

**NATIONAL CONSUMER DISPUTES REDRESSAL COMMISSION
NEW DELHI**

CONSUMER CASE NO. 52 OF 2006

1. MOHIT SRIVASTAVA & ANR.
S/O. DR. K.K.S. SRIVASTAVA, R/O. LIG 73, INDRA
NAGAR,
KANPUR
UP

2. SMT. SANDHAYA SRIVASTHAVA,
W/O. MOHIT SRIVASTAVA R/O. LIG 73, INDRA
NAGAR,
KANPUR
U.P.

.....Complainant(s)

Versus

1. DR. NEELAM MISHRA & ORS.
C/O. SHIVANI CLINIC, 120/503, SHIVAJI NAGAR,
KANPUR
U.P.

2. DR. H.S. CHAWLA

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3. DR. H.S. CHAWLA (R-3)

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4. DR. CHANDRAYEE LUTHRA,
C/O. KMC, 120/500 (24) LAJPAT NAGAR,
KANPUR
U.P.

5. KANPUR MEDICAL CENTER
120/500 (24), LAJPAT NAGAR,
KANPUR
U.P.

6. NEW INDIA ASSURANCE COMPANY LIMITED
87, M.G. ROAD, FORT,
MUMBAI -400 001.

.....Opp.Party(s)

BEFORE:

**HON'BLE MR. ANUP K THAKUR, PRESIDING MEMBER
HON'BLE DR. S.M. KANTIKAR, MEMBER**

For the Complainant :

For the Opp.Party :

Dated : 04 Mar 2021

ORDER

APPEARED AT THE TIME OF ARGUMENTS

Mr. Nakul Diwan, Sr. Advocate with

For Complainants : Mr. Raghavendra M. Bajaj, Advocate Ms. Garima Bajaj, Advocate and

Mr. Sanskar Agarwal, Advocate

For OP No.1 : NEMO

For OP Nos. 2 & 3 : Mr. Ajay Saroya, Advocate

For OP No.4 : Dr. Sushil Kr. Gupta, Advocate

Pronounced on: 4th March 2021

ORDER

PER DR. S. M. KANTIKAR, MEMBER

1. The brief facts:

The Complainant No. 1 Mohit Srivastava's wife Smt. Sandhya Srivastava, the Complainant no. 2 (hereinafter referred to as the "patient") during her pregnancy was under care of Dr. Neelam Mishra (the Opposite Party No. 1) at Shivani Clinic in Kanpur. On 22.12.2005 at about 4.00 p.m., she felt labor pains and consulted Dr. Neelam Mishra, who admitted the patient in Kanpur Medical Center Pvt. Ltd. (hereinafter referred to as the "the Opposite Party No. 3 - KMC). On the same day, the Opposite Party No. 1 conducted delivery of the patient and a healthy female baby was born at 10.29 pm with the birth weight 4.2 kg. It was alleged that in the midnight at about 12.45 a.m., the Opposite Party No. 1 rushed the hospital and directly went to the labor room. At around 1.15 am, the Pediatrician Dr. Chandrayee Luthra (hereinafter referred to as the "Opposite

Party No. 2”) came to the hospital and she also rushed to labor room. On enquiry, the duty doctor told the Complainant No. 1 that the baby was suffering from fever; therefore doctors have been called to see the baby. The Opposite Parties Nos. 1 and 2 came out of labor room wherein the Opposite Party No. 2 was holding the baby in her hand, wrapped in a cloth with only face and the hand of the baby visible. The Opposite Party No. 1 said in Hindi that “ *Thand ki vajah se Phaphole par gaye hain* ” and informed the Complainant No. 1 that the child was suffering from cold and got infected which needs ICU care; and that there is no need to worry, the baby will be fine by morning. The Complainant No. 1 requested the Opposite Party No. 2 to show the baby, but she was not willing to show it, however after lot of persuasion the cloth was unwrapped from the baby which revealed a bandage put on lower portion of both the legs. Upon further enquiries, the Opposite Party No. 2 admitted that the baby sustained burn injuries because of a rod heater kept nearby. It was alleged that the entire staff went to attend another delivery and they forgot the instant baby, putting near the rod heater. The mother and the child were kept under treatment at the KMC for two months. The baby’s skin grafting of both legs was done using mother’s skin. The baby and mother were discharged from the hospital on 20.02.2006.

