore dispatched not only the blocks and slides but also all the 10 reports that are mentioned in the chart reproduced in the order dated 11.01.2022. Thus, the entire material was there with AIIMS to give its opinion and the report dated 01.06.2022 has not cast any doubt on the contents of the blocks and slides that were submitted before it. It is through I.A. No. 2399/2022 at the stage of final arguments that this contention has been raised by Mr. Sobti to urge that the correct material had not been tendered by the Complainant and that the opinion of AIIMS is therefore not founded at a correct representation by the Complainant. He has submitted that compared with the opinions relied on by the Opposite Parties/Appellants leaves no room for doubt that the prognosis and the diagnosis as well as the

treatment through surgery were in accordance with medical protocols and consequently, any deficiency or defect in the pathological or other medical reports tendered by the Dayanand Medical College is not established. He therefore submits that the complaint insofar as relates to Dayanand Medical College and its Doctors is neither tenable nor sustainable and therefore deserves to be rejected.

93. We may now discuss the stand about the reports taken by the pathologists before the State Commission in their written statement that has been filed on behalf of opposite party No.1 and 5 to 8 in the original complaint . A copy of the written statement is on record as an Annexure P-29 to Appeal No.479 of 2019. Written synopsis on behalf of Dayanand Medical College and the Pathologists has also been filed on 8th December 2021 vide Diary No. 25443. The said opposite parties / appellants had taken a clear stand that they were qualified and that they had received the specimen of the excision comprising of the tissues of the sample that was sent by Dr. Ravinder Tah. It is also stated that the block was prepared and the main slide alongwith slides of sections from the main block. Two of the markers as advised in the report dated 2.8.2014 were tested but the test of the said markers was furnished on 7.8.2014 in the afternoon by which time the surgery had been performed. Thus the report dated 7.8.2014 does not seem to be available with the surgeon when the surgery was performed on 7.8.2014. Nonetheless the said report also indicated a cancerous behavior. The opposite parties / appellants have described their report dated 2.8.2014 as one containing a preliminary

impression. There is one averment contained in the evidence by way of affidavit of Dr. Neena Sood as also the evidence affidavit of other pathologists which needs mention. The averment is contained in paragraph 14 of the said affidavit as follows:-

*"It is further submitted that as admitted by the complainant herself in para 3 of her affidavit that the report dated 2/8/2014 was to be reviewed after IHC findings of four markers and as such the preliminary report dated 2/8/2014 given by the deponent and respondent no. 6 and 7 **cannot be treated as final report and as submitted earlier the final report could not be given in the absence of block, which** was not with the deponent and respondent no. 6 and 7, therefore the allegation of the complainant that the report given by the deponent and respondent no. 6 and 7 is not according to Exi. C-16 i.e. article - U.K. Guidelines for the management of cutaneous melanoma. **Since in the present case the final report could not be given due to non-availability of the block, the question of following the guidelines as claimed by the complainant does not arise at all. It is further submitted that the complainant underwent her surgery without obtaining the 2nd opinion as suggested by the deponent and respondent no. 6 and 7 and desired by the complainant herself, she herself choose not to obtain the final histopathology report by resubmitting the block.** It is further stated that no final histopathology report can be given in the absence of block as clearly indicated in Exi. R-5/11 at page no. 54.49 under heading:*

The estimation of prognosis for patients with melanoma and the same is reproduced as under:-

"A large number of pathological features have been suggested as offering prognostic information. Tumour thickness was established by Alexander Breslow as the most valuable prognostic guide [1]. Blocks are cut from the apparently thickest area of the primary melanoma by the pathologist and the slides cut from this block are examined using an ocular micrometer to measure the distance between the overlying epidermal granular layer and the deepest invasive area of the primary lesion (Fig. 54.67)".

*It is further submitted that it is worldwide recognized that to differentiate between melanocytic and non-melanocytic skin cancer the standard for IHC markers are to be used i.e. CK (Keratin), S-100, HMB-45, Melan-A as observed in book titled as **Lever's Histopathology of the Skin**. The relevant extract is reproduced as under:*

Immunohistochemistry

"Most of the problems in distinguishing amelanotic or oligomelanotic tumorigenic melanomas from other tumors can be resolved by immunohistochemistry, using a panel of antibodies including S-100, HMB-45, Keratin (low and intermediate molecular weight such as AE1/3.On immunohistochemical testing, S-100 protein is nearly always positive in melanoma..... It has been concluded that Melan-A and tyrosinase markers are sensitive and specific in making the diagnosis of a melanocytic lesion (200,437)".

Copy of the book is annexed herewith as Exi. R-5/14.

*It is further submitted that in layman language the IHC four markers are to be done to know the type of cancer whether it is Squamous Cell Carcinoma, Basal Cell Carcinoma or Malignant Melanoma. Since in the present case S-100 marker was positive and CK was negative, so it ruled out the squamous and basal cell carcinoma and favored malignant melanoma and confirmed melanocytic nature of cancer. **Since the complainant herself opted for surgery without waiting the result of all markers and herself choose not to resubmit the block for final histopathology report, it does not lie in the mouth of the complainant that the report of DMC & Hospital is incomplete.** As submitted earlier in the absence of block the final histopathology report could not be given.*

It is further submitted that in none of the other review reports submitted by the complainant, the final conclusion is given and rather they advised for further surgery.

It is further submitted that all the doctors used different terminologies for the diagnosis, which cannot be relied upon to reach the final conclusion that it is not a case of malignant melanoma."

94. A perusal of the said averment indicates that the pathologist intended the obtaining of the marker reports two of which were reported on 7.8.2014 as was available in terms of the facilities at the DMC Hospital and the rest of the other markers, i.e. the other two had been sent to SRL Diagnostic Bombay namely for the report on HMB-45 and Melan-A. The other two markers were got examined and their slides were developed which indicated CK negative and S-100 as positive. This finding on these two markers was given on 7.8.2014 by the DMC Hospital and according to the opposite parties / appellants the remaining block had already been sent to SRL Diagnostic Bombay on 5.8.2014 itself on the request of the complainant. The report from SRL Diagnostic Bombay was received on 21.8.2014 and the block was received back from SLR Diagnostic on 27.8.2014 that stands entered in the register. The complainant again visited the DMC Hospital on 28.8.2014 and she took back the said block on 28.8.2014.

95. The stand of the opposite parties / appellants is that the said block was not available to make any further sections or further analyze the same as the block had been taken away admittedly by the complainant on 28.8.2014.

96. The complainant was discharged from the Mediways Hospital after the surgery on 7.8.2014 and the samples of this surgery were sent to SRL Diagnostic Bombay that was prepared on 14.8.2014. This sample had been

sent on the prescription of Dr. Satish Jain and is Ex. C-26. The defence taken is that since the cancerous part had already been excised by Dr. Ravinder Tah, the local wide excision in the 2nd surgery at Mediways Hospital by Dr. Satish Jain and the sample taken therefrom did not show any residual cancer which was obvious. The opposite parties / appellants have taken a stand that this material was never sent to the DMC Hospital for any histopathological examination after the 2nd surgery at Mediways hospital.

97. The defence therefore taken is that all the oral communications with Dr. Harpeet Kaur and have statements that have been relied on by the complainant is qua the tissues samples that had been excised in the 1st surgery by Dr. Ravinder Tah and it was not an opinion in relation to the samples which were sent after the 2nd surgery.

98. It is in this background that Mr. Sobti Learned Counsel for the opposite parties / appellants of DMC Hospital and pathologists is that the report dated 2.8.2014 was based on a preliminary impression and the complainant did not send any further sample for any comparative analysis or tests. The opposite parties / pathologists had therefore stated that the report dated 2.8.2014 cannot be treated as a final report as the said report clearly advised the obtaining of the markers test as indicated in the report dated 2.8.2014. Since the block was not with the DMC College Hospital and had been sent to the SRL Laboratory Bombay that was returned back on 27.8.2014, there was no occasion for the DMC College Hospital to have made a cross-check of the clinical examinations of the SRL Laboratory and make an assessment along

with the Immunohistochemistry report dated 7.8.2014. This was because the block was admittedly went away on 5.8.2014 and then immediately upon its return from the SRL Laboratory was received by the complainant as claimed by her on 28.8.2014. Mr Sobti therefore contends that apart from the two reports dated 2.8.2014 which was on a preliminary impression with an advice for marker test and the IHC report dated 7.8.2014, no other examination was carried out nor any assessment made as the block and the sides had been taken away by the complainant for a second opinion. It has therefore been urged on their behalf that so far as the material of block and slides prepared from the sample of the tissues excised by Dr. Ravinder Tah are concerned have also been reflected in five reports to confirm the preliminary impression of malignancy including the report of the AIIMS dated 18.11.2015 as also the report of the Postgraduate Institute Chandigarh dated 27.12.2014. It is urged that the report of a single junior doctor dated 3.1.2015 from PGI Chandigarh is without the complete background of the blocks and slides that were subject matter of tests before the DMC Hospital. It is also urged that the PGI had demanded the blocks to ascertain the exact Clark's level and Breslow's thickness which indicates that the melanocytic nature of the cancer did show the behaviors of a positive existence of Melanoma.

99. Apart from this, the literature which has been cited and referred to in the written statement as well as the affidavit evidence of the pathologists, it has been urged that even with the currently available best clinical practices at times it is difficult to differentiate between non-cancerous, borderline

cancerous and cancerous lesions. The contention therefore is that in an area of such alleged uncertain opinions that were conflicting on the issue of the malignancy, there was no reason to treat the report of the answering opposite parties / appellants to be negligent and having been drawn up negligently. All due care had been taken to prepare the reports and therefore the estimation of the prognosis was based on a careful study of the block and slides that had been received from Dr. Ravinder Tah.

100. Once the excision had been made of the suspected area, it was quite obvious that the subsequent surgery and tissues therefrom would not reflect any malignancy once the damaged tissues had been removed.

101. The contention therefore raised is that the allegations made against the pathologists about not having performed their professional job correctly is without any basis and the blame cannot be put on the pathologists for any such alleged neglect.

102. It is urged that the complainant herself being of the medical line had already obtained the block and slides on 5.8.2014, two days prior to the surgery for 2nd opinion which she states to have received on 28.08.2024, and therefore she ought to have waited for the 2nd opinion and should not have given her consent for the surgery if she had any doubts about the histopathological test. The anxiety of the complainant to undertake this surgery on the basis of these preliminary impressions was her own decision and if she had any doubts about the same she ought to have waited for the confirmatory reports. It is submitted that even without waiting for the marker

tests as advised, the surgery was performed and two of the marker tests arrived in the afternoon on 7.8.2014 whereas the other two arrived later on on 12.8.2014. It is therefore urged that the surgery could have awaited the results of these markers tests. It is therefore submitted by Mr. Sobti that no surgery was performed at DMC Hospital and the opposite parties / appellants were only pathologists who were nowhere concerned with the performance of the surgery and consequently, they cannot be held liable for any such alleged negligence of the performance of the surgery without waiting for the marker tests.

103. It is urged that the liability cannot be inferred or presumed on the basis of certain subsequent tests that were carried out which in no way reflect any neglect on the part of the pathologists. It is urged that no negligence has been attributed to the pathologists for any subsequent opinions that have been found on the basis of the available block and slides including that of AIIMS on 2.6.2022 cannot relate back or connect with any neglect on the part of the pathologists.

104. He therefore submits that there being a difference of opinion amongst the pathologists where five of the reports indicate the probability of a malignancy, the prognosis and the diagnosis by the pathologists cannot be described as an act of neglect.

105. We may also refer to the written arguments filed on behalf of the opposite parties / appellants of DMC Hospital and the pathologists as noted above. It has been stated that the original slide had been issued to the

complainant on 5.8.2014 and the surgery was performed without obtaining the second opinion and waiting the results of the markers and any review report by the appellants. The surgery was conducted on 7.8.2014. The appellants had given the report of two markers i.e. S-100 and Cytokeratin to be positive in tumor cells in S-100 marker and negative tumor cells in the Cytokeratin marker. There was a consistency in these Immunohisto chemistry findings with the report dated 2.8.2014 and the report of the other two markers arrived on 12.8.2014 from SRL Diagnostic Bombay that also confirmed melanocytic nature of tumor cells.

106. After the receipt of the block being returned from SRL Diagnostic Laboratory, it was sent for the second time after one month of the surgery and the report given by them on 10.9.2014 suggested Atypical Epithelioid Neves which according to the opposite parties / appellants lean towards malignancy as per the literature relied on by them.

107. The written submissions further state that the digital slides were sent to the Pathology Consultancy Services that gave an opinion of Cheek-Spitzoid Tumor of uncertain malignant potential that meant that the cancer potential of lesion was uncertain but the laboratory did recommend for a wider excision. The complainant also sent the same to Oncopath Diagnostic Laboratory which again used the terminology Compound Neves with marked Atypia and did recommend re-excision. The report from the Tata Memorial Hospital dated 22.12.2014 and the report from PGI Chandigarh dated 27.12.2014 supported the opinion given by the pathologists of DMC Hospital. According to the

opposite parties / appellants, all this has not been considered in correct perspective and as a matter of fact has been ignored by the State Commission and hence the findings cannot be sustained in so far as it relates to the pathologists.

108. The complainant has countered these submissions by urging that at the very first instance when the blocks and slides were prepared, the DMC Hospital and its pathologists neither measured the specimen as per the protocols nor was the Breslow's thickness attempted which was necessary as per the UK guidelines and other international standard guidelines to be done before giving any opinion of malignancy. It is urged that the stage of the cancer and its width and spread has to be intimated in a report when an opinion of malignancy is being found. It is urged that even if it was an alleged preliminary opinion, even though the report dated 7.8.2014 is apparently a final opinion, then too it was incumbent upon them to have not sent the report without these markers and steps which ought to have been undertaken to find out and report the stage of the alleged malignancy. Without the same a reference to malignancy led to the disastrous consequences which the complainant has faced and is facing till date.

109. On the issue of error in diagnosis which the complainant alleges to be a wrong diagnosis by the Pathologist by not undertaking any confirmatory test or such tests which were advisable, reference can be had to the commentary on wrong diagnosis made under Chapter 4, Para 4-018 of the authority on medical negligence by Michael Jones. While dealing with the said subject, the

learned Author has commented about the dangers associated with diagnostic techniques available such as tests or instruments and the dangers associated with alternative diagnosis and referred to the authority of ***Maynard vs. West Midlands Regional Health Authority, [1984] 1 W.L.R. 634***, where Lord Scarman writing the majority judgment for the Bench discussed the matter in a case where a physician and a surgeon experienced in the treatment of chest diseases formed an opinion which according to them was in the best interest of their patients to carry out a diagnostic operation namely mediastinoscopy. The patient was diagnosed for Tuberculosis and therefore they decided for the operative procedure to provide them with a biopsy from the swollen gland for any further treatment. It was their stand that the evidence of tuberculosis was so strong that it was unreasonable and wrong to defer diagnosis and put their patient to the risk of operation. In an action brought against them which was not mistake of carelessness in performing the surgery, but about an error of judgment in requiring the operation to be undertaken. The judgment is a celebrated authority which had also taken into account the famous Bolam test and their Lordships proceeded to hold as under:

3 The question in this appeal is whether a physician and a surgeon, working together in the treatment of their patient, were guilty of an error of professional judgment of such a character as to constitute a breach of their duty of care towards her. The negligence alleged against each, or one or other, of them is that contrary to the strong medical indications which should have led them to diagnose tuberculosis they held back from a firm diagnosis and decided that she should undergo the diagnostic operation, mediastinoscopy. It was an operation which carried certain risks, even when correctly performed, as it is admitted that it was in this case. One of the risks, namely damage to the left laryngeal

recurrent nerve, did, as the judge has found and the respondent authority now accepts, unfortunately materialise with resulting paralysis of the left vocal chord. Comyn J., the trial judge, held that the two doctors were negligent. The Court of Appeal (Cumming-Bruce L.J. and Sir Stanley Rees, Dunn L.J. dissenting) held that they were not. The only issue for the House is whether the two medical men. Dr. Ross who was the consultant physician and Mr. Stephenson the surgeon, were guilty of an error of judgment amounting to a breach of their duty of care to their patient. Both accept that the refusal to make a firm diagnosis until they had available the findings of the diagnostic operation was one for which they were jointly responsible.

