NATIONAL CONSUMER DISPUTES REDRESSAL COMMISSION
NEW DELHI

REVISION PETITION NO. 2699 OF 2008

(Against the Order dated 10/03/2008 in Appeal No. 732/2006 of the State Commission Delhi)

1. SHIV KUMAR SHARMA
S/o Late Sh. Prem Chand Sharma, Resident of D-11,
Main Road, D Block, East Azad Nagar Nearby MCD
School
Krishna Nagar
Delhi .....Petitioner(s)

Versus

1. ST. STEPHENS' HOSPITAL & ORS.
Boulvard Road, Near Tis Hazari Court
Delhi - 54
2. NEW INDIA INSURANCE COMPANY LTD.
2nd Floor, Jeewan Deep Building, 10 Parliament Street,
New Dlhi
Delhi - 110 001
3. NEW INDIA INSURANCE COMPANY LTD.
2nd Floor, Jeewan Deep Building, 10 Parliament Street,
New Delhi
Delhi - 110 001 .....Respondent(s)

REVISION PETITION NO. 2912 OF 2008

(Against the Order dated 10/03/2008 in Appeal No. 732/2006 of the State Commission Delhi)

1. ST. STEPHENS HOSPITAL
Boulevard Road, Near Tis Hazari Court,
Delhi - 110 054
Delhi .....Petitioner(s)

Versus

1. SHIV KUMAR SHARMA & ANR.
S/o Late Sh. Prem Chand Sharma, Resident of D-11,
Main Road, D Block, East Azad Nagar Nearby MCD
School
Krishna Nagar
Delhi
2. NEW INDIA ASSURANCE COMPANY LTD.
2nd Floor, Jeevan Deep Building, 10 -Parliament Street,
New Delhi - 110 001

Delhi .....Respondent(s)

BEFORE:

HON'BLE MR. JUSTICE R.K. AGRAWAL,PRESIDENT
HON'BLE DR. S.M. KANTIKAR,MEMBER

For the Petitioner :
For the Respondent :

Dated : 08 Jul 2021

ORDER

Appeared at the time of arguments through video conferencing

For the Complainant : Mr. Sanjeev Kumar Verma, Advocate

For the Hospital : Mr. Rajeev Sharma, Advocate

For the Insurance Co. : Mr. Navdeep Singh, Advocate

Pronounced on: 8 th July 2021

ORDER

PER DR. S.M. KANTIKAR, MEMBER

1. Both the Revision Petitions have been filed against the Order dated 10.03.2008 passed by the State Consumer Disputes Redressal Commission, Delhi (hereinafter referred to as the "State Commission") in Appeal No. 732 of 2006, which partly allowed the Appeal and modified the Order of the District Consumer Disputes Redressal Forum (hereinafter referred to as the "District Forum"), wherein the award of compensation of Rs. 5 lakh was reduced to Rs. 2.5 lakh.

2. For the convenience, the Parties are referred as placed before the District Forum, such that, the Complainant is Shiv Kumar Sharma, the Opposite Party No. 1 is St. Stephen's Hospital, New Delhi and Opposite Party No. 2 is the New India Assurance Co. Ltd.

3. Brief facts: On 18.08.2003 the Complainant Mr. Shiv Kumar (hereinafter referred to as "the patient") sustained bodily injuries due to road accident. After First-Aid at Ambala Government Hospital, on 21.08.2003 he was referred to St. Stephens Hospital, Delhi (Opposite Party No.1). Dr. Mathew Verghese examined him and diagnosed it as fracture of femur (thigh bone) on right side. On 02.09.2003 he was operated and a rod was implanted from the loin to the thigh and he was discharged on 08.09.2003. The doctor informed about successful operation. During follow-up after one month, X-ray of operated site was taken and seen by Dr. Bedi of Opposite Party No. 1 Hospital. He assured that it would take some more time for getting everything cured. It was alleged that even after 6 months the patient was unable to walk due to pain. In the month of May, 2004 because of unbearable pain in operated leg, the patient contacted Dr. Neeraj Garg who examined the patient and took X-rays. He opined that there was a fracture of the loin bone, and advised the patient to approach the same hospital where he was first operated. However, the patient met his family doctor, Dr. Arvind Saxena, who saw all the X-ray films and opined that the fracture had occurred during the 1 st operation in the Operation Theatre (OT) of the Opposite Party No. 1 Hospital. Then, the Complainant met Dr. Bedi and showed opinions of two doctors.Dr. Bedi, in order to protect the doctors at the Opposite Party No. 1 Hospital, told that the fracture might have occurred due to fall somewhere else. On 06.12.2003, the patient was advised for bone grafting as there was unsatisfactory union of bones. However, the patient was not willing to undergo bone grafting. On 04.06.2004, the patient came back to the Hospital with the complaint of pain in right hip and thigh. The X-ray revealed displaced intra-capsular fracture of neck femur and he was advised to undergo osteosynthesis- a valgus osteotomy and fixation with angled blade plate. The cost of operation was told about Rs. 45,000/-. Because of financial hardship the Complainant did not opt for further surgery and approached the nearby Dr. Hedgewar Arogya Sansthan", (Govt. Hospital) Karkardooma, Delhi wherein on 21.07.2004 he was operated by Dr. Ashish and Niraj Garg.