2. After discharge from the KMC, the Complainants took their child to Ursula Horsman Memorial Hospital (UHM), Kanpur. The Emergency Medical Officer examined the baby and confirmed the thermal burn injuries to the baby which lost three toes in the left and two toes in the right side because of dry gangrene. The Complainant further submitted that the baby was under regular treatment for several years at Apollo Hospital, New Delhi. The baby underwent several corrective operations & plastic surgery. The Complainants suffered mental agony and incurred huge expenditure on the treatment of their child.

3. Being aggrieved by the alleged medical negligence due to careless treatment and deficiency in service from the Opposite parties; the Complainants filed the Consumer Complaint under Section 21 of the Consumer Protection Act, 1986 (for short ‘the Act, 1986’) and prayed compensation to the sum of Rs.1,02,33,000/- along with interest @ 24% p.a for the irreparable loss and injury suffered by them.

DEFENCE:

All the Opposite Parties filed their respective written versions and in totality, denied allegations of negligence on their part.

4. Dr. Neelam Mishra (Opposite Party No. 1)

The Opposite Party No. 1 submitted that she is a qualified Gynec & Obstetrician running ‘Shivani Clinic’ in Kanpur and having experience of more than two decades. The patient was under her supervision during Ante Natal Care (ANC). On 22.12.2005, the patient came to her Shivani Clinic for labor pain and got examined by her. The patient’s husband expressed his desire to admit in a nursing home affiliated to CGHS for reimbursement of the expenses. There was no role of the Opposite Party No. 1 in selecting the hospital and as per their choice, the patient got admitted in Kanpur Medical Centre (the Opposite Party No. 3). The delivery was successfully conducted by the Opposite Party No. 1 and a healthy female baby was delivered at 10.29 p.m. on 22.12.2005. The Opposite Party No. 1 left the hospital after preparing bed head ticket and giving the instructions to the in charge staff to keep the child under the care of Pediatrician. As it was peak winter season, the Opposite Party No. 1 further instructed the staff nurse to keep baby properly wrapped. Hence there was neither negligence nor deficiency in service on the part of the

Opposite Party No. 1 who diligently performed her duty. She kept on visiting mother and baby during prolonged hospital stay, did not charge professional fees for delivery or visits.

5. **Dr. Chandrayee Luthra (Opposite Party No. 2)**

The Opposite Party No. 2 submitted that she is a Pediatrician She raised preliminary objection on maintainability of the Complaint that parallel proceedings i.e. Criminal complaint initiated by the Complainants against the Opposite Parties. There is no cause of action against her. The patient was admitted to KMC on 22.12.2005 and delivered female child at 10.29 p.m. on the same day. The Complainants themselves admitted that the Opposite Party No. 2 was not even in the picture at that time. She came to the hospital at about 1.15 a.m. on 23.12.2005 i.e. only after the alleged incidence had taken place. Thereafter, at about 1.45 a.m., she along with the Opposite Party No. 1 came out of the labour room holding the baby wrapped in a blanket. Later on, the Complainant came to know that the new-born baby suffered burn injuries below the stomach. At the time of alleged incidence, the child was being looked after by one of the attendants of the Complainants i.e. grandmother of the child. The instant Complaint requires voluminous evidence and cross-examination of several witnesses, which cannot be summarily decided under the Act 1986.

6. **Kanpur Medical Center Pvt. Ltd. (Opposite Party No. 3)**

Dr. H. S. Chawla, Managing Director of KMC Hospital (Opposite Party No. 3) filed written version and raised similar preliminary objections on maintainability and submitted that the Complainants are not Consumer under Section 2(1)(d) of the Consumer Protection Act, 1986. The treatment given to the patient and her new born baby was without any delay. The attending doctors were alert and the diligent throughout. After the delivery, the staff nurse on duty washed the baby with warm water and after clothing wrapped the baby in a blanket and kept the baby in the tray in labour room. At the request of the attendants, the grandmother of the child was allowed inside. On the request of the grandmother of the child, a warm air blower was kept in the labour room to keep the room warm. According to the staff on duty, the blower was not facing the child and proper care was given to keep the child warm at a distance, thus no negligence could be attributed.