4 The issue is essentially one of fact: but there remains the possibility, which it will be necessary to examine closely, that the judge, although directing himself correctly as to the law, failed to apply it correctly when he came to draw the inferences upon which his conclusion of negligence was based. Should this possibility be established as the true interpretation to be put upon his judgment, he would, of course, be guilty of an error of law.

5 In English law the appeal process is a re-hearing of fact and law. But the limitations upon an appellate court's ability to review findings of fact are severe, and well-established. Lord Thankerton stated the principles in *Watt or Thomas v. Thomas*[1947] A.C. 484; and recently the cases and the principles have been reviewed by this House in *Whitehouse v. Jordan*[1981] 1 W.L.R. 246, itself a medical negligence case. It is, therefore, **unnecessary now to re-state them**. I would, however, draw attention to some observations by Lord Bridge of Harwich in *Whitehouse's* case and by Brandon L.J. in a Court of Appeal case, *Joyce v. Yeomans*[1981] 1 W.L.R. 549, since they are directly relevant to the problems facing your Lordships in this appeal. Lord Bridge said, p.269 *op.cit.*,

"I recognise that this is a question of pure fact and that, in the realm of fact, as the authorities repeatedly emphasise, the advantages which the judge derives from seeing and hearing the witnesses must always be respected by an appellate court. At the same time the importance of the part played by those advantages in assisting the judge to any particular conclusion of fact varies through a wide spectrum, from, at one end, a **straight conflict of primary fact between witnesses, where**

credibility is crucial and the appellate court can hardly ever interfere, to, at the other end, an inference from undisputed primary facts, where the appellate court is in just as good a position as the trial judge to make the decision."

6 The primary facts in this case are undisputed. But **there are gaps in our knowledge of some details of the medical picture due to a loss of hospital notes.** These gaps occur in the critical period during which the two doctors made the decision which is said to be negligent. The **gaps have to be bridged by inference.** In this task, the trial judge, it must be recognised, had the advantage of seeing and hearing the two medical men whose professional judgment, reached during that period, is impugned. We are not, therefore, at the extreme end of Lord Bridge's "wide spectrum", though we are near it. There is room for a judgment on credibility for the reasons given by Brandon L.J. in *Joyce v. Yeomans*, *supra*, at p.556. Speaking of expert evidence, the learned Lord Justice made this comment:

"There are various aspects of such evidence in respect of which the trial judge can get the 'feeling' of a case in a way in which an appellate court, reading the transcript, cannot. Sometimes expert witnesses display signs of partisanship in a witness box or lack of objectivity. This may or may not be obvious from the transcript, yet it may be quite plain to the trial judge. Sometimes an expert witness may refuse to make what a more wise witness would make, namely, proper concessions to the viewpoint of the other side. Here again this may or may not be apparent from the transcript, although plain to the trial judge. I mention only two aspects of the matter, but there are others."

7 These are wise words of warning, but they do not modify Lord Thankerton's statement of principle, nor were they intended to do so. The relevant principle remains, namely that an appellate court, if disposed to come to a different conclusion from the trial judge on the printed evidence, should not do so unless satisfied that the advantage enjoyed by him of seeing and hearing the witnesses is not sufficient to explain or justify his conclusion. But if the appellate court is satisfied that he has not made a proper use of his advantage, "the matter will then become at large for the appellate court" (*loc. cit.*, p.488).

8 The only other question of law in the appeal is as to the nature of the duty owed by a doctor to his patient. The most recent authoritative

formulation is that by Lord Edmund-Davies in the *Whitehouse* case. Quoting from the judgment of McNair J. in *Bolam v. Friern Hospital Management Committee*[1957] 1 W.L.R. 582, 586 he said (p.258) that "the test is the standard of the ordinary skilled man exercising and professing to have that special skill." If a surgeon fails to measure up to that standard in any respect ('clinical judgment' or otherwise) he has been negligent." The present case may be classified as one of clinical judgment. Two distinguished consultants, a physician and a surgeon experienced in the treatment of chest diseases, formed a judgment as to what was, in their opinion, in the best interests of their patient. They recognised that tuberculosis was the most likely diagnosis. But, in their opinion, there was an unusual factor, viz. **swollen glands in the mediastinum unaccompanied by any evidence of lesion in the lungs. Hodgkin's disease, carcinoma, and sarcoidosis were, therefore, possibilities.** The danger they thought was Hodgkin's disease; though unlikely, it was, if present, a killer (as treatment was understood in 1970) unless remedial steps were taken in its early stage. They, therefore, decided on mediastinoscopy, an operative procedure which would provide them with a biopsy from the swollen gland which could be subjected to immediate microscopic examination. **It is said that the evidence of tuberculosis was so strong that it was unreasonable and wrong to defer diagnosis and to put their patient to the risks of the operation.** The case against them is **not mistake or carelessness in performing the operation**, which it is admitted was properly carried out, but an **error of judgment in requiring the operation to be undertaken.**

9 A case which is based on an allegation that a fully considered decision of two consultants in the field of their special skill **was negligent clearly presents certain difficulties of proof. It is not enough to show that there is a body of competent professional opinion which considers that theirs was a wrong decision, if there also exists a body of professional opinion, equally competent, which supports the decision as reasonable in the circumstances. It is not enough to show that subsequent events show that the operation need never have been performed, if at the time the decision to operate was taken it was reasonable in the sense that a responsible body of medical opinion would have accepted it as proper. I do not think that**

the words of Lord President Clyde in *Hunter v. Hanley* 1955 S.L.T. 213, 217 can be bettered:

*"In the realm of diagnosis and treatment there is ample scope for genuine difference of opinion and one man clearly is not negligent merely because **his conclusion differs** from that of other professional men ... The true test for establishing negligence in **diagnosis or treatment on the part of a doctor is whether he has been proved to be guilty** of such failure as no doctor of ordinary skill would be guilty of if acting with ordinary care."*

10 I would only add that a doctor who professes to exercise a special skill must exercise the ordinary skill of his speciality. Differences of opinion and practice exist, and will always exist, in the medical as in other professions. There is seldom any one answer exclusive of all others to problems of professional judgment. A court may prefer one body of opinion to the other: but that is no basis for a conclusion of negligence.

110. The above are the extracts of the judgment that have been quoted for reference only. The ratio has been expressed by indicating that a medical professional may not be negligent merely because the conclusion differs from that of other professional men. What is more prominent is the proposition as laid by them stating, "It is not enough to show that subsequent events show that the operation need never have been performed, if at the time the decision to operate was taken it was reasonable in the sense that a responsible body of medical opinion would have accepted it as proper."

111. One of the decisions cited on behalf of the complainant appellant is the judgment of the Apex Court in the case of ***Spring Meadows Hospital & Anr. Vs. Harjol Ahluwalia, (1998) 4 SCC 39***, where in paragraph 10 some general principles have been observed including that of *res ipsa loquitor* which may be applicable in some situations. However, no direct answer was given with

regard to the same, but in that case due to the injecting of a drug, a child suffered a vegetative state of life that was taken into account for awarding compensation.

112. The same judgment on the issue of error of judgment discussed another English case ***Whitehouse vs. Jordan, [1981] 1 All England Report, Page 267***, where the allegation was that an Obstetrician had pulled too hard in a trial of forceps delivery thereby causing the head of the child to become wedged with consequent asphyxia and brain damage. During trial, the action of the doctor was held to be negligent but the Court of appeal then presided over by Lord Denning reversed the same emphasizing that an error of judgment would not tantamount to negligence. However, this opinion was reversed and Lord Fraser while delivering the judgment in the House of Lords observed as under:

"The true position is that an error of judgment may, or may not, be negligent; it depends on the nature of the error. If it is one that would not have been made by a reasonably competent professional man professing to have the standard and type of skill that the defendant held himself out as having, and acting with ordinary care, then it is negligence. If, on the other hand, it is an error that such a man, acting with ordinary care, might have made, then it is not negligence."

113. The commentary by Michael Jones on medical negligence also refers to certain circumstances regarding pathology reports. The learned Author has cited a judgment in the case of ***Abbas vs. Kenney [1996] 7 Medical Law Reports page 47***, where it has been held that a misleading pathology report may result in a finding that a surgeon was not negligent in embarking on

radical surgery in a case of suspected cancer. The said judgment is extracted hereinunder:

Abbas v Kenney

Queen's Bench Division
Gage J
17 July 1995

Negligence – Gynaecology – Consent – Whether surgeon had obtained consent to more radical procedure should it become apparent that it was necessary in the course of laparotomy and oophorectomy – Misleading pathology reports – Whether surgeon's decision on total pelvic clearance was negligent.

The patient, a young childless woman, was referred for a private consultation to the defendant, a distinguished surgeon, after having been diagnosed in Pakistan as suffering from papillary adenocarcinoma of the right ovary. On 30 March 1989, after initially embarking upon a laparotomy, he carried out a total pelvic clearance on the plaintiff, believing her to have cancer in the recto-uterine pouch as well as the cancer of the right ovary. Before the hysterectomy and omenectomy, the defendant telephoned the plaintiff's mother to tell her what operation he now intended to carry out and the reasons for so doing, though he maintained that the plaintiff had herself already consented to any such operation, should it be found to be necessary. In fact, later histology revealed that the mass which the defendant had believed was cancer was in fact endometriosis. As a result of the hysterectomy and omenectomy performed by the defendant the patient would never be able to bear children. The plaintiff claimed damages from the defendant on the grounds (1) that he had not obtained her consent to the total pelvic clearance and that if he had sought such consent she would have refused it; (2) that the decision to carry out the total pelvic clearance was negligent because the defendant should have regarded the mass which he found in the recto-uterine pouch as being more likely to be endometriosis than cancer and that he proceeded to radical surgery too hastily. Moreover, there were circumstances which should have aroused his suspicions as to the authenticity of the specimen which had been sent from Pakistan, including the fact that in the accompanying documentation there had been a mistake as to the plaintiff's age and her name had been misspelt.

Held – (1) A doctor has a duty to explain to a patient, in such a way as the patient will understand, the nature and implications of surgical procedures which he intends to carry out, but the precise explanation which he gives is a matter for the clinical judgment of the doctor concerned. In this the Bolam test applies (*Bolam v Friern Hospital Management Committee* (1957) 1 BMLR 1, [1957] 1 WLR 582). The defendant had explained to the plaintiff that the standard treatment for ovarian cancer was a total pelvic clearance, but that in her case he might be able to remove only the right ovary. The plaintiff knew before the operation that if, after examining her, it was apparent that the cancer had spread, it would be advisable to remove her reproductive organs. On the available evidence, the defendant's explanation to the plaintiff before surgery

was adequate and was fully understood by her, and there was nothing in his telephone call to her mother during the operation which was inconsistent with this. Accordingly, the plaintiff had given real consent to the operation carried out by the defendant.

(2) The defendant had been misled by the pathology reports from Pakistan into believing that the plaintiff had ovarian cancer, but the plaintiff had not succeeded in proving that he had been negligent. The plaintiff's action failed.

Cases referred to in judgment.

Bolam v Friern Hospital Management Committee (1957) 1 BMLR 1, [1957] 2 All ER 118, [1957] 1 WLR 582.

Chatterton v Gerson (1980) 1 BMLR 80, [1981] 1 All ER 257, [1981] QB 432, [1980] 3 WLR 1003.

Hills v Potter [1983] 3 All ER 716.

Hunter v Hanley 1955 SLT 213.

Maynard v West Midlands Regional Health Authority (1983) 1 BMLR 122, [1985] 1 All ER 635, [1984] 1 WLR 634, HL.

Sidaway v Bethlem Royal Hospital Governors (1985) 1 BMLR 132, [1985] 1 All ER 643, [1985] AC 871, [1985] 2 WLR 480, HL.

Wilsher v Essex Area Health Authority (1988) 3 BMLR 37, [1988] 1 All ER 871, [1988] 1 AC 1074, [1988] 2 WLR 557, HL.

Action

The plaintiff claimed damages for negligence as a result of which she would never be able to bear children. The issues before the court were whether the defendant had properly obtained the plaintiff's consent to an operation, after giving her an adequate explanation of the procedures which he intended to carry out, and whether he had been negligent in relying on pathology reports from Pakistan and carrying out radical surgery on the basis both of these reports and of his own assessment of the mass which he found in the plaintiff's body during the operation, without further investigation.

Ian Karsten QC and *Vivienne Gay* (instructed by *Evill & Coleman*) for the plaintiff.

Terence Coghlan QC (instructed by *Hempsons*) for the defendant.

GAGE J. The plaintiff claims damages for negligence against the defendant, her consultant gynaecologist and obstetrician. The action arises out of the treatment of the plaintiff by the defendant in March 1989. In that month the plaintiff consulted the defendant as a private patient, having been referred to him by a doctor in Pakistan. Doctors in Pakistan had diagnosed the plaintiff as suffering from papillary adenocarcinoma of the right ovary.

The defendant was and is a distinguished surgeon, holding a consultancy in obstetrics and gynaecology at St Thomas' Hospital in London. He has had considerable experience in dealing with cancer patients, and is described as having a special interest in oncology.

On 30 March 1989 the defendant carried out on the plaintiff an abdominal hysterectomy and omentectomy, known as a total pelvic clearance. His reason for doing so was that, during the course of a laparotomy, he became convinced that, in addition to the cancer of the right ovary, the plaintiff had a secondary outbreak of cancer in the recto-uterine pouch, the 'pouch of Douglas'. In fact,

subsequent histological tests showed that the mass or lump which the defendant thought was cancer was endometriosis.

It is the plaintiff's case that the defendant failed to obtain her consent before carrying out the total pelvic clearance, and that had he sought her consent she would have refused it. She also alleges that the defendant's decision to carry out this radical surgery was negligent.

The tragic consequence for this very young woman is that she can never have children. The knowledge that it was unnecessary for all her reproductive organs to be removed can only serve to magnify the distress and anguish which this fact has caused her, and will no doubt continue to cause her for some years to come.

Only liability remains in issue. Subject to liability, quantum has been agreed by the parties.

Before I turn to the issues in the case, I shall set out a chronology of some of the undisputed facts, and refer to some of the agreed documents.

The plaintiff's early life had been in Kenya. Sadly, her father was murdered in Nairobi in 1983. Following his death, she and her family were taken by her mother to England. They stayed here for a period of about one year before moving to Pakistan. The plaintiff finished her education in Pakistan, and by 1988 was living a full and active life, studying for her Bachelor of Arts degree. In the summer of 1988 she met the man who was to become her future husband. She intended to marry him at the end of 1989 and to continue her studies to obtain a Master's degree. She is obviously an intelligent and well-educated young woman.

In early 1989 she had two painful menstrual periods. After the first one she consulted her uncle, Dr Saadiq Hussain, a distinguished doctor in Lahore. He had diagnosed an appendicitis. On 19 February 1989 an appendicectomy was carried out by Professor Ullah, a professor of surgery at Lahore. Dr Saadiq Hussain attended the operation.

During the course of it it was discovered that her right ovary had a ruptured cyst on its surface. Pieces from the cyst were removed for histological examination. The cyst was sewn up and the appendix removed. The histological report revealed a diagnosis of papillary adenocarcinoma. The report itself misspelt the plaintiff's first name, put her age as 16 (she was actually nearly 21) and described her as suffering from pain in the umbilicus, which she was not. It also described the tissue to be analysed as blackish in colour.

Following the devastating news disclosed by the report, there were discussions in the plaintiff's family, and a decision was made to send her to England for diagnosis and treatment by the defendant. A doctor in Pakistan, known to the defendant, had recommended the defendant to the plaintiff. He wrote to the defendant, asking him to see her.