ARGUMENTS:

Heard the arguments from both the sides and perused the material on record *inter alia* medical record of KMC.

7. **Arguments on behalf of Complainants:**

Learned Counsel for the Complainant argued that there was complete breach of duty on the part of doctors and the staff of the hospital, which they were supposed to perform. It was not a standard duty of care and was not acceptable to medical science. The Counsel raised the following points:

- (i) Firstly the standard of care necessary in the winter season for the new born after giving wash was not taken.
- (ii) Secondly instead of using rod heater, the doctors could have used incubator for warming the baby, but carelessly the rod heater was used, and the baby was kept in front of the rod heater without monitoring by the staff on duty.

(iii) Thirdly the precautions should have been taken by advising someone to remain with the child during warming / heating.

The learned Counsel reiterated the facts and submissions made in affidavit of evidence. He relied upon **Spring Meadows Hospital & Anr. Vs. Harjol Ahluwalia** , (1998) 4 SCC 39; **Hii Chii Kok vs. Ooi Peng Jin London Lucien & Anr.** (2017) SGCA 38.

8. **Arguments on behalf of the Opposite Parties:**

a) None present for the Opposite Party No. 1 during arguments. We have considered the written arguments and the evidence on record filed by the Opposite Party No. 1. The learned Counsel for the Insurance Co. admitted the burn suffered by the newborn. He further submitted that liability of Insurance Co. depends upon the terms and conditions of the indemnity policy. The learned Counsel for the Opposite Parties Nos. 2 & 3 submitted that at the time of the alleged incident, the baby was being looked after by one of the patient's attendants i.e. the grandmother of the baby. In the aforesaid contextual matrix, adjudication upon the alleged incident will require appreciation of evidence in the form of examination and cross-examination of many witnesses. The civil and criminal writ petitions are already pending before the Hon'ble Allahabad High Court wherein the aforesaid proceedings are pending. Therefore, this Commission cannot adjudicate this complaint in summary proceedings under the Act 1986.

b) The learned Counsel for the Opposite Parties Nos. 2 and 3 reiterated the affidavit evidence. He further argued he baby was delivered by the Opposite Party No. 1 with assistance and qualified staff nurse in the labour room. The staff on duty washed the baby with warm water and after clothing wrapped the baby in warm blanket and kept in the labour room. There was no delay in the treatment of mother and baby, the doctors were alert and attentive throughout. At the request of the attendants, the grand-mother of the baby was allowed inside the labour room and the warm air-blower was kept in the labour room to keep the room warm. As the staff nurse on the duty went to attend another delivery at 11.07 p.m. and when she came back to see the child, she noticed that the grandmother was not in the room and the blower was turned facing towards the baby. The staff nurse noticed the baby developed blisters on the lower part of her body (below the waist) and she immediately informed it to the Opposite Party No. 1 and the duty doctor. The Opposite Party No. 1 came to the hospital at 1.15 a.m. and after examining the child, she called the Opposite Party No. 2 (Pediatrician) who reached the labour room at 1.45 a.m., examined the newborn and noticed blisters on both legs of the child below waist. Thus, the act of baby's grandmother was solely responsible for the unfortunate incidence and therefore, the Opposite Party No. 3 is not liable for the alleged negligence. The Counsel submitted that the Opposite Party No. 3, in its support, filed an affidavit of Dr. H. S. Chawla, Managing Director of KMC Hospital to explain layout plan of labour room. Also filed an affidavit of Ms. Anis, staff nurse and one CD containing audio-video recording of the child in question while she was attending her school Woodbine Gardenia School at Kanpur on 19.07.2016.