On 28 March 1989 the plaintiff and her mother attended for a consultation with the defendant at the Wellington Hospital. The consultation lasted 40-45 minutes. That consultation is crucial to the first issue on liability, namely, whether or not the plaintiff gave her consent to the operation eventually carried out by the defendant. The plaintiff and her mother say that she did not. The defendant said that she did.

At the consultation the defendant was given a letter from Mr Ullah. In it he said:

'Small tissue protruding out which was taken out for biopsy and histopathological examination. Rest of ovary showed small cysts.

Under running suture of O chromic catgut applied to ruptured site for control of haemorrhage. Pelvis mopped out of blood and a tube drain put in the pelvis and abdomen closed in layers. Appendicectomy was also done. Post-operative recovery was uneventful.

Histopathological report: Papillary adenocarcinoma of the ovary.'

Professor Ullah signed it.

The defendant also had the histological report made in Lahore. It is common ground that the defendant told the plaintiff that he would have the slide and paraffin block of tissue brought to him from Pakistan by the plaintiff subjected to histological examination by Dr Pambakian.

On 29 March 1989, having had the diagnosis orally confirmed by Dr Pambakian, the defendant telephoned the plaintiff and arranged for her to be admitted to the Wellington Hospital on 30 March 1989. The written histological report from Dr Pambakian is dated 31 March 1989. It states: 'The specimen consists of fragments of moderately-differentiated papillary mucous-secreting adenocarcinoma.' There is no dispute that this specimen was correctly analysed by Dr Pambakian.

On admission to the Wellington Hospital the plaintiff signed a form of consent. That reads, after giving her name and address:

'I hereby consent to undergo at the Churchill Clinic the operation of laparotomy and oophorectomy, the nature and purpose of which have been explained to me by Dr Borshoff. I also consent to such further or alternative operative measures as may be found to be necessary during the course of the operation and to the administration of a general, local or other anaesthetic for any of these purposes.'

That is then dated 30 March 1989, and signed by the plaintiff. In addition, Dr Borshoff signed:

'I confirm that I have explained the nature and purpose of this operation/treatment to the person who signed the above form of consent.'

At 17.45 on 30 March 1989 the defendant started the operation on the plaintiff. The operation note of the hospital reads: 'Diagnosis: Laparotomy and right oophorectomy.' During the course of the operation he discovered a lump or mass in the pouch of Douglas. Believing it to be a malignant mass, the defendant decided it was necessary to carry out a pelvic clearance. Before doing so, he left the operating theatre and telephoned the plaintiff's mother. He told her what he intended to do, and the reason for it. The defendant says that she supported his decision to carry out this operation, although it is his case that the plaintiff had already consented to any such operation.

The nursing card index records the following:

'Phone call from Mr Kenney @ 1815 hours. Spoke to patient's mother from theatre. Mother informed [that] surgery has to proceed, given verbal consent by phone to Mr Kenney. Mother shocked and upset.'

Accordingly, the total pelvic clearance was performed.

The operation notes completed afterwards in typed form show this:

'Psannensteil. Malignant tissue in the POD [pouch of Douglas] with rectum and sigmoid loops stuck to it, as was the back of the cervix. Ovaries and tubes normal! Liver, kidneys, paraortic nodes, under surface of diaphragm normal. It was not possible to remove all the malignant tissue without removing the uterus. Therefore TAH [total abdominal hysterectomy] BSO [bilateral salpingo-oophorectomy] and omenectomy performed with removal of part of the anterior surface of the rectum and a wedge of sigmoid colon. Corrugated drain to pelvis. At the end of the operation no malignant tissue was palpable/visible. Will need chemotherapy and then drugs diagnosed.'

Subsequently, the histological report showed the lump to be endometreotic and not malignant cancer. On 6 April 1989 the plaintiff was informed by the defendant of what had happened. The nursing Kardex records the following:

'Mr Kenney explained exactly the nature of the operation in the pathology report. The patient appeared to take the news very well. Was not distressed, but is a little sad, stated "It is my destiny".'

The plaintiff agreed that this accurately reflected her reaction at that stage. On 7 April 1989 she was discharged.

Following these events, the plaintiff underwent chemotherapy and sought a number of opinions from doctors in this country. Various reports and letters from these doctors and doctors outside this country are contained in the agreed documents.

On 8 May 1989 Dr Naylor, a consultant gynaecologist and obstetrician, wrote to the defendant, setting out some of the plaintiff's and her mother's anxieties. In that letter he said:

'Her specific anxieties were:

1. That the specimen from Pakistan actually related to her daughter. She has checked in the Hospital in Pakistan where biopsy of ovary was taken and the doctors there have assured her that no other patient on that day underwent a biopsy of ovary. I have, therefore, assured her that the specimen relates to her daughter.

2. She wondered how the appearances of endometriosis could have suggested to you those of a spread from a carcinomatous lesion of the ovary. I pointed out that the conclusion you made, and the decision you took involving radical surgery was just what any other Gynaecologist of high standing in London or Pakistan would do. I went on to point out that due to the extent of this lady's endometriosis she would never have become pregnant and probably would have been disabled by severe dyspareunia and dysmenorrhoea. I pointed out that although it was unusual to perform a total abdominal hysterectomy and bilateral salpingo-oophorectomy in somebody of 21, I had a number of patients under my care who had had this procedure performed when aged between 25 and 26. They had gone on to have a happily married life and adopted children. I then went through all this again with her daughter and for a third time with the prospective son-in-law.'

On 17 October 1989 the plaintiff wrote to Mr Kenney. In that letter she reports that she has had other treatment and that she would be coming to see him for a check-up. At the end of the letter she says this:

'I would appreciate it if you would write to me at the given address and let me know *as soon as possible*. The rest is fine and I'm not doing too badly.'

On 9 March 1990 a letter was written by a Dr Soriero, a gynaecological oncologist in the USA, to another doctor in America. It is unnecessary to refer to the whole of that letter, but towards the end of it that doctor says this:

'The fact that she had only endometriosis at the time of the second laparotomy leads one to wonder whether she had a borderline tumor of the ovary initially or a stage 1 tumor of the ovary. It is unfortunate that a hysterectomy was performed without first determining whether she had any residual malignancy. Her treatment has certainly been aggressive up until this point, including the four cycles of cytotoxic Carboplatinum. I will ask Fouzel to try to gather all of the pathology material from Pakistan and also the hysterectomy material from England before determining what hormonal replacement she should receive.'

Finally, on 10 April 1990, the plaintiff again wrote to the defendant. This letter was more critical than the earlier letter, which had contained no criticism of the defendant. She said this:

'I am writing to inform you that I plan to visit you at the end of July, as my mother will be there too at the same time. I now feel that I have got to talk to you about the way I feel. Granted that I did face the consequences with the utmost courage at the time. However now I feel that things were done in haste. You might think this emotion to be merely natural after a great loss. I certainly hope that once again you might be able to "lay the cards on the table".'

She then asks for a formal appointment to be sent to her.

In none of those letters is there any mention in explicit terms of the complaint that the defendant did not obtain the plaintiff's consent to carry out the total pelvic clearance.

In August 1989 the plaintiff married her fiancé. She and her family were naturally concerned that when her fiancé and his family learned of her inability to have children the engagement might be broken off. This anxiety persists to this day. The plaintiff remains fearful that parental pressure may cause her husband to reject her and take another wife. In order to escape such pressures she and her husband have gone to live in the USA.

Liability

Two main issues arise on liability.

The first concerns the question of whether or not the defendant explained to the plaintiff before the operation that he might have to carry out a total pelvic clearance and obtained her consent to such an operation if it was necessary.

The second issue concerns the defendant's decision to carry out the total pelvic clearance.

Counsel are in substantial agreement, but not complete agreement, about the principles of law applicable to this case. So far as consent is concerned, I have been referred to a number of authorities, and in particular *Chatterton v Gerson* (1980) 1 BMLR 80, [1981] QB 432 and *Sidaway v Bethlem Royal Hospital Governors* (1985) 1 BMLR 132, [1985] 1 AC 871.

In my judgment it is clear from the authorities that a doctor has a duty to explain what he intends to do and the implications of what he is going to do. It must be explained in such a way that the patient can understand. The precise terms, and precise emphasis on what he intends to do is a matter for the individual doctor, based upon his clinical judgment. In this regard, what has been called 'the *Bolam* test' applies to this aspect of a doctor's duty in the same way as it applies to his duties of diagnosis and treatment (see *Bolam v Friern Hospital Management Committee* (1957) 1 BMLR 1, [1957] 1 WLR 582). At the end of the day, what the court has to decide is whether the patient gave real consent to the procedure intended.

Mr Karsten accepted that consent may be implied as well as expressed. If a doctor fails to obtain real consent, the operative procedure will be actionable in trespass and/or negligence.

One further legal issue arises on consent. Mr Coghlan submitted that even if the plaintiff did not consent to the total pelvic clearance, she could not succeed if I were satisfied on the evidence that even if she had been told of the possibility of a total pelvic clearance she would still have consented to the operation. He submitted that, as a matter of causation on that finding, the negligence would not have been causative of the damage.

To counter such an argument, Mr Karsten relied on a passage in *Chatterton v Gerson* in support of the proposition that if the lack of consent caused the operation to amount to a trespass questions of this sort did not arise. In *Chatterton v Gerson*, giving judgment, Bristow J said ((1980) 1 BMLR 80 at 89, [1981] QB 432 at 442):

'Where the claim is based on trespass to the person, once it is shown that the consent is unreal, then what the plaintiff would have decided if she had been given the information which would have prevented vitiation of the reality of her consent is irrelevant.'

It is to be observed that this part of the judgment was obiter.

Whilst it is not strongly disputed by Mr Coghlan, he relied on further observations of Bristow J in the same case, and other judges, as indicating that cases of trespass rarely arise. In *Hills v Potter* [1983] 3 All ER 716 at 728, Hirst J said:

'I should add that I respectfully agree with Bristow J in deploring reliance on these torts in medical cases of this kind; the proper cause of action, if any, is negligence.'

Counsel for each party submitted that, on the facts in this case, these complicated issues of causation turning on the difference between a claim in negligence and a claim in trespass do not really arise for decision. I agree. However, I desire to add my voice to those of others in stating that in my view

these cases will almost always fall to be dealt with on the law of negligence and it will only be in the most exceptional case, if at all, that any difference will arise from a cause of action in trespass to one in negligence.

As will appear later in this judgment, on the facts of this case I do not find it necessary further to explore the law of trespass. In any event, when asked if he wished to amend to alleged trespass Mr Karsten declined to do so.

On the issue of negligence, both parties are agreed that the test first enunciated in *Bolam v Friern Hospital Management Committee* (1957) 1 BMLR 1, [1957] 1 WLR 582 and more recently explained by Lord Scarman in *Maynard v West Midlands Regional Health Authority* (1983) 1 BMLR 122, [1984] 1 WLR 634 is the principle to be applied. In that case Lord Scarman said ((1983) 1 BMLR 122 at 126, [1984] 1 WLR 634 at 638):

'It is not enough to show that there is a body of competent professional opinion which considers that theirs was a wrong decision, if there also exists a body of professional opinion, equally competent, which supports the decision as reasonable in the circumstances. It is not enough to show that subsequent events show that the operation need never have been performed, if at the time the decision to operate was taken it was reasonable in the sense that a responsible body of medical opinion would have accepted it as proper. I do not think that the words of Lord President (Clyde) in *Hunter v Hanley* 1955 SLT 213 at 217 can be bettered: "In the realm of diagnosis and treatment there is ample scope for genuine difference of opinion and one man clearly is not negligent merely because his conclusion differs from that of other professional men . . . The true test for establishing negligence in diagnosis or treatment on the part of a doctor is whether he has been proved to be guilty of such failure as no doctor of ordinary skill would be guilty of if acting with ordinary care . . ." I would only add that a doctor who professes to exercise a special skill must exercise the ordinary skill of his specialty. Differences of opinion and practice exist, and will always exist, in the medical as in other professions. There is seldom any one answer exclusive of all others to problems of professional judgment. A court may prefer one body of opinion to the other, but that is no basis for a conclusion of negligence.'

These principles are to be contrasted with the test for causation which is to be decided on the usual balance of probabilities test (see *Wilsher v Essex Area Health Authority* (1988) 3 BMLR 37, [1988] 1 AC 1074).

I turn to the issue of consent. In evidence the plaintiff stated that, at the consultation with the defendant on 28 March 1989, the defendant never mentioned anything about a total pelvic clearance. Her recollection was that he spoke solely about an operation to explore her abdomen and to do no more than remove her right ovary and fallopian tube if that proved necessary. She said that she made it clear to the defendant that she wanted to have children. His response was that he would treat her as he would his own daughter. She said that if he had mentioned the possibility of a hysterectomy and total pelvic clearance she would not have consented to it. She would have sought a third, fourth, and fifth opinion if necessary before consenting.

In cross-examination she accepted that Mr Kenney, the defendant, had given her hope that her life would be saved and that she might not lose her fertility. At first she denied that she had been fearful of these possibilities, but in my view it became clear during the course of her evidence that, before seeing the defendant, she could not bring herself to accept the result of the histological report carried out in Pakistan. On the basis that it was accurate, I am quite confident that, as any woman would be, she was fearful of the threat to her life and to her ability to bear children.

She also accepted that the defendant had said that he would carry out the least extensive surgery possible, consistent with saving her life. However, she added that in that context they discussed that that would mean only the removal of the right ovary. She stated that she understood that the purpose of the operation was to explore her abdomen.

At one stage she volunteered the answer that she was prepared for the removal of the right ovary, but, as she put it, 'after that if it [meaning the cancer] had spread, he would discuss it with me'. Immediately after giving that answer she withdrew it, saying that it was a mistake and that that had not been discussed at all. She accepted that the defendant had not said to her that the worst thing that could happen to her was the removal of the right ovary, but her recollection of precisely what he said was a little unsure or foggy, since she was asking so many questions.

When asked about the letters which she had written to the defendant, which contained no reference to the lack of consent, she insisted that the full impact of this aspect of the matter did not strike her until many months after the event. In her letter of 10 April 1990 she felt she was covering that aspect of the matter by her comment that she felt that things had been done in haste.

The plaintiff's mother also gave evidence about what happened at the consultation with the defendant. She concentrated on what she said was the defendant's promise not to use the tissue and slide from Pakistan, but to concentrate on material which he himself obtained. She added that the defendant said that if he found cancer he would only remove the right ovary. She insisted that this was the limit of what he would do, even if he had found that the cancer had spread from the right ovary.

She also gave evidence of what, for her, must have been the truly horrifying telephone conversation which she had with the defendant during the operation. She said that she was unable to bring herself to give permission for the total pelvic clearance. In the end she said that she told the defendant that she would leave the decision to him.

The defendant stated that he had a very clear recollection of the consultation. It was clear in his mind because cancer had been diagnosed in such a young girl. The effect of his evidence was that he had explained to the plaintiff and her mother that the standard treatment for cancer of the ovary was the removal of the uterus, tubes, ovaries, and greater omentum, a total pelvic clearance. However, in her case, provided that there was no evidence that the cancer had spread, it could be treated by simply the removal of the right ovary and tube together with subsequent chemotherapy.

This news was, he thought, greeted with great relief and joy by the plaintiff. He did not explain what the survival statistics were for the various degrees of cancer, since it was not his practice to do so. He said that the plaintiff and her mother expressed some doubt about the histological report from Pakistan. Their concern was not for the specimen itself but for the report based on the

slide. He assured them that he would get his own expert to examine the specimen, and produce his own report. At the end of consultation he was sure that he had gained the confidence of his patient and that he and she understood that his main brief was to save her life, and if possible to save her fertility. He accepted that he had concentrated on the good chance of being able to limit the removal to the right ovary.

In a written statement produced for the purposes of this action, the truth of which he swore to, there is the following passage:

'I explained to her that the standard treatment in these circumstances would be to remove the womb, tubes and ovaries together with a layer of fatty tissue known as the greater omentum. This would be followed by chemotherapy. I got the impression that this was exactly what she had been led to expect in Pakistan and she was particularly gloomy and depressed by this prospect. This was especially so because she was engaged and about to be married, and this would have a devastating effect on her by removing any chances of motherhood. I explained to her that I would need to have the pathology checked. If the pathology was correct the least extensive operation I would be able to perform would be to remove the right ovary and tube, providing that when I operated there was no evidence of spread anywhere else in the pelvis or, for that matter, the abdomen. At the mention of the possibility of a more minor procedure than they had been led to expect, with the possibility of her remaining fertile, she was overjoyed. I gained the impression that the patient was a highly sophisticated and intelligent young woman who readily understood the implications of our discussion.'

As to the telephone call to Mrs Dhebar, the defendant accepted that he had put the position to her in stark terms as a matter of life and death that he carry out the total pelvic clearance. He said that he spoke to her, not because he needed her consent, but because matters had turned out unexpectedly worse than he had foreseen at the consultation. He thought it right to explain to the plaintiff's mother what he intended to do before doing it. Having gained her support, he proceeded with the operation. He explained that the consent form signed by the plaintiff in Dr Borshoff's presence reflected the operation which he hoped and believed was all that would be necessary, but from the consultation he was in no doubt that it was understood by the plaintiff that there was no alternative to a total pelvic clearance if the cancer had spread.

On the conflict of evidence between the witnesses on this issue I prefer the evidence of the defendant. I find him to be a careful and precise witness. He is obviously a surgeon of considerable experience and distinction. I can readily understand why he would have a clear recollection of this consultation, which was with a woman who was exceptionally young to be suffering from ovarian cancer.

The plaintiff, I am sure, was endeavouring to be entirely truthful in her evidence. However, at that time, in 1989, she must have been under huge strain and distress. She volunteered the fact that she could not now really be sure about all that was said, and that some of what the defendant said was now a little foggy. In her witness statement she denied that the defendant had at any stage told her that the standard procedure was for a total abdominal

hysterectomy to be carried out. In evidence she accepted that the defendant might have told her this. I regret that I found her evidence unreliable.

The plaintiff's mother was in my view not an impressive witness. On one piece of her evidence Mr Karsten accepted that she was very unlikely to be correct. I have the greatest sympathy for her. I have no doubt that she blames herself for much of what has happened to her daughter. However, I feel bound to say that in my view her evidence has been coloured by an understandable desire to right what she sees as a wrong that has been done to her daughter.

For these reasons I have no hesitation in preferring the evidence of the defendant to that of the plaintiff and her mother. On this aspect of the case, wherever the plaintiff's evidence and that of her mother conflicts with the evidence of the defendant I prefer, and accept, the defendant's evidence to theirs.

This finding is not determinative of this issue. Mr Karsten makes four points as to why I should find that there was no real consent by the plaintiff. In summary they are these.

The defendant's own version of his explanation of the options available to the plaintiff was not sufficiently clear and adequate to explain to the plaintiff that if the cancer had spread he would carry out a hysterectomy and total pelvic clearance at that operation.

Secondly, any uncertainty which was in the plaintiff's mind after the consultation as to what the defendant intended to do would have been completely cured by the unambiguous form of written consent signed by her on 30 March 1989.

Thirdly, if the defendant really believed that he had obtained a true consent, he would have no need to have spoken to her mother during the course of the operation.

Fourthly, his evidence that he would have been faced with a terrible conflict if Mrs Dhebar had refused to consent to the operation on 30 March 1989 could not possibly have arisen if he had in fact already obtained the plaintiff's consent.

Mr Coghlan submitted that if I accepted the evidence of the defendant there can be no question of the plaintiff not consenting. He submitted that the plaintiff was an intelligent young woman. She admitted that she had some knowledge of cancer and that she was aware that not only her life might be in danger, but also her reproductive organs. He submitted that her admission that the defendant might have told her that the standard treatment for ovarian cancer was a total pelvic clearance, and that he had said that he would carry out the minimum surgery consistent with saving her life, was sufficient of itself to show that this intelligent young woman was well aware of the options available for operative treatment.

In the light of these submissions, and my acceptance that the defendant's version of events, where it conflicts with the plaintiff's version of events, is to be preferred, I find the following facts.

I find that the defendant did explain to the plaintiff that the standard treatment for ovarian cancer was a total pelvic clearance.

I further find that he made it clear to her that in this instance it might be possible to restrict the operation to removing the right ovary.

I find that the plaintiff's evidence that the defendant said that he would 'have a look' is consistent with his evidence that he needed to investigate to see if the cancer had spread, assuming that the pathology reports confirmed that she had cancer.

I further find that the plaintiff, being an intelligent and in my judgment sophisticated young woman, at the time realised that if the cancer had spread beyond the right ovary the least extensive surgery would mean that the standard treatment would be carried out, namely the removal of her reproductive organs.

I regret that I find it significant that in neither of her two letters to the defendant following the operation did the plaintiff explicitly complain that the operation was carried out without her consent. I cannot accept her explanation that at the date of the first letter the full significance of what had happened to her had not seemed to have sunk in, nor that in the second letter the reference to 'things done in haste' was intended as meaning the inclusion of an allegation of lack of consent.

Further, although at one stage I considered that there might be force in it, I do not accept the submission that the plaintiff's knowledge that her mother had consented to the operation would have had an inhibiting effect on her.

In my judgment the plaintiff is not only an intelligent and sophisticated woman, she is also a determined woman. If, as she stated, she had all along been aware that she had not consented to this operation, I believe that she would have said so from a very early stage.

As to Mr Karsten's four submissions, on my findings the defendant's explanation was sufficient to make clear to the plaintiff what he was intending to do, and was fully understood by the plaintiff. In those circumstances, in accepting that an operation was to be carried out, by implication she consented to this procedure.

On my findings, the second point does not arise. There was no uncertainty.

As to the third and fourth points, I find nothing inconsistent in the defendant's action in telephoning Mrs Dhebar during the operation. His explanation for doing so seemed to me entirely consistent with the careful and kindly approach which it is accepted he exhibited from the first time that he met the plaintiff and her mother. Neither argument persuades me that he made this telephone call because he had not obtained consent for this procedure.

I do not find it at all surprising that the plaintiff should now believe that she did not consent to the operation. Both before and after the operation her mind must have been in a turmoil of anxiety and distress. It is hardly surprising that she cannot now remember clearly what was said to her then, and that she would now be able to say to herself that she did not consent to this operation.

No one could feel anything but the greatest possible sympathy for the plaintiff over the tragedy that has befallen her. I regret, however, that I feel compelled to reject her evidence that she did not realise that if the cancer had spread she would have to undergo an operation to remove her reproductive organs. In my view, her state of mind was that she did realise there was a possibility, and did consent to such an operation being carried out if it proved necessary, but that she had high hopes that it would not be necessary.

Accordingly, I find that the plaintiff gave a real consent to the operation carried out by the defendant.

Negligence

I turn now to the issue of negligence.

Before turning to the factual issues, I propose to set out a little of the medical background. The following matters I understand to be agreed.

Ovarian cancer, for the purposes of this case, can be divided into two kinds – epithelial cancer and germ cell cancer. The latter is sensitive to radio- and

chemotherapy and is therefore more easily cured. Adenocarcinoma is of the epithelial variety.

Secondly, epithelial cancer can be subdivided into at least three types of tumour, namely, mucinous (the Lahore diagnosis in this case), serous and others.

Thirdly, there are four modes by which cancer can spread and form secondary sites of cancer. One such mode is known as trans-coelomic spread, by which the tumour is released into the abdominal cavity and transported by fluid into the abdomen. It then forms a secondary tumour at the site where it is deposited.

Fourthly, ovarian cancer in a woman under the age of 24 is very rare.

Fifthly, when ovarian cancer is diagnosed it can and should be staged – that is, put in a category of seriousness. There are four stages of seriousness, ascending from stage 1 to stage 4. Stages 1 to 3 are themselves subdivided into three separate sub-stages.

Sixthly, endometriosis in a woman under 24 in mild form is not rare, but in severe and invasive form it is very rare, but not as rare as ovarian cancer.

I now turn to the decision to carry out the total pelvic clearance.

The plaintiff's criticisms of the defendant were made under four main headings. It is said of the defendant that his management and care of the plaintiff fell below the standards of a reasonably competent surgeon in the following respects.

His initial examination was inadequate. He paid insufficient attention to what had happened on the Lahore operation. He should have regarded the mass which he found in the pouch of Douglas as being at least as likely, or more likely, to be endometriosis than cancer. He proceeded with undue haste to the radical surgery.

I have heard evidence from four experts called on behalf of the plaintiff and two called on behalf of the defendant. These experts were: for the plaintiff, Mr John McGarry, an independent consultant gynaecologist; Professor Fox, a leading consultant pathologist; Mr J Carron Brown FRCS FRCOG, a retired consultant; Dr Graham Read, a consultant clinical oncologist; and for the defendant, Mr John Shepherd, a consultant gynaecological surgeon and oncologist; and Professor Stephen Smith, a professor of obstetrics and gynaecology.

The defendant, both in his written witness statement and in his evidence, strongly defended his decision to carry out the total pelvic clearance. He said that he properly examined the plaintiff, but he deliberately did not carry out a rectal and vaginal examination. The latter decision was made in deference to the plaintiff's Muslim faith and the fact that she was a virgin. It was also in the knowledge that ultrasound scans were to be carried out before the operation.

He decided to carry out the operation because, on finding the mass in the pouch of Douglas, he concluded that it was a spread of cancer from the right ovary. He considered endometriosis but rejected it, since to encounter malignancy in such a young girl is very rare; to encounter malignancy and endometriosis would be even more rare. He had had to work on the assumption that the specimen reported on by the pathologist in Pakistan and by Dr Pambakian as being papillary adenocarcinoma was correct and, that being so, the most likely explanation of the mass was a spread of cancer. Since there was no evidence of it having been observed by Professor Ullah in Pakistan, the likelihood was that it had developed in the intervening six weeks.

In view of its size, its appearance, its attachment to the surrounding structures, and the fact that any biopsy would not rule out cancer, he was convinced that it was cancer and that the only treatment was an immediate resection. This would mean that the uterus could not be saved. In addition, it would indicate a stage 2B cancer, for which the only treatment was a total pelvic clearance.

His evidence that the mass appearance was very like malignant cancer and not endometriosis was supported by Dr Pambakian. In his witness statement and in evidence, Dr Pambakian stressed that the idea that it might be other than cancer did not occur to him until after he had carried out his tests. Its appearance was entirely consistent with malignancy, and had none of the signs of powder-burns which are seen in endometriosis. He accepted however that to some extent his mind was conditioned to think it was cancer because of the results of his earlier biopsies.

One central factual issue arises on this part of the case. It is the issue of whether or not the specimen brought from Pakistan by the plaintiff's mother was actually a specimen taken from the plaintiff at the operation in Lahore or whether, because of a mix-up either in the hospital or in the laboratory in Lahore, it was a specimen from another patient.

This issue is bound up with the issue of whether the plaintiff at any time suffered from papillary adenocarcinoma of the right ovary. The experts completely disagree on this issue.

The plaintiff's experts' evidence ranged from deep suspicion about the Lahore specimen to the opinion that it was highly improbable that the plaintiff ever suffered from cancer. The defendant and his experts called on his behalf are of the view that the histology report from Pakistan must be accepted, having been obtained by a reputable surgeon operating at a reputable medical centre under the eye of a very respected physician and sent to a reputable laboratory.

At times the evidence has become involved in extremely technical matters and argument between the experts. There was surprisingly little common ground. It is impossible in this judgment to do justice to all the evidence put before me by some of the most eminent doctors in the United Kingdom in this field, and the arguments which they deployed. I propose merely to set out the evidence on both sides in summary form, followed by my conclusions.

The plaintiff's case on this topic centred round the evidence of Professor Fox, with whose evidence the other experts for the plaintiff agreed. Professor Fox is a very well known and a very well respected gynaecological pathologist. He put forward six points to support his view that it was so highly improbable that the plaintiff had suffered ovarian cancer as to make such a diagnosis untenable.

Since he accepted that the specimen brought from Pakistan was properly analysed as showing papillary adenocarcinoma, it followed that his view was that there must have been a mix-up of specimens in Lahore. Professor Fox's six points were as follows.

(1) Epithelial ovarian cancer in a woman of the plaintiff's age was extremely rare.

(2) The symptoms in Lahore of acute appendicitis are entirely untypical of ovarian cancer in its early stages.

(3) Professor Ullah's description of a not particularly large ruptured cyst from which material extruded is entirely untypical of a malignant cyst.

(4) Professor Ullah's description of taking the extruded pieces is not a description of a malignant cyst being excised. Accordingly, it is in the highest degree unlikely that all of the malignant tumour would have been excised leaving no sign of it when the defendant operated, and no evidence of it on subsequent histological examination following the operation in London.

(5) At the operation in London both ovaries were found to be normal, and the metastatic mass present was in isolation in the pouch of Douglas. This is entirely untypical of the way cancer would have spread. If the tumour had disseminated it would be much more likely to have spread to other parts of the pelvis as well as the pouch of Douglas.

(6) On histological examination in London no evidence of residual tumour was found in the right ovary.

In addition, the plaintiff relied on the fact that the spelling of her name, the mistake in her age, the misdescription of her symptoms and the colour of the tissue in the histological report from Pakistan, as well as the delay in obtaining it, gave rise to doubts as to its origin and authenticity.

Against this, the defendant and his experts, while accepting the first of Professor Fox's six points, disagreed that the others were of great significance. They both said that cancer can present in many different ways. In particular, Mr Shepherd, who is accepted as one of the top six gynaecological surgeons specialising almost exclusively in cancer patients in the UK, said that it was entirely feasible for a normal or near-normal looking ovary to be cancerous, and for that cancer to be excised by surgery or a combination of surgery and diathermy on a ruptured cyst.

They also relied on a letter Dr Saadiq Hussain had sent, disclosed by the plaintiff, in which Dr Saadiq, after making investigations into the possibility of a mix-up and a mistake in descriptions on the report, stated in clear terms that no mix-up had occurred. A notice under the Civil Evidence Act was served by the defendant in respect of this document, and no counter-notice was served by the plaintiff.

Mr Karsten has submitted that I should make a finding on this issue, and that my finding should be that the report from Pakistan was wrong. He submitted that on all the available evidence it is now clear that the plaintiff never suffered from ovarian cancer; therefore, he submitted, the specimen taken in Pakistan must have been mixed up with a specimen from another patient in Pakistan.

Mr Coghlan submitted that a finding on this issue was not necessary, but if there was to be a finding it should be that the report from Pakistan was accurate, and that the plaintiff did suffer from ovarian cancer in March of 1989.

I find the evidence and arguments on this issue extremely finely balanced. Professor Fox's six points make a powerful case for a finding that the plaintiff never suffered from ovarian cancer. On the other hand, Mr Shepherd's evidence that all traces of the cancer could have been removed in Pakistan seems to me to be credible. Dr Saadiq Hussain's letter provides some explanation for the discrepancies in the pathology report from Pakistan.

At a late state in the evidence, in connection with another matter, Mr Shepherd stated that the chances of the plaintiff having ovarian cancer and endometriosis was one in ten million. This statistic appeared to conflict with other evidence about the coincidence of ovarian cancer and endometriosis present in pre-menopausal women. However, it was supported by Professor Smith. If correct, it would make it very unlikely that the plaintiff suffered

from ovarian cancer, since it is common ground that the mass found in the pouch of Douglas had proved to be endometriotic in an acute form.

I have considerable reservations about the efficacy of this statistical evaluation. However, I accept that the coincidence of ovarian cancer and endometriosis in the form found in the plaintiff at her age would be very rare indeed. That being the case, and taking into account too the significant evidence that no trace of ovarian cancer was found in the plaintiff's right ovary following her operation in London, not without some hesitation I conclude that it is more probable than not that she did not suffer from ovarian cancer, and that the pathology report from Pakistan was the report on tissue which did not come from her.