The learned Counsel for Opposite Parties relied upon a few medical literatures and judgments namely:

- i. Guidelines for Ante Natal Care and Skilled Attendance at Birth by ANMs and LHVs)
- ii. Neonatal intensive care unit – Wikipedia

Judgments:

1. **Kumari Femy & Ors. Vs. Kavitha V.K. (Dr.)** I (2013) CPJ 34 (NC);
2. **Sushma Sharma Vs. Bombay Hospital II** (2007) CPJ 9 (NC);
3. **Bharathi Knitting Company vs. DHL Worldwide Express Courier Division of Airfreight Ltd.** , (1996) 4 SCC 704;
4. **Director General, Jacob Mathew vs. State of Punjab & Anr.** (2005) 6 SCC;
5. **Baburao Satappa Irrannanavar vs. KLE Society's Hospital & Research Centre & Anr.** , IV (2006) CPJ 71 (NC);
6. **M.A. Ganesh Rao vs. Dr. T.M.A. Pai Rotary Hospital & Ors.** , I (2007) CPJ 338 (NC);
7. **Indira Kartha & Ors. Vs. Dr. Mathew Samuel Kalarickal & Anr.** , I (2006) CPJ 62 (NC);
8. **Achutrao Haribhau Khodwa & Ors. Vs. State of Maharashtra & Ors.** , (1996) 2 SCC 634;
9. **Bolam vs. Friern Hospital Management Committee**, 1957 Indlaw QBD 53

9. **FINDINGS & CONCLUSION:**

We have perused the medical record of the KMC. Admittedly on 23.12.2015 after delivery the new born suffered thermal burns below waist in both the legs. The Opposite Party No. 1 and 2 have attended the baby between 1.15 AM to 2 AM and the baby was immediately shifted to NICU for dressing and further treatment. Subsequently during the hospital stay skin grafting of baby's both legs was performed by Plastic Surgeon using Skin graft (SSG) harvested from left thigh of the mother (patient).

10. Let us examine the reasons for burn injury whether it was due to hot air blower or a rod heater. It was a month of December and evidently severe cold winter. The baby was delivered at 10.29 PM and after wash, the baby was properly wrapped in the cloth/ blanket and kept under care of grandmother. The staff nurse noted the blisters/burn at about 1.15 AM. It is pertinent to note that the blanket was intact, not burnt, but the newborn baby suffered burn below waist and to both legs (photograph produced). Thus in our view it was thermal burn due to dry heat from the hot air blower. Thus complainant's allegation that the rod heater was kept near baby is not sustainable. The baby was full term and healthy which does not require to keep in the incubator for warming.

11. It is pertinent to note that as customary practices in the hospital after delivery; one attendant is allowed to present with the mother and new born in the labour room. The affidavit filed by the Opposite Parties stated that as insisted by the Complainants, the grandmother of the child was allowed to stay on a stool by the side of the mother and child. The baby, wrapped in blanket, was given in the custody of grandmother. Due to sever winter in the month of December the hospital

provided hot air blower to keep the room sufficiently warm. Logically any prudent person or the Staff shall not put the blower facing towards the newborn. The evidence of staff nurse Ms. Anis revealed that the blower was initially not directly facing the baby; however after attending another delivery when she came back ; noticed the blower was turned towards the baby and grandmother was not present there. She noticed that baby sustained thermal injury to her both lower limbs up to the waist. In our considered view, thus the hospital staff as well as the patient's attendant-grandmother both are responsible for the unfortunate mishap. In the charge sheet the charge under Section 338 of IPC 1860 was found proved against the staff nurse Ms. Anis.

12. Physical impairment certificates can be issued by all medical graduates who are registered under Schedule I of MCI act 1956, and there is no need for the medical graduate to be a specialist. However, the court always considers the specialization and the expertise of the certifying doctor while relying on the assessment of physical impairment certified by the doctor.