It follows from this finding that the tissue tested by Dr Pambakian, although correctly analysed by him as ovarian cancer, was not tissue coming from the plaintiff.

I turn now to my general observations about the expert witnesses.

In my judgment, the most impressive witnesses on either side were Professor Fox and Mr Shepherd. Each was possessed of a wealth of knowledge and experience. Each belonged to a small and select group of leading specialists in their respective fields. Each gave his evidence in firm, at times robust and clear, terms. They both spoke with great authority.

Of the other witnesses, although she was called as a witness of fact, I preferred Dr Bates' evidence to that of Dr Read. Dr Read acknowledged Dr Bates as a leader in their field of clinical oncology. He expressed his criticisms of the treatment of the plaintiff in comparatively diffident terms. When asked by leading counsel for the plaintiff whether the defendant's decision to carry out a total pelvic clearance was within acceptable practice, after some hesitation he said that it fell short of optimal practice. Dr Bates saw no reason to criticise what the defendant had done.

I found Mr McGarry's evidence in some respects unsatisfactory. He had not treated a patient with ovarian cancer for many years. He said that before carrying out any operation he would seek the advice of an oncologist. The impression he gave was that his experience of cancer patients was comparatively small, and that his experience was far less than that of the other witnesses. I have no hesitation in preferring Mr Shepherd's evidence where it conflicted with that of Mr McGarry.

Mr Carron Brown gave his evidence in clear and moderate terms. He was obviously a surgeon of some experience. However, that experience did not seem to me as extensive in this field as that of the defendant, and certainly not as great as that of Mr Shepherd. As with Mr McGarry, I prefer Mr Shepherd's evidence to that of Mr Carron Brown.

Finally, Professor Smith was obviously a doctor of some distinction in his field. His expertise covered both practice and research. His evidence supported that of the defendant and Mr Shepherd on the issue of whether it was reasonable to have diagnosed ovarian cancer rather than endometriosis.

I approach this part of the case against the factual background as I have set it out, and on the basis of my assessment of the expert witnesses.

The criticism that the defendant failed to carry out a proper initial examination was not sustained, and not pursued by Mr Karsten in his final address. The other three criticisms can conveniently be summarised into one central issue: was the defendant negligent in deciding to carry out the operation of total pelvic clearance when he did?

To this question, Mr Carron Brown gave the answer that it was a difficult question. His view was that it would have been better if there had been less haste. He added, 'It is the only answer I can give'. It is unnecessary to emphasise that this was hardly the most clear-cut answer to one of the most crucial questions in the case.

Professor Fox, giving his evidence from the viewpoint of a pathologist, said that he would have advised the surgeon to exercise extreme caution. He pointed to the fact that there was such a conglomeration of atypical features that in his opinion a diagnosis of ovarian cancer was untenable. It was clear that as a pathologist he thought that the defendant's diagnosis was incorrect, and that he had been quite wrong to proceed to radical surgery. In his view, the defendant could and should have taken biopsies before proceeding to such radical surgery.

As against this, Mr Shepherd entirely endorsed the defendant's actions. He stated that, if he had been the surgeon, he would have carried out more radical surgery than the defendant did. In cross-examination he prefaced this by saying that he would have done this provided he had obtained the consent of the patient and he was satisfied that the pathological findings were correct. He added that if he did not know the source of the pathological report he would have checked the source before operating. In his evidence-in-chief he had stated that he saw no reason to doubt the authenticity of the pathology report, since a distinguished doctor and relative of the plaintiff, Dr Saadiq Hussain, had been present at the operation.

In his final submissions, Mr Karsten concentrated on five factors as indicating that the defendant had failed to take sufficient care before carrying out the operation. He submitted that the defendant failed properly to look at the operation notes from Pakistan. This was indicated by the defendant recording pre-operatively that a cystectomy had been carried out when it had not. Secondly, he wrongly assumed that the mass which he found had grown in six weeks. In this respect he wrongly assumed that the surgeon in Pakistan would have been able to see it and would have noted its existence if it had been there when he operated on the plaintiff. Thirdly, at operation the defendant had found that the right ovary was quite normal, rather than showing signs of cancer spread. Fourthly, he failed to take heed of the alarming discrepancies in the pathology report from Pakistan. Fifthly, he should have taken account of all the points made by Professor Fox as indicating that a diagnosis of ovarian cancer was untenable.

All these matters were put both to the defendant and to Mr Shepherd during the course of their evidence. Each rejected these criticisms. Essentially each said that the way in which cancer can present itself is infinitely variable. Whereas there might have been a number of atypical features, the pathology report was clear-cut. The defendant said that he saw no reason to doubt that report, it having been checked by his own pathologist. Both the defendant and Mr Shepherd stressed that a mucinous tumour was a potentially lethal disease. In the circumstances, each defended the decision to operate on the facts known to the defendant as a perfectly reasonable one. They disagreed with Professor Fox's opinion that a diagnosis of ovarian cancer was untenable.

On that evidence, and on the basis of my assessment of the expert witnesses, in my judgment the plaintiff has simply not proved that the defendant was negligent.

In the end, the criticism of the defendant essentially comes down to an allegation that the combination of atypical features ought to have caused

him to question the efficacy of the sample of tissue which came from Pakistan.

I have found on a balance of probabilities that this sample was not a sample taken from the plaintiff. That finding was to a large extent influenced by the fact that the histological tests following the operation in London showed no trace of cancer in the right ovary, something obviously not known to the defendant at the time of the operation. It does not mean that the defendant should have been so suspicious of the pathology report as to cause him to doubt its reliability.

In my judgment there is in the criticism of the plaintiff's experts the use of a good deal of hindsight. I do not think that it was nearly as obvious before the operation as it was after it that the sample from Pakistan might not be the correct one. I have already found on this matter that the defendant's evidence is to be preferred to that of the plaintiff's mother when he stated that the plaintiff and her mother expressed anxiety only about the slide and not about the sample.

Finally, the fact as I have found, that the coincidence of ovarian cancer and endometriosis would have been so rare in a young woman of the plaintiff's age, makes it the more understandable that the defendant, believing the pathology reports to be correct, would rule out endometriosis as a diagnosis. It follows that, in my judgment, the defendant was misled by the pathology reports into believing that the plaintiff had got ovarian cancer when I find on balance that she had not.

In any event, as I have already stated, Mr Shepherd strongly supported the defendant's decision to carry out the operation. Since Mr Shepherd is acknowledged to be a very experienced and distinguished surgeon, it seems to me quite impossible to conclude that the defendant fell below the ordinary skill of a surgeon practising in this field. Accordingly, I reject the allegations of negligence made against him.

It follows from the above that I must reject the plaintiff's claim. It is, I hope, clear from what I have already said that I have the greatest sympathy for the plaintiff. The facts which emerge from this case show that she has been the victim of a tragic mistake. However, for reasons which I have endeavoured to explain, in my opinion no legal liability for that mistake can be attributed to the defendant.

114. Having said that we may now proceed to deal with the report of the AIIMS dated 01.06.2022 which is extracted hereunder:

**ALL INDIA INSTITUTE OF MEDICAL SCIENCES
Ansari Nagar, New Delhi - 110029**

No.F.2-18/Medical Board/2022-Estt. (H.)

Dated: 01.06.2022

Subject: Report of the Medical Board constituted at AIIMS in compliance of Hon'ble National Consumer Disputes Redressal Commission, New Delhi for expert opinion vide order dated 06.04.2022 in First Appeal No. 476 of 2019 & other connected matters.

With reference to the letter No.FA/476/2019/NCDRC/2021-22 dated 21.04.2022, received from the Sh. S. Hanumantha Rao, Joint Registrar & Executive Magistrate (Delhi), National Consumer Disputes Redressal Commission, Upbhokta Nyay Bhawan, 'F' Block. General Pool Office Complex, I.N.A., New Delhi-110023, regarding subject noted above, the Medical Superintendent, AIIMS has been constituted a medical board consisting of the following members:-

- | | |
|--|---------------|
| 1. Dr. M. Ramam | - Chairperson |
| Professor, Deptt. of Dermatology & Venereology | |
| 2. Dr. S.V.S. Deo | - Member |
| Professor (Surgical Oncology), Dr. BRA-IRCH. | |
| 3. Dr. Sushma Sagar | - Member |
| Professor, Deptt. of Surgery (TC) | |
| 4. Dr. Sudheer Kumar Arava | - Member |
| Addl. Professor, Deptt. of Pathology | |
| 5. Dr. Shipra Agarwal | - Member |
| Addl. Professor, Deptt. of Pathology | |
| 6. Dr. Deepam Pushpam | - Member |
| Asstt. Professor, Deptt. of Medical Oncology | |
| 7. Dr. Arif T.P. | - Member Secy |
| Department of Hospital Administration | |

The board members convened a meeting on Monday, 1 June, 2022 at 04:00 PM.

All board members were present. The histopathology materials (Blocks & slides) which were received by the board were reviewed by the board experts. The medical board after discussion is of the following opinion:

- Section re-stained from the original biopsy slide along with the reviewed slide from the different centers (Tata memorial hospital Mumbai, PGI Chandigarh, SRL lab and 1 digital slide in a CD) all together showed an acanthotic epidermis without any surface ulceration. There is linear proliferation of melanocytic cells arranged in small variably sized cluster/nests with occasional singly lying cells, predominantly located at the dermoepidermal junction without any definitive evidence of extension into the dermis. Cleaving of the nests in relation to the adjacent epidermis is noted. Eosinophilic degenerated material (kumano bodies) are also noted at places. Upper dermis shows dense chronic inflammatory cell infiltrate with few telangiectatic blood vessels. The melanocytes on higher magnification revealed minimal pleomorphism, moderate amount of clear to eosinophilic cytoplasm, round to elongated nucleus with an occasional prominent nucleoli. Atypical mitosis/necrosis is not noted.
- **Overall histomorphological features are suggestive of Spitz Nevus**
Note: Malignant melanoma is a close differential diagnosis of Spitz nevus due to the presence of some overlapping histological features. In the current case, absence of more than occasional mitotic activity, necrosis, asymmetry and ulceration as well as the presence of Kumano bodies favor the diagnosis of Spitz nevus
- Immunohistochemical stained slides on review revealed that the proliferating cells are that of melanocytic origin (Positivity for S 100, HMB 45 and melan A with cytokeratin negativity)
- All the submitted hematoxylin and eosin stained slides for review in Box- 2 showed marked fading artifacts. Hence no definitive opinion was possible on these slides.
- Sections cut and stained from the single paraffin block bearing no: S-14-1385 revealed presence of tiny focus of junctional melanocytic nevus components on which further definitive opinion was not possible.

- *Sections cut and stained from the 33 paraffin blocks provided, revealed that all the resected margins and soft tissue components included are free from the lesion*
- *All the lymph nodes included in the sections show histomorphological features of reactive hyperplasia without any evidence of metastasis.*

115. A perusal of the said report would reflect a comprehensive consideration of the material on record and with specific findings having been recorded therein. A report submitted by an expert body cannot be ordinarily discarded unless any error can be pointed out that may prejudice the opinion one way or the other. As a matter of fact the Apex Court has held that the credibility to such reports has to be given and as noted above the report dated 01.06.2022 was rendered on the request of this Commission through specific orders passed for analyzing the material on record as well as the reports from various sources.

116. Coming to the findings recorded in the said report, we may at the outset once again reiterate that we have no doubt that the appropriate material as dispatched by this Commission had been received by AIIMS and the same was duly analyzed as indicated in the said report. The report categorically records that degenerated material has been noted at places, but **“atypical mitosis/ necrosis is not noted”**. The second important observation made is that the overall histomorphological features are suggestive of **“Spitz Nevus”**. It then goes on to record in the note that malignant melanoma is a close differential diagnosis of Spitz Nevus due to the presence of some overlapping histological features. In the case at hand, **absence of more than occasional mitotic activity, necrosis, asymmetry and ulceration as well as the**

presence of Kamino bodies favour the diagnosis of Spitz Nevus. The IHC stained slides indicate that the cells are of melanocytic origin.

117. The post-surgery paraffin block appeared to be free from the lesion and the lymph nodes included in the section indicated histomorphological features of reactive hyperplasia **without “any evidence of metastasis”**.

118. In our considered approximation, the said report seems to indicate that there were some overlapping histopathological features due to which a differential diagnosis of malignant melanoma came close to Spitz Nevus, but on examination of the other features of “absence of any mitotic activity, necrosis or ulceration”, the diagnosis favoured Spitz Nevus which seems to be benign and not malignant.

119. In the present case, there are two peculiar things namely that the consent for surgery was given by the complainant who herself was a Dentist in the medical line. The question about the pathological tests dated 02.08.2014 and 07.08.2014 by the Dayanand Medical College prior to the operation were apparently conclusive on malignancy, but the tests conducted later on indicated otherwise as has been the case of the complainant. The fact is that the report that was given with an opinion of malignancy was also accompanied by an advice for Marker tests to be conducted out of which facilities for two of the tests were not available. It is for this reason that the Pathologists have taken a stand that the said report was incomplete and the surgery ought to have been performed accordingly. The surgery was performed on the 07.08.2014 on which date arrived the test of

Immunohistochemistry where the Marker S-100 indicated positive in tumor cells and the Cytokeratine test indicated negative in tumor cells. However the impression recorded is that the findings are consistent with malignant melanoma. The Surgeon therefore seems to have proceeded on the strength of these tests which though indicated as conclusive on malignancy, yet advised for the other Marker tests the facilities whereof were not available in the Dayanand Medical College.

120. It is therefore a possible doubtful borderline error that can be construed from the reports of the pathologists dated 02.08.2014 and the IHC report dated 07.08.2014. We say this because the pathologists had apart from observing suggestive of malignant melanoma had clearly advised the marker tests to be conducted. This in our opinion ought to have been confirmed before bringing the complainant under the knife. Instead the IHC report dated 07.08.2014 states that the tests were consistent with malignant melanoma. The complainant herself had applied for obtaining the block slides which was allowed by the DMC doctors, but without actually waiting for the examination of the said block and slides or the marker tests that were received later on, the surgery was performed on 07.08.2014. Neither the complainant awaited any second opinion or waited for the outcome of tests prior to the surgery, nor did the block and slides could be examined by the DMC once again for review or any other confirmatory test as the block and slides had been sent to the SRL Labs, which they alleged had been handed over to the complainant, but the fact remains that the block slides were returned back on 27.08.2014. No

request was made by the complainant to the DMC in writing for any other confirmatory test and on the other hand the DMC also did not carry out any confirmatory test.

121. There were contradictions in some of the pathological reports including the correctness thereof and the list of these pathological reports has already been extracted hereinabove and were the subject matter of assessment by the All India Institute of Medical Sciences when the matter was sent by this Commission for an expert opinion. The discrepancies have been pointed out by both sides claiming advantage and we also agree that there were conflicting opinions as to whether the malignancy was certain or not. However, it is clear that the complainant did require a surgery even if it was spitz nevus. None of the opinions or the medical literature as relied on by the parties including that by the complainant do indicate that the surgery was totally unwanted. The surgery was required may be and probably to a lesser extent as claimed by the complainant without disturbing her nervous and muscular system. We therefore rest our conclusions on the final expert opinion of All India Institute of Medical Sciences dated 01.06.2022.

122. What comes out of this discussion on the events as unfolded is that the description of the diagnosis of malignant melanoma on the reports dated 02.08.2014, followed by the IHC report dated 07.08.2014 though reflected as "consistent" was not a confirmed report, but on the basis of the potential of the supposed malignancy, the reports were issued by DMC in the absence of a complete confirmation of the marker tests that had been advised by itself. The

report is being described to be not a final report by the pathologists in their affidavits, but if that was so, then according to the guidelines cited on behalf of the complainant and the standard norms for carrying out a biopsy, the report ought to have categorically stated that it was not a confirmed malignancy, and was rather subject to any further pathological, histopathological, morphological or clinical tests. It is clear that the pathologists in our opinion seem to have acted deficiently by not expressing their doubts, which they subsequently seem to be projecting as not a final report in their affidavits. The doubt ought to have been expressed clearly if it was not a final or a confirmed report. To the contrary even though the 02.08.2014 report states "suggestive of malignant melanoma" the IHC report dated 07.08.2014 categorically records to be "consistent" with malignant melanoma. The above discussion therefore leads to the conclusion that the pathologists to an extent were not correct in their assessment about malignancy and in the circumstances of this case, we find them to be partially negligent.

123. The State Commission while recording its findings entered into the issue of informed consent and came to the conclusion that the consent forms were signed by Mr. Ravinder Singh, the husband of the complainant on 07.08.2014 before the surgery. The inference drawn by the State Commission and the reasoning given stands recorded in paragraph 95 to 106 of the impugned order that has been extracted hereinabove. The State Commission while relying on the decision of the Apex Court in the case of **Samira Kohli (Supra)** held that unless the procedure is necessary to save the life or

preserve the health of the patient, as it may be unreasonable to delay any further procedure, it is only in such situations that it can proceed without a consent, or else the consent of the patient is necessary. It was therefore held by the State Commission that the complainant, who was herself a Dentist, ought to have been informed about the nature and extent of complications involved and the risk of surgery. This does not appear to have been done nor were the relatives intimated about these complications. The State Commission further observed that it has not come in evidence as to who had filled the consent forms and how, nor any such person was examined, nor an affidavit placed on record.

124. We have perused the documents on record and the Anaesthesia as well as Surgery Consent Form-A has been signed by the husband of the complainant who is a doctor. The same is extracted hereinunder:

consent for surgery

Near Octroi Post, Ferozepur Road, Ludhiana. 142 027 (Pb.)
Phone : +91-161-5099502-505, Fax : +91-161-5099508
Emergency : +91-161-5099501, Ambulance : +91-161-5099500
E-mail : info@ludhianamedways.com Website : ludhianamedways.com

CONSENT FORM - A
CONSENT OF PATIENT FOR ANAESTHESIA AND SURGERY

Name of the Patient Kamunal preet Age/Sex 37y/F
(Block Letters)

Unit/Ward/Bed PRT 103 CR NO. H00907
(Block Letters)

I hereby make a decision of my own free will and give consent to the operative procedure
Local wide Excision face + Rt Maxillary on my self
wife/daughter/father/mother (4) on date 7/8/14
by Dr. Satish Jain and his/her team. Under any type of
anaesthesia (GA/Regional/LA) administered by Dr. Hitesh and
his/her team as may be deemed necessary. The effects and nature of the anaesthesia and operation and the
necessity of an alternative operative procedure have been explained to me in the language I understand.

I have also been explained that any operation or procedure involves risk and hazards which
maybe serious or even fatal.

I further give my consent to release of professional and / or other information from the
medical record as deemed necessary in accordance with the rules and policies of the hospital.

Witness Staff Signature [Signature]

Signature [Signature] Name RAVINDER SINGH

Name Harsimranjit Kaur Relationship with the Patient Husband

Date 7/8/14 Date 7/8/14

125. The abovementioned form has been signed on 07.08.2014. On the same day and at the same time, the High Risk Consent Form-B for Anaesthesia and Surgery was also signed by the patient – complainant and her husband. The same is extracted hereinunder:

CONSENT FORM - B
HIGH RISK CONSENT FOR ANAESTHESIA AND SURGERY

I understand that/My relative fall into category of a High Risk patient for surgery & anaesthesia because in addition to the present problem I/My patient also suffers from one or more of the following additional diseases as identified below which can complicate the course of pre-operative period and add to the risk of surgery and anaesthesia.

Heart disease
Diabetics
Incapacitating restrictive/
Obstructive lung disease
Severe anaemia
Renal Failure
Difficult upper airway
Patients with full stomach
Deranged neurological status
H.I.V. Positive/
Immuno compromised Allergies

High blood pressure
Other endocrine disorders
Blood dyscrasias

Shock
Electrolyte and base imbalance
Severe chest injuries/plytrauma/R.T.A.
Multiple organ disease syndrome
Hepatic disorders
Any other

DECLARATION :

1. I hereby after understanding the grave risk involved give my consent for the best interest of my self/my patient.
2. I/My patient also understand that there is a High Risk of intra-operative hemorrhage and damage to surrounding structures and there is no guarantee of cure.
3. Although it is impossible for the doctor to inform me of every possible complication that may manifest itself during anaesthesia or surgery or at a later date, all my queries have been explicitly answered and I give my consent for any therapeutic/resuscitative measure that may be needed.

SIGNATURES

Patient Harnish
Name Kanwalpreet Kaur
Date 7/8/14
Witness Staff
Name Kanwalpreet Kaur
Date 7/8/14
Surgeon D. S. Lall
Name E
Date 7/8/14

Relative P. H.
Name Raninder Saini
Date 7/8/14
Relationship Husband
Anaesthesia CA
Name D. R. Lall
Date 7/8/14

126. The aforesaid documents were very much on record that establishes that all precautions for taking consent were taken.

127. The complainant herself has argued the matter before us and we find her to be quite conversant with the nuances of medical science, she herself being a dental doctor. We find it difficult to presume that the complainant had no idea about the consequences of the surgery that was to be undertaken on the basis of the pathological reports indicating "suggestive" of malignant melanoma. Thus, the procedure that was to be undertaken for surgery was known to the complainant who had undertaken this decision to consult the OP-3 or for that matter, even OP-4. The State Commission has also recorded the fact that the patient herself was a dental doctor. If that is so, then the complainant also knew about the type of form and the nature of consent that was to be filled up, and we do not find any objections taken by the complainant to the filling up of the consent form by her husband. It is not the case of the complainant that she went in for surgery without any information about the surgery that was going to be performed on her. She herself being a dental doctor, it would be rather unreasonable to presume that she was not having any idea about the consequences of such surgery, including facial disruption. To presume that there was no knowledge, or very little knowledge about the procedure to be undertaken would not be fair on the facts of the present case inasmuch as the complainant herself has indicated that she had consulted the OP-4 and she had taken the decision to get the surgery performed. It will be difficult for us to presume that the complainant was such a patient who was unaware of what was going to happen and the manner of the surgery.

128. The second part of it is the information regarding the consequences of the risks involved in the surgery and the post operative complications. Unfortunately, in the present case, as soon as the report from the pathologist was received indicating "suggestive" of malignant melanoma followed by the IHC report dated 07.08.2014, a decision was taken to get the surgery conducted with the active consultation of the complainant, who had the capacity to give consent. She was also referred by Dr. Iqbal Singh and her brother who is a doctor, was in touch with Dr. Sumeet Jain. Thus, it cannot be said that the complainant was uninformed or lacking in any capacity to understand the consequences of an excision of the right cheek. The broad nature of the procedure and the nature of the surgery was understood by her, but as is evident from the facts of the present case, the surgery was performed in a quick succession of the IHC report on 07.08.2014. The complainant knew about the pathological reports and she was given to believe that the disease was malignant on the basis of such reports and consequently the surgery was performed.

129. The case of the complainant is that the surgery was performed on the basis of wrong pathological reports. In our opinion, that is a different issue regarding negligence, but to construe that there was an absence of informed consent for the surgery may not be correct. The finding of the State Commission that no person has been examined to prove the filling up of the consent form cannot be a ground to disbelieve the consent form having been signed by the complainant and her husband after fully understanding the

nature of the surgery that his wife was to undergo. The treatment of malignancy by itself is a high risk surgery and the entire case of the complainant is that the removal of the mole by Dr. Tah had led to the doubts about the existence of complications. The complainant was not unaware of surgical procedures, inasmuch as admittedly she had undergone a kidney transplant several years ago and was under immune suppressant drugs at the same time herself being a dentist. The complainant, therefore, could have very well sought any information that she wanted about any surgery being advised in the background of the pathological reports. The complainant could have herself elicited further information, but it seems that the complainant in this situation consented for the surgery that was performed on 07.08.2014. The consent form having been signed by none else than by the complainant and her husband does not dilute the impact of the consent, and therefore the State Commission was not justified in drawing an adverse inference, and to that extent the discussions made and the conclusion arrived at by the State Commission does not appear to be tenable. The State Commission has clearly erred by referring to only one consent form and has overlooked the high risk consent form that has been signed by the complainant and her husband. We therefore do not agree with the finding of the State Commission holding the OP-2 to 4 to be negligent in proceeding with the surgery without any consent or informed consent from the complainant.

130. The next aspect of the matter is the involvement of Dr. Sumeet Jain, the OP-4, in the conduct of the surgery, which the complainant alleges was

actually performed by him. For this, the complainant has also relied on her evidence relating to the consultative process leading to the surgery and the communications between her and Dr. Sumeet Jain. The State Commission in paragraph 109 and 110 of the findings recorded by it has relied on the WhatsApp conversation and audio talk recordings that were exhibited as C35 and C24 respectively and have been quoted in the above noted paragraphs. The complainant has also urged that it was Dr. Sumeet Jain who was a qualified oncologist and it is he who had introduced her to his father OP-3, who is also a surgeon. It is the contention of the complainant that even though the documents of Mediways Hospital have only been signed by Dr. Satish Jain, but that does not in any way establish the absence of Dr. Sumeet Jain.

131. What we find from the documents on record is that Dr. Sumeet Jain has taken the plea that he was employed in the Dayanand Medical College and was not on the payrolls of Mediways Hospital. The contention is that there is no evidence to indicate that he was in any way, connected with the surgery that was performed in Mediways Hospital. Mr. K. G. Sharma, learned counsel has further relied on the affidavit of one Dr. G. S. Brar filed before the State Commission and brought on record vide IA/11465/2024 filed on 29.07.2024 vide Diary No. 26415. The affidavit filed on behalf of the hospital, OP-2, in paragraph 12 categorically states that Dr. Sumeet Jain (OP-4) has never been associated with the hospital in any manner whatsoever and all allegations pertaining to the involvement of OP-4 in the surgery have been vehemently denied. It has also been stated that the complainant had been referred to OP-

3, Dr. Satish Jain, who is a famous Onco Surgeon, by none else than Dr. Iqbal Singh Ahuja, who happens to be a close relative/uncle of the complainant. It has also been stated in the said affidavit of the hospital that Dr. Sumeet Jain had only put a favourable word for taking care, she being a friend of the OP-4. It has also been stated that in fact, the complainant had been called upon to come after five days in the OPD for follow-up treatment, but she did not turn up for any further examination. The surgery was opted by the complainant, keeping in view the long-standing 35 years experience of Dr. Satish Jain. It is therefore submitted on behalf of Dr. Sumeet Jain that he had only discussed her problems with Dr. Satish Jain and dropped in a favourable word for her surgical treatment. This fact is also stated in paragraph 3 of a reply/WS filed before the State Commission by Dr. Satish Jain. As a matter of fact, the OP-3 in his affidavit has also stated that he was threatened by accusing his son and defaming him and further involving him in litigation.

132. Apart from this, Dr. Sumeet Jain, OP-4 before the State Commission, in his reply and affidavit has stated that he has a special degree of MCH based on the "extremeties" of melanoma in India and it is because of this qualification that the complainant had sought friendly inputs with reference to a common friend, Dr. Ashish Ahuja, Associate Professor of Surgery, DMC Ludhiana. This opinion was also sought with reference to the real brother of the complainant, Dr. Jaspreet Singh, who was pursuing his fellowship in cardiology in USA, and it was through these common links that the OP-4 had been contacted to give his opinion or friendly advice for resolving this medical

problem of the complainant. It has been categorically stated in the said affidavit that it was on account of the aforesaid friendly advice that views had been exchanged with the brother of the complainant, Dr. Jaspreet Singh, on 06.08.2014 and again post-surgery on 18.08.2014, for which reliance was placed on emails of the said dates that were filed on record.

133. The affidavit further states that the role of OP-4 was limited to that extent and any other allegations made are denied and therefore the said opposite party cannot be blamed for any good gesture having been shown.

134. The OP-4 had also stated that he was a super specialist onco surgeon trained from Tata Memorial Hospital, Mumbai, and apart from giving only suggestions, the OP-4 was neither involved in the decision-making either pre-operative or post-operative care of the complainant. With regard to his presence in the hospital on the date of the surgery, an affidavit of Dr. Brar was filed in evidence to substantiate that the OP-4 was with the Dayanand Medical College as a doctor on that date and therefore his participation in the surgery was refuted.

135. The submissions of Mr. K.G. Sharma, learned counsel on behalf of Dr. Sumeet Jain, have been advanced by pointing out all these averments, as well as the affidavit of Dr. Brar which is extracted hereinunder:

A-240 70014957

BEFORE THE HON'BLE NATIONAL CONSUMER DISPUTES REDRESSAL
COMMISSION, NEW DELHI

FIRST APPEAL No. 664/2019

501-11465/1004

1260

IN THE MATTER OF

Mediways Hospital & Ors.

..... Appellants

Versus

Kanwalpreet Kaur & Ors.

..... Respondents

INDEX

N.D.O.H. 31/08/2024

S. No.	Particulars	Pages
01.	Application for Placing Additional Documents on Record along with supporting affidavit.	01-04
02.	Certified copy of the Affidavit of Dr. G.S. Brar, Prof & HOD, Deptt. Of Surgical Oncology, DMC & Hospital, Ludhiana.	05-06

03. COPY OF E-MAIL

-7-

Filed by -

K. G. Sharma, S. K. Jha & S. K. Roy,

Advocates,

Counsel for the Appellants,

54, LGF, Vinoba Puri,

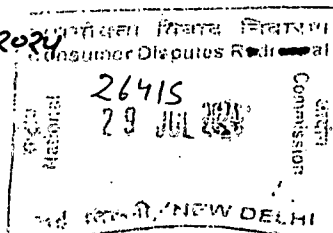
Lajpat Nagar - II, New Delhi - 110024.

Email ID : kgsharnaadv@gmail.com

Mobile 9958801096.

New Delhi

Date: 18.07.2024



12A

171+PS

[Handwritten signatures and dates]

[Handwritten signature and date]

BEFORE THE STATE CONSUMER DISPUTES REDRESSAL
COMMISSION, PUNJAB, CHANDIGARH

Original Complaint No. CC/10 / 2015

Karawalpreet Kaur

...Complainant

versus

Dayanand Medical College & Hospital & others.

...Respondents

Affidavit of Dr. G.S. Brar, M.Ch,
(Surgeon Oncology), Professor and
Head of Surgeon Oncology, DMC &
Hospital, Ludhiana.

I, the above named deponent do hereby solemnly affirm and
declare as under :-

1. That the deponent is a highly qualified and well known
Surgical Oncologist having 17 years of experience. The deponent is
acclaimed surgeon and is heading the department of surgical
oncology in DMC Hospital.

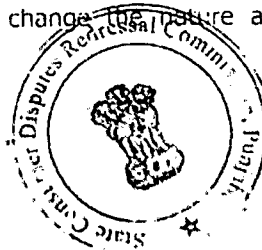
2. That Dr.Sumeet Jain was working in DMC Hospital in
August, 2014 and as per the service rules of DMC Hospital he is
restrained from conducting surgery in any other hospital/ place but
for DMC Hospital. On 07.08.2014 Dr.Sumeet Jain was involved in a
complex surgery (Transhiatalsophagectomy) at DMC Hospital for
which he was engaged in operation theatre for not less than 6 hrs,
till 3.45 PM. This complex surgery could also have lasted longer in

duration. Thereafter, Dr.Sumeet Jain was also involved in post operative care of the patient. The duly attested photocopy of OT register dated 07.08.2014 is annexed herewith as **Exhibit OP-3/20.**

That the complainant/ Dr.Kanwalpreet Kaur had visited the deponent with her histopathological report dated 02.08.2014 on perusal of which the deponent had advised for surgery in form of wider excision / surgery for the removal of lesion and explained to her the pro and cons of neck dissection. The complainant and her brother Dr.Jaspreet Singh were curious and insistent on neck dissection and were advised to seek second opinion if they wish to do so. The deponent has perused the treatment/ surgery conducted by Dr. Satish Jain and under the given circumstances Dr.Satish Jain has acted as per the determined protocol for the treatment in furtherance of histopath report dated 02.08.2014 and IHC report dated 07.08.2014. Different nomenclature with respect to melanoma is acceptable but does not change the nature and character of melanoma.