13. It is pertinent to note that as per the discharge summary issued by the Opposite Party No. 2 on 20.02.2006, it revealed that the child suffered deep burns over anterior and middle aspect of both legs, dorsum of feet including all toes and one small patch on both thighs and labia majora. Further, we have perused the opinion and the interrogatories replied by Dr. Avtar Singh, the Orthopaedic Surgeon at Ursula Horsman Memorial Hospital, Kanpur. The Disability Certificate dated 02.08.2015 was issued to the child Ayushi Shrivastava by Handicap Board which consists of experts in Orthopedics, ENT and Ophthalmology. It was certified that the child suffered 60% physical impairment and physical disability of 28% (i.e. child lost her 2nd & 3rd toes on right foot and 1st, 2nd & 3rd toes on left foot; $10+5+4+5+4=28\%$). Dr. Anupama Singh examined the baby on 10.08.2015 and further surgery advised. She recorded the clinical findings as below:

“Right foot: dorsum healed split thickness skin graft, great toe small scared stump with proximal phalanx healed scared. 2nd, 3rd toes absent with scar present.

Lt. Foot: Healed skin graft on dorsum of left foot. Scared till forefoot buried stump of great toe under scared tissue.

Advise: X-ray Both foot AP & Lat. View. Release of buried stump left great toe under S.A./G.A.

Dated: 10-08-2015

Thus, the child suffered the impairments and disabilities which have been assumed to be contributing factors to a decline in health and function and to the loss of independence.

14. Though the instant complaint was filed by the parents of the child, it is maintainable. We would like to rely upon the decision of Hon'ble Supreme Court in the case of **Spring Meadows Hospital and Another v. Harjol Ahluwalia**, [1998 4 SCC 39] held that the parents of victim can file the complaint. The court acknowledged the importance of granting compensation to the parents of a victim of medical negligence in lieu of their acute mental agony and the lifelong care and attention they would have to give to the child. This being so, the financial hardship faced by the parents, in terms of lost wages and time must also be recognized. Thus, the above expenditure must be allowed.

15. In the instant case we do not find any negligence on the part of the Opposite Parties Nos. 1 and 2 while conducting uneventful delivery of healthy baby and gave proper NICU care after the burns suffered by the newborn. However, the hospital the Opposite Party No. 3 is held liable vicariously. It is settled law that the hospital is vicariously liable for the acts of its doctors in various decisions of Hon'ble Supreme Court in **Achutrao Haribhau Khodwa v. State of Maharashtra** , (1996) 2 SCC 634, **Savita Garg vs. National Heart Institute** , (2004) 8 SCC 56, which also followed in **Balram Prasad v. Kunal Saha** , (2014) 1 SCC 384.

16. We have perused the audio-video CD filed by the Opposite Parties. It was recording done on 19.07.2016 of the child Ayushi attending her school Woodbine Gardenia School at Kanpur. However, it will not come for rescue of the Opposite Parties from their liability of failure of duty of care. It is known that living with a disabled child can have profound effects on the entire family—parents, siblings, and other family members. Far-reaching effects associated with raising a disabled child are the time and financial costs, physical and emotional demands, healthcare expense and logistical complexities (transport to and from school). Such child faces various psychological challenges including experience of feeling inferior, frustrated, sad and angry because of rejection by other children, neighbours and/or by other community members. For parents, having a disabled child may increase stress, take a toll on mental and physical health, make it difficult to find appropriate and affordable child care. It may be associated with guilt, blame, or reduced self-esteem.

17. The compensation is awarded usually for the permanent physical impairment of nonreversible nature, leading to permanent disability. The hospital- Opposite Party No. 3 must not only compensate a the child for the physical pain caused by burn which will continue to cause, but also any emotional pain and disfigured burn victim has suffered and will suffer in the future. In addition the child being embarrassed, depressed, or experiencing any of the other emotional reactions likely caused by a disfigurement.

18. It is pertinent to note that the newborn was in the custody of grandmother who failed in her duty of care towards the baby. She would have been alert during wee hours from any rising temperature due to hot air blower in the room. In our view, it was impossible for the newborn to sustain such burn injuries when the baby was in the lap of grandmother. According to the evidence of the staff nurse Ms. Anis, the grandmother was not present in the room whereas the blower was facing towards the baby. Thus it can be inferred that no other than grandmother put the blower facing the baby. Thus, it was contributory negligence in the instant case.