Place:

Dated:



[Signature]
Deponent

VERIFICATION :

I have verified that the contents of my above evidence by way of [redacted] are true and correct to my knowledge. No part of it is false and nothing has been kept concealed therein.

Place:

Dated:

ATTENDED BY

Landdeep Kaur, D.O.

Public Complaint Cell

Certified to be true copy

[Signature]
10/7/24

State Consumer Disputes Redressal
Commission, Punjab,
CHANDIGARH

21/2/2024

[Signature]
Deponent

136. What we find from the findings recorded by the State Commission is that heavy reliance has been placed on the WhatsApp conversation and the audio talks in September, 2014 and the State Commission has believed the said conversation to conclude that Dr. Sumeet Jain had performed the actual surgery along with his father. There is no indication or assessment by the State Commission of the stand taken by Dr. Sumeet Jain in his affidavit or the evidence of Dr. Brar in his support.

137. We find that there is no cross-examination of Dr. Sumeet Jain or interrogatory issued and it is the WhatsApp conversation and the audio talk recorded long after the surgery that was made the basis of the contention as pleaded in the complaint that Dr. Sumeet Jain had performed the surgery. On the basis of this material, we find that the State Commission did not assess the evidence of Dr. Sumeet Jain and his contentions raised in his reply. The WhatsApp conversation does indicate that Dr. Sumeet Jain had made suggestions and had also talked to the complainant, but apart from that, he had also sent two mails on 06.08.2014 and then later on 18.08.2014 to the brother of the complainant. This in all probability demonstrates a consultative communication regarding the surgery. But there is no clinching material to conclude the presence of Dr. Sumeet Jain inside the operation theatre and the actual performance of surgery by him. The discharge documents and the hospital documents nowhere indicate the presence of Dr. Sumeet Jain at Mediways Hospital and on the other hand, the affidavit of Dr. Brar has

nowhere been discussed by the State Commission or discarded as untruthful or unreliable.

138. Thus, on an appreciation of the aforesaid facts and the evidence on record, we find that it could not be established convincingly that Dr. Sumeet Jain had participated with his father in the actual performance of the surgery, even though he had involved himself in some suggestions and opinion through his communications between the complainant, her brother, and then forwarding the suggestions with reference to the same to his father, the OP-3, Dr. Satish Jain. It is also admitted that Dr. Sumeet Jain is from the specialised field of oncology, particularly his work on melanoma, and therefore it is quite possible for him to have tendered his opinion, more so to a friendly family and to the complainant who is stated to have been known to him. The reference also by the relative/uncle of the complainant, Dr. Iqbal Singh, indicates the friendship and acquaintance between the parties and therefore, it is probable that the suggestions of Dr. Sumeet Jain may have played a role in the procedure and the ultimate performance of this surgery. The question is whether a conclusion can be drawn about his negligence in the actual performance of the surgery?. In this case, the consultation and the communications between Dr. Sumeet Jain, the complainant, her brother, and Dr. Satish Jain do indicate the contributions of Dr. Sumeet Jain towards consultation only, but there is no proof or evidence of any actual participation in the performance of the surgery by him so as to establish negligence on that count.

139. In the given circumstances, Dr. Sumeet Jain cannot be held liable for any negligence in the actual performance of the surgery, but his suggestions and the communications do indicate his involvement in the background that he had a friendly acquaintance with the complainant, who was referred by her uncle and whose brother from USA had been talking to Dr. Sumeet Jain. This affinity does indicate that there were inputs given by Dr. Sumeet Jain, who was himself a trained oncological surgeon. The surgery was performed undoubtedly by Dr. Satish Jain, who is the father of Dr. Sumeet Jain. There may be, therefore, a genuine doubt about his actual presence in the operation theatre along with his father, but there is no doubt about his association and involvement of offering inputs to the extent indicated above.

140. The situation turned detrimental because of the pathological reports that followed from the Dayanand Medical College and the facial surgery was a major surgery.

141. The Complainant has raised her submissions narrating her medical journey in respect of surgery and has urged that the diagnosis of Cancer given by the pathologist was a wrong diagnosis and was not an error of judgment. The opinion of malignancy was an incorrect assessment and the report was prepared without exercising due care.

142. It was urged that the Medical Board of the All India Institute of Medical Sciences in their report dated 01.06.2015 mentioned a rare skin condition but it nowhere indicates malignancy. The Laboratory reports, all cross the country and even abroad have indicated the disease to be a typical Epithelioid Nevus

or a Compound Nevus or a Dysplastic Nevus or a Spitz Nevus or a Spitzoid Tumor of uncertain malignant potential with no sign of malignancy. Thus, the reports indicate a care non-cancers diagnoses and the wide local excision was made with limited margins. This was with a removal of 1-2 mm of rim of normal appearing skin. To the contrary an extensive and deep surgery of the face and neck was performed damaging the nervous system thereby reducing the strength of the right shoulder and causing facial paralysis apart from the plastic surgery complications.

143. The Pathological reports and the Radiological Reports including the MRI scan that was done thereafter nowhere established the diagnosis of malignant cancer.

144. Biopsy had been conducted by adopting the process of the applicable markers but confirmatory tests ought to have been done by reflecting the stage, the thickness and the depth of the examination to confirm any malignancy which was not done. In the absence of any malignancy the Pathological Reports indicated that the report was benign.

145. It was pointed out that the guidelines for the pathological tests and the standard protocol was not followed and the surgery could not have been performed without ascertaining the stage of the cancer or malignancy in terms of the Standard Marker Tests. The Report of the Dayanand Medical College does not even mention the site of the growth, the size and the diameter and the height of growth and whether the specimen was complete or incomplete. There was no measurement mentioned and the core technical dimensions

were missing. It is however submitted that the markers that were suggested by the Dayanand Medical College would differentiate between the types of skin cancer but not from a cancer from a non-cancer. The Diagnostic Markers that could have determined the malignancy potential of a Biopsy have not been attempting in the event there was a dilemma.

146. The Dayanand Medical College also failed in its duty to retain the records and appropriate documentations before releasing the sites and block to the Complainant. This was yet another lapse on their part.

147. Apart from this, the Complainant has also relied on the oral talks between her and the pathologist to confirm that they maintained their diagnoses till the end. The pathologists were well aware of the proposed surgery and therefore there was no advice given that the surgery should not be performed till the Marker Tests are confirmed. On the other hand, the pathologists have taken up a case that the surgeon had never reverted back to seek any further examination or confirmation about his doubts regarding the tests.

148. The contention is that the stand of the Opposite Parties about uncertainty in the reports cannot be a ground to hold them negligent is incorrect, in as much as, it is evident that they were uncertain of the diagnosis and therefore to confirm Melanoma Cancer further tests and opinion ought to have been rendered including a Breslow Thickness Test in order to ascertain the stage and other features of the tumor.

149. The contention of the pathologists and surgeons about the different types of nomenclature used in the tests indicate inconsistency and uncertainty, and therefore even the opinion given by All India Institute of Medical Sciences on 02.06.2022 has no firm foundations.

150. The Complainant has relied on the decision of **Vinay Srivastava Vs. Dr. P.S. Hardia**, to urge that this is not a case for error of judgment and is a clear case of careless diagnosis, **2013 SCC OnLine NCDRC-4**. Another judgment relied on is that of **Malay Kumar Ganguly vs. Dr. Sukumar Mukherjee, (2009) 9 SCC 1**. Reliance is then placed on the decision in the case of **Sitaram Bhartiya Institute of Science and Research vs. Vidya Bhushan Jain, 2017 SCC OnLine NCDRC 973** to substantiate the submission on informed consent.

151. Reliance is then has placed on the decision of the Apex Court in the case of **Spring Meadows Hospital vs. Harjol Ahluwalia, (1998) 4 SCC 39** to press into service the principal of *res ipsa loquitor* following the same another decision has been rendered by this Commission in the case of **Ravi Rai Vs. Fortis Healthcare** in **CC/479/2017** the order whereof has been upheld by Hon'ble Supreme Court in the case of **Rahul Kakran vs. Ravi Rai** in **Civil Appeal No.13659/2024**.

152. On the quantum of compensation 08 judgments has been relied on namely; i) **Atanu Dutta vs. Mool Chand Khairati Ram Hospital & Ayurvedic Research Institute, 2022 SCC OnLine NCDRC 889**, ii) **Jyoti Devi vs. Suket Hospital (2024) SCC 655**, iii) **Balram Prasad vs. Kunal**

Saha (2014) 1 SCC 384, iv) Ashish Kumar Chauhan vs. Indian Army, (2023) SCC 152, v) V. Krishnakumar Vs. State of Tamil Nadu (2015) 9 SCC 388, vi) X vs. Bhatia Global and Endosurgery Institute (2023) SCC OnLine NCDRC 212, vii) Reba Modak vs. Sankara Nethralaya (2022) SCC OnLine NCDRC 528, viii) Maharaja Agrasen Hospital vs. Rishabh Sharma, (2020) 6 SCC 501.

153. On the strength of the aforesaid decisions, the contention raised is that the State Commission has awarded a lesser compensation than what was desirable. Keeping in view the fact that the Complainant was herself a dentist by profession and was also suffering due to her previous ailment of Kidney transplant and consequently she not only was injured bodily but her entire professional career was ruined. The award of compensation therefore in the background that medical negligence has been established is not proportionate to the sufferance of the Complainant. The decisions that have been relied on have been pointed out to contain that this is a lifelong damage caused to the Complainant who was of only 23 of age when this entire episode took place and the face of the Complainant was deformed with complications of shoulder problem and Facial Palsy. The Complainant is unable to smile and her lip movements are badly affected. Not only this, her eye lids are also affected and betting of her eye lids is irregular. This has been recorded and indicated in the report of the medical summary prepared at John Hopkins Hospital, USA where the Complainant had to undertake different surgery and treatments to get the damage repaired as a consequence of the incorrect diagnoses and the

surgery performed as confirmed by the State Commission. The contention therefore is that the Complainant deserves the entire claim and an enhanced amount in the background in all the complications which the Complainant has suffered.

154. The Complainant has claimed an amount of Rs. 95 lakhs in the complaint and has also sought additional damages and costs. The Complainant has filed FA No.476 of 2019 praying that the impugned order of the State Commission dated 31.08.2018 inadequately awards a lesser compensation than that was desirable on the facts of the present case and therefore, same deserves to be modified by enhancing the compensation to at least Rs. 95,00,000/-.

155. In order to assess the said arguments the nature of the negligence and the mitigation circumstance if any had to be taken notice of. We will deal with this later on but the fact remains that the damage suffered by the Complainant is evident.

156. The question is should the Surgeon have waited or examined this further in order to ascertain the status of the malignancy and probed into the stage thereof, the measurements including the depth and its spread. The complainant has established that no such further tests were conducted nor any such tests were resorted to to ascertain the stage of the malignancy. It is here that the findings recorded by the State Commission become relevant on the evidence on record and in our opinion the principles of *res ipsa loquitur* can also be attracted where the Surgeon himself proceeded with the surgery

in the absence of any further confirmatory test and went on to excise the right side of the cheek upto the level of neck which was obviously a major and wide excision changing the facial contours of the complainant drastically.

157. The role of the Surgeon, Dr. Satish Jain, who admittedly did not get any confirmatory report done, keeping in view the standards and practices of confirmatory reports through marker tests including the need of examining the length, breadth and depth of the infection has been analyzed by us. We find ourselves in agreement with the argument of the complainant that at least this minimal confirmation was necessary in order to plan the extent of surgery and the depth of it which had to travel to the neck level 4. The excision was elaborate and a wide one. There is no document or any report obtained by Dr. Satish Jain to confirm as to the extent of the surgery that was to be performed in proportion to any spread of malignancy or its future spread. The surgeon was also under an obligation and medical duty not to have gone into surgery without waiting for any confirmatory test. In fact the surgery seems to have been performed on the report dated 02.08.2014, and the IHC report that had been received in the afternoon of the 07.08.2014, the day on which the surgery was performed. The performance of the excision was therefore on the presumption of the pathological reports referred to above as virtually confirming malignancy. The belief treating the status, without confirming the stage of the cancer or the requirement of the depth as per confirmatory reports clearly is absent and in our opinion falls within the Bolam's test. We may point out that the Surgeon, in his operation notes, has nowhere indicated

the depth or the extent or the stage of cancer. The complainant is correct in her submissions that there are certain tests which ought to have been conducted. From the literature cited by her and also going through the various clinical standards and norms internationally acknowledged as cited by the complainant, the Breslow thickness of the tumour has to be measured and assessed for the purpose of conducting any such surgery. The depth of penetration of dermis known as Clarks level has also to be assessed and referred to. The medical literature also indicates that the proportion of surgery has to be attempted once it is established if the penetration is more than 2 millimetres. Admittedly there is no assessment of this infiltration either by the Pathologists or even by the Surgeons nor any such attempt has been made prior to the conduct of the surgery. Had it been so, the same would have been mentioned in the Operation Theatre notes. To understand the same, we reproduce the detailed surgical notes as recorded in the Progress Sheets dated 07.08.2014 which is extracted hereinunder:

289

PROGRESS SHEET

Name Kamalpreet
Age 37 Sex F
C.R. No. 1100907 Ward 126
Bed No. 1
Doctor Incharge Dr. S. Jit

Date/Time	Details
	<u>Detected Surgical Site</u>
	<u>Diagnosis: Right side Maxillary RTFCA</u>
<u>7/8/14</u>	<u>Refer: (Biopsy) earlier - Reported as P2110</u>
<u>7/9/14</u>	<u>Operation: Local wide Excision of the lesion</u>
	<u>on the RT face in mid face region with</u>
	<u>Modified Neck Dissection, Rt Side (Level I-IV)</u>
	<u>LC A. P. 1111</u>
	<u>Operative Details:</u>
	<u>RT Face lesion: Excision was extended with 1 cm</u>
	<u>of margin all around including the Biopsy scar</u>
	<u>& pigmented lesion in the lower lateral part. There</u>
	<u>was scarring underneath because of previous biopsy.</u>
	<u>The whole scarred tissue in the depth was excised</u>
	<u>all around upto the underlying normal tissue in its</u>
	<u>depth. Hemostasis was achieved. Wound</u>
	<u>closed in 2 layers.</u>
	<u>Modified Dissection Neck (MND)</u>
	<u>A transverse incision about 6 cm.</u>
	<u>long was given below the margin of the mandible.</u>
	<u>Subplatysmal flaps were raised. Upper one</u>
	<u>upto the level of lower border of mandible.</u>

PT

(290)

Lower flap dissected down upto clavicle
to expose the sternocleidomastoid muscle.
Lymph nodes from lateral aspect were
cleared including the Rt submandibular gland.
Rt Internal jugular, Sternocleidomastoid
muscle, spinal accessory nerve, and
marginal mandibular branch which comes
in the field of MND were saved.
Hemostasis achieved, wound closed in 2
layers over drain.
Blood loss less than 100cc.
Postoperative recovery is excellent.
Operating time 2 hrs.

[Signature]
Dr. [Name]
Operator

158. A perusal thereof nowhere indicates any such assessment on the basis of the aforesaid standard prescribed method of assessment in order to confirm malignancy. We therefore hold that in all probabilities and given the circumstances as well as the evidence on record, to the extent as discussed above, the pathologists as well as the surgeons have not lived-up to the expected levels of their skills that is supposed to be ordinarily possessed by

them for conducting a pathological examination and performing a surgery after suspecting a malignant melanoma. We find that the minimum obligatory tests have been deficient, and had they been carried out and observed, it is quite probable that the nature of surgery and its extent could have resulted in a different dimension.

159. We have for our satisfaction referred to the authority of Michal Jones and have also perused the above quoted elaborate decision of the Queen's Bench in the case of ***Abbas Vs. Kenny (Supra)***. The said case is an interesting read as that was also a case, where a hysterectomy came to be performed in England on the basis of the belief that the pathological report that had arrived from Pakistan was worth believing. However, the distinction in that case is that certain other tests were carried out in England itself, the reference whereof has been made in that decision in detail. Not only this, at least half a dozen doctors were examined who deposed on either side and on an appreciation of evidence in that case, the doubt went in favour of the surgeon and the claim of medical negligence was dismissed.

160. As against the said decision in the present case the surgery was straightaway performed on 07.08.2014, on the basis of unconfirmed pathological reports, which according to the pathologists themselves were not final reports. The report dated 04.08.2014, did indicate the requirement of the advised marker tests, that had not been carried out as indicated therein. Only two of the marker tests were got done at DMC as admittedly all the facilities were not available. Thus, the Surgeon also proceeded, may be on account of

his wide experience of 35 years, and on account of the faith of the complainant in the surgeon, given the fact that she has been introduced through a fraternity of doctors including her uncle and brother, who were aware of the prospective surgery. The Surgeon may have also been influenced by the IHC report dated 07.08.2014 which used the phrase "consistent with malignant melanoma".

161. In our opinion had the confirmations been made to find out the extent of malignancy before proceeding with surgery, it is quite possible that the outcome may have been somewhat different.

162. However, we would like to put in a caveat here that going through the various reports that have been discussed hereinabove and have also been discussed by the State Commission, we find that even though there was a doubt about the malignancy as diagnosed, but there seems to be an opinion and also supported by medical literature that in spite of the absence of malignancy, a wide excision was necessary even for the diagnosed Spitz Nevus. However, once again the extent and width as well as the depth of such an excision was dependent on a confirmatory report and therefore also if such confirmatory reports had been made available prior to the surgery, quite possibly the complainant may not have had to undergo the extent of the surgery that was performed.

163. The consequences of such a surgery have also impacted the complainant. The damage to the muscle, the nervous system and of course the facial looks of the complainant have definitely been grossly affected as is

evident from the post-surgery treatments undergone by the complainant, leading up to the surgeries performed at John Hopkins Hospital, USA. The reports from the DMC, the Fortis Hospital and other neurological experts does indicate that the nerves have been damaged. Her normalcy therefore is in a way substantially irretrievable. She has therefore undergone the trauma of a subdued life due to the aberrations which is likely to continue subject to any treatment in future.

164. One of the arguments of the opposite parties, uniformly was that she had a weak constitution having undergone a kidney transplant seven years prior to the surgery and was under immunosuppressive drugs. It was also argued with the help of literature that the patients with immunosuppressants were amenable to such forms of infections likely to result in some sort of melanoma or malignancy. This may have been a reason for the complainant to have suffered, but that is not the finding of the experts. The fact that she had undergone a surgery and was under immunosuppressive drugs was very well known to the AIIMS on both occasions, particularly when it tendered its report on 01.06.2022. The said report nowhere refers to the same as an aggravating factor and has rather confined itself to the blocks and slides regarding the pathological investigations. We therefore do not find any reason to investigate this matter any further.

165. For all the reasons aforesaid, we find that the complainant also for some reason did hastily participate in the surgery voluntarily and of her own consent. Nonetheless, there was a partial negligence on the part of the

pathologists to have described a malignant melanoma in their reports dated 04.08.2014 and 07.08.2014 "consistent" without confirming the same through the requisite marker tests and the Surgeon, opposite party no. 3, Dr. Satish Jain also proceeded, may be on the inputs as also received by him from the opposite party no. 4, Dr. Sumit Jain for conducting the surgery on the basis of such unconfirmed reports. The surgeon Dr. Satish Jain also did not undertake any further investigations and performed the surgery without any confirmation as desired and consequently to that extent there is negligence on the part of the surgeon as well.

166. We however do not find sufficient proof to establish the participation of the opposite party no. 4, Dr. Sumit Jain in the actual performance of the surgery and to that extent as already discussed above, negligence cannot be attributed to him on that count, but he seems to be involved in contributing through his inputs for the performance of the surgery as reasoned out above.

167. This claim of enhancement of compensation has been broadly made on the ground that the State Commission has not appropriately assessed the extent of the emotional, physical and financial trauma which the Complainant underwent and has been narrated in detail. It is the case of the Complainant that her life has been completely devastated being a woman of a young age having been subjected to a surgery that was unnecessary and unwanted. The very diagnosis of cancer not having been established to be even existing for the performance of such a surgery itself has a chilling effect on a person who is informed of suffering from cancer. Thus, the very nature of disclosure of a

disease which did not exist potentially disturbed the complainant who had to all the time treat herself to be a cancer patient which is a serious disease. It is therefore, the contention of a Complainant that to make a person believe that he or she is suffering from a serious disease like cancer when in effect there was none, is itself traumatic.

168. The Complainant also contends that this belief expressed by the pathologist and the surgeon of malignancy continued and the Complainant had to run about who ultimately ascertained the nature and status of a disease which was ultimately found to be noncancerous. This period of time spent in searching for the correct diagnosis was itself a traumatic period. The surgery itself was wrong and based on a wrong diagnosis. The surgery was of the face, the major portion whereof was diastatic in effect disfiguring the most important and vital part of a female. The physical trauma, therefore, is not a simple surgery that was claimed to be successful, but was an exercise which was possibly to extent an unnecessary and resulted in many deformities apart from disfiguring of the face of the Complainant. This stands established with the nervous system having been damaged and repaired at John Hopkins Hospital that could not bring about the desired results as a consequence whereof there is a drooping of the shoulders and the nervous system having been affected.

169. The consequences of this have travelled upto the upper lips that cannot respond to either smile or laugh. The blinking of the right eye has been

affected and all these issues affecting the facial expression of a person has come about in the present case to have a permanent effect.

170. In order to undertake corrective measures the Complainant has travelled upto USA and has also undertaken repeated journeys and treatment which indicate the extent of the sufferance of the Complainant which further adds to the physical injury on the face of the Complainant.

171. This has led to financial constraints as the Complainant had to incur a lot of expenses for getting investigations and reports and then subsequent corrective surgeries conducted at John Hopkins Hospital, in United States. The Complainant had relied on the approximate expenses incurred by her and she was also scheduled for other surgeries for rectifying her physical features as advised by the Plastic Surgeon.

172. In addition to this the Complainant is a Dentist and has been professionally impacted since the year 2014 and continued to have affected her profession even thereafter. It is this professional damage as well which has been pleaded in the Appeal to urge that all these factors that were placed before the State Commission have not been appropriately dealt with.

173. The Complainant through her lawyer has also relied on certain judgments as referred to above. The judgments that have been cited do not prescribe any straightjacket formula but have emphasized on the severity of the negligence, the damage caused and the impact on the person effected on all fronts including emotional, physical and financial constraints. It has also been emphasized that the award of compensation should be reasonable and

not exorbitant. The Apex Court has also ruled that it is difficult to satisfy all parties simultaneously but certain guiding principles have been indicated to assess the damages, including future inflation and value of money the damages, therefore, are to be computed simply not on the basis of the latin principle *restitutio in integrum*.

174. There is one factor which cannot be ignored, namely that the Complainant had the problem of a mole on her right cheek that was first excised by Dr. Ravinder Tah who had sent her samples for biopsy that was examined at Dayanand Medical College and by the Pathologist leading to the dispute relating to malignancy. There is no allegation by the Complainant against Dr. Tah, who had conducted a surgery by removing the mole and excising a part of the right cheek that has not been disputed by the Complainant. It is therefore, evident that the Complainant had a problem on the face and the surgery was performed by Dr. Tah to remove a genuine defect through an operative treatment after examining her. Thus, the initial surgery which led to a partial impact on her right cheek, even though a minor excision was still a surgery performed on the face which had its impact. Howsoever, minimal it might have been, the Complainant was bound to have some sort of aberrations in her physical appearance on account of such an excision even though the same could have been corrected by Dr. Tah himself who was a Plastic Surgeon.

175. Having said that we find that even though the complainant had been subjected to a radical surgery with the shortcomings indicated above, but it

cannot be conclusively said that the surgery was not required as the medical evidence indicates that in such situation, even if it is not malignant then too a wide excision may have been a probable correct medical advice for treating Spitz Nevus. The complainant also did not doubt this and rather in spite of the fact that she had been introduced by Dr. Iqbal Singh, her own relative, and her brother Dr. Jaspreet Singh, apart from the fact that she was herself a BDS doctor, the decision cannot be said to have been taken impulsively by her without understanding its consequences. She was therefore aware and with the nature of the communications on which reliance has been placed by the complainant herself, it is evident that there was an internal communication and discussion about the nature of the surgery and its consequences. Hence we find that the analysis and the lump sum amount awarded by the State Commission on the peculiar facts and circumstances of the this case is justified. We find no ground therefore to enhance the compensation component as claimed by the complainant, but the extent of the pursuit of litigation and trauma suffered by her, the litigation costs are on the lower side. We enhance the same to Rs. 5,00,000/- as against Rs. 55,000/-, but without any interest thereon. Rest of the compensation and other components awarded are upheld. FA/476/2019, FA/479/2019 and FA/664/2019 therefore stand disposed off with the aforesaid findings and modifications.

FA no. 1637 and 1639 of 2019

176. These two appeals have been filed by the two insurance companies questioning the correctness of the impugned orders, broadly on two grounds;

first that the insurance companies were neither proper nor necessary parties to the complaint. The other ground taken is that there was no privity of contract between the complainant and either of the insurance companies. The contract of professional indemnity was between the doctors and the insurance companies. It may be pointed out that FA no. 1637 of 2019 – the Dayanand Medical College was insured with the United India Insurance Company under a Professional Indemnity (Medical Establishment) Policy for the period 09.06.2014 to 08.06.2015 for an insured sum of Rs.37,50,000/-, the indemnity limits there under were circumscribed by the condition that "any one year or Rs.1.50 crore, any one accident Rs.1.50 crore in the ratio of 1:1 to a maximum of 25% of the limit of indemnity. Thus there were two policies in so far as Dayanand Medical College is concerned.

177. Dr Satish Jain, the Surgeon who performed the surgery was also insured with the Oriental Insurance Company for the period 25.02.2014 to 24.02.2015 which was a professional indemnity cover for Rs.10 lakh.

178. Dr Sumeet Jain one of the OPs has also taken a separate policy with the Oriental Insurance Company which was a professional indemnity policy for a sum of Rs.50 lakh.

179. In addition thereto Dr Sumeet Jain was also insured with United India Insurance Company under a professional indemnity coverage for a sum of Rs.10 lakh from 25.02.2014 to 24.02.2015.

180. The State Commission while proceeding to discuss the negligence and the liabilities recorded the findings on the quantum of compensation. The

Commission in the impugned order records the liabilities on the insurance company in paragraphs 134 to 139 as follows:

134. Accordingly, keeping in view the totality of the facts and circumstances of the present case, we are of the view that the complainant deserves a total lump sum compensation of Rs.55,00,000/- for suffering disability and face paralysis due to medical negligence on the part of opposite parties No.1 to 8 as well as for the expenses incurred on her treatment and the suffering she will have to bear in future, including mental agony, harassment, avoidable pain, sufferings caused to her. However, keeping in view contributory negligence of these opposite parties, this amount is to be proportionately divided amongst them, keeping in view their extent of medical negligence. Therefore, out of above awarded amount, the joint and several liability of opposite parties No.1, 5 to 8 and 10 shall be ₹10,00,000/-, whereas the opposite parties No.2 to 4 and opposite parties 9 to 12 shall be jointly and severally liable to pay the remaining amount of ₹45,00,000/- to the complainant. It is made clear that the liability of opposite parties No.9 to 12 shall be as per the indemnity limits of the Insurance Policies issued by them. The complainant is also entitled to suitable interest on the awarded amount from the date of filing of the complaint till realization of entire amount.

135. It is relevant to mention here that opposite party No.1-DMC was insured with opposite party No.10-United India Insurance Company, vide Prof. Indemnity (Medical Establishment) Policy bearing No.250400/46/14/32/00000049, Ex.R-U/1, with effect from 09.06.2014 to 08.06.2015. The indemnity limits under this policy was as under:

"Any One Year (AOY) ₹1,50,00,000/-, Any One Accident (AOA) ₹1,50,00,000/-. AOA/AOY Ratio 1:1 (Indemnity limit per any one claim limited to maximum of 25% of the limit of Indemnity)."

136. It is also relevant to mention here that opposite party No.3-Dr.Satish Jain was insured with opposite party No.9-United India Insurance Company, vide Professional Indemnity Dr. (Other) Policy

bearing No.041200/46/13/35/00004464, Ex.R-9/1, with effect from 06.10.2013 to 05.10.2014. The sum insured during the policy period for Any One Year, was ₹10,00,000/- and Any One Accident was ₹10,00,000/-.

137. Besides this, opposite party No.3-Dr. Satish Jain was also insured with opposite party No.12-Oriental Insurance Company Limited, vide Insurance Policy No.233905/48/2014/889, Ex.RO/3/1, with effect from 15.09.2013 to 14.09.2014. The sum insured during the policy period for Any One Accident was ₹10,00,000/-.

138. Similarly, opposite party No.4-Dr.Sumeet Jain was insured with opposite party No.9-United India Insurance Company, vide Professional Indemnity Dr. (Other) Policy bearing No.041200/46/13/35/00007637, Ex.R-9/10/1, with effect from 25.02.2014 to 24.02.2015. The sum insured during the policy period for Any One Year, was ₹10,00,000/- and Any One Accident was ₹10,00,000/-.

139. Besides this, opposite party No.4-Dr.Sumeet Jain was also insured with opposite party No.10-United India Insurance Company, vide Professional Indemnity Dr. (Other) Policy bearing No.250400/46/13/35/00000301, Ex.R-9/10/2, with effect from 19.03.2014 to 18.03.2015. The sum insured during the policy period for Any One Year, was ₹50,00,000/- and Any One Accident was ₹50,00,000/-.

181. The Insurance Companies have been held jointly and severally liable to pay the amount awarded but with a finding that the insurance companies shall be liable only to the extent as per the insurance policy as discussed in the preceding paragraphs. Further these liabilities were fixed after holding the pathologist and the surgeons along with the Dayanand Medical College to be liable for medical negligence.

182. Having heard the learned counsel for the insurance companies and the learned counsel for the complainant and other parties, we find that there is no illegality in the conclusions drawn by the State Commission in so far as the extent of liability of insurance company is concerned. However, the contention on behalf of the insurance companies is that this was a matter to be settled with between the insurance company and the insured and therefore, the Consumer Complaint could not have been maintained inasmuch as there is neither any deficiency alleged against the insurance companies nor there is there any allegation of unfair trade practice.

183. We find the above contention of the learned counsel to be correct that there is neither any deficiency nor any unfair trade practice that could be possibly alleged by the complainant against the insurance companies. They were made parties merely because there was a professional indemnity coverage to the hospital and to the doctors to the extent indicated above. We find that the State Commission has cautiously indicated that the liability would be only to the extent of the coverage under the terms of the policy and not beyond it.

184. The liability fixed on the OPs therefore, would be recoverable only in terms of the policy by those which were insured, from the Insurance Company only to the extent the companies are liable in terms of the policies. Consequently, there cannot be a joint and several liability of "negligence" attributed to the insurance company. We therefore, dispose of these two appeals with the observation that the insurance companies would not be

jointly and severally liable but their liability will be only confined to terms of the policies.

185. These two appeals are therefore, disposed of with the aforesaid observations.

Sd/-

.....
(A.P. SAHI, J.)
PRESIDENT

Sd/-

.....
(BHARATKUMAR PANDYA)
MEMBER

AM/Mukesh/Satish/Pramod/bs/SS/S/MM/Brahm/P/Court-1/CAV