19. Contributory negligence is the Complainant's failure to exercise reasonable care for their safety. Thus it is behavior that contributes to one's own injury or loss and fails to meet the standard of prudence that one should observe for one's own good. Contributory negligence breaks the causal connection between defendant's negligence and plaintiff's injury or loss and frequently pleaded in defense in the case of negligence. In the instant case the affidavit of nurse Ms. Anis establishes that the grandmother (complainants' attendant) has contributed to the burn injury of the newborn. Thus, we have to decide how much damage was caused by the complainant's behavior, and payment could be reduced or denied. However in our considered view, in the instant

case the claim may still be allowed, as just and equitable having regard to the Complainant's share in responsibility for the damage. The loss apportionment is the solution for charging both parties when both were at fault.

20. The grant of compensation to remedy the medical wrong/negligence is within the realm of law of torts. In the instant case we hold the KMC hospital vicariously liable for the medical negligence and shall pay compensation to the Complainants. It is based on the principle of restitution in integrum. The said principle provides that a person is entitled to damages which should as nearly as possible get that sum of money which would put him in the same position as he would have been if he had not sustained the wrong. The complaint for medical negligence was filed in the year 2006 and now 15 years are elapsed. While awarding the compensation we have to consider the parents suffered mental agony and financial strain bringing up the child. The complainant submitted that Rs.5000/- monthly expenditure which may continue for long period. They have to incur regular monthly expenses to keep an attendant/nurse, physiotherapy along with assistive devices. As suggested by the doctors, the child may need plastic surgery depending on her growth. The child is female who has to suffer disability and walking difficulty throughout her life and difficulty to get married due to disfigurement (as discussed in para 13 above). For the quantum of award of compensation, we would like to rely upon the precedents laid down by Hon'ble Apex Court in **Malay Kumar Ganguly v. Sukumar Mukherjee**, (2009) 9 SCC 221, **V. Krishnakumar v. State of T.N.**, (2015) 9 SCC 388; **Balram Prasad v. Kunal Saha**, (2014) 1 SCC 384.

21. In the **S pring Meadows Case** (*supra*) very often in a claim for compensation arising out of medical negligence a plea is taken that it is a case of bona fide mistake which under certain circumstances may be excusable, but a mistake which would tantamount to negligence cannot be pardoned. The hospitals are institutions, people expect better and efficient service, if the hospital fails to discharge their duties through their doctors being employed on job basis or employed on contract basis, it is the hospital which has to justify. In the instant case, we do not find it was a bonafide mistake which deserves pardon. It was not error of judgment also, but it was the failure of duty of care from the hospital staff as well as the patient's attendant (grandmother).

22. We restrain ourselves to give any findings on the liability of Insurance Co. in the instant case. It should borne in mind that Medical negligence has been alleged against the hospital and the doctor, and not against the insurance cos. and the claim of the complainants is against the hospital and the doctor (for their alleged medical negligence), and not against the insurance cos. The respective insurance policy concerned is a separate and a distinctively different contract between the hospital / doctor and the respective insurance co., and is governed by its own terms and conditions. However, the Insurance Co. is duty bound to indemnify the doctor/s or hospital.

23. Based on the foregoing discussion, to serve the ends of justice, a lump sum compensation to the sum of Rs. 40 lakh shall be just and adequate. The contributory negligence is evident in the instant case, therefore the liability of KMC hospital shall restrict up to 50%. Accordingly, the Opposite Party No. 3 Kanpur Medical Center Pvt. Ltd. is directed to pay Rs. 20 lakh to the Complainants (parents of the child) within six weeks from today, failing which the amount shall carry interest at the rate of 9% p.a. till its realisation. The parents shall keep the awarded amount in fixed deposit in any nationalized bank till the child attains majority, till then they may draw periodic interest for the welfare of the child. In addition, the Opposite Party No. 3 shall pay Rs. 1 lakh towards the cost of litigation.

The Complaint is partly allowed.

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ANUP K THAKUR
PRESIDING MEMBER

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DR. S.M. KANTIKAR
MEMBER