4. Being aggrieved by the alleged negligent treatment at the Opposite Party No. 1 Hospital, the Complainantfiled the Complaint No. 481/2004 before the District Forum, Tis Hazari, Delhi and claimed a total amount of Rs. 16,97,800/-.

5. The Opposite Party No. 1, in their Written Version, denied the allegation and submitted that the Complaint was false, misconceived and not maintainable. The Complainant suppressed the facts that he was initially treated at the Ambala Government Hospital, wherein the X-rays showed only fracture of femur shaft. The Opposite Party No. 1 denied that the fracture in loin bone had occurred during surgery performed at their hospital.

6. The District Forum after hearing both Parties, partly allowed Complaint vide Order dated 20.06.2006 and directed the Opposite Party No. 1 to pay Rs. 5.00 lac to the Complainant and Rs. 5,000/- as cost of litigation.

7. The Opposite Parties preferred two separate appeals before the State Commission, challenging the Order of the District Forum. The First Appeal No. 732/2006 was filed by the Hospital and FA/739/2006 was filed by the Insurance Company.

8. The State Commission disposed both the Appeals vide common Order dated 10.03.2008 and modified the quantum of award. The State Commission directed the hospital to pay a lump sum compensation of Rs. 2.5 lakh to the Complainant.

9. Being aggrieved by the Order of State Commission, the instant cross Revision Petitions were filed. The Hospital (Opposite Party No. 1) filed Revision Petition No. 2912 of 2008 for dismissal of Complaint whereas the Complainant filed Revision Petition No. 2699 of 2008 for enhancement of compensation.

10. We have heard the learned Counsel for both the sides, perused the material on record, *inter alia,* the Medical Record and the X-ray films.

11. The crux of this matter is that whether the treating doctors of Opposite Party No. 1 Hospital failed to diagnose fracture of loin bone.

12. The contention of Complainant was that the X-ray taken on 02.09.2003 prior to the operation did not show any intra capsular fracture of neck femur. However, the X-ray taken after surgery within 24 hours, on 03.09.2003, clearly revealed the intra capsular fracture neck femur. Even during follow-up visits, the doctors failed to notice/ detect the intra capsular fracture neck femur. Thereafter, because of unsatisfactory union of bones, on 15.12.2003 the doctors advised for bone grafting, but the patient was not willing for the grafting. The patient again after 6 months for the pain in right hip and thigh came to the Opposite Party No. 1 Hospital on 04.06.2004. The X-ray revealed displaced intra-capsular fracture of neck femur. However, the patient did not opt for the advice for osteosynthesis surgery.

13. We have perused the standard book **Campbell's Operative Orthopaedics** and few medical literatures on the subject.As per the medical text; after stabilization of fracture of shaft femur due to stress iatrogenic fracture neck of femur may occur. Therefore, the presence of a sub-clinical occult fracture and failure to take necessary X-rays in external rotation of the shaft of femur may account for pre-operative mis-diagnosis. The pre-operative CT scan of the femur neck for all such patients were to be done before doing closed intra-medullary nailing for shaft fracture. The CT scan is repeated after closed nailing to confirm the state of the femoral neck, unless a fracture was seen on a plain film or during intra-operative fluoroscopy.

14. From the article **'Insufficiency fracture of the femoral neck after intramedullary nailing'** by Kitajama, J. Orthop Sci 1999; 4(4):304-6, we understand that even if the fracture neck femur was the result of the interlocked intra-medullary nailing. Despite due care and caution, the process of forcible hammering can either result in fracture neck femur or aggravate the missed fracture. It leads to the earlier undisplaced fracture becomes displaced.

15. In the instant case, we find that the operation for intramedullary nailing of shaft femur was performed without any fault by the qualified Orthopedic Surgeon. However, failure to take appropriate X-rays with external rotation of the shaft of the femur to rule out the presence of a sub-clinical occult fracture, may account for pre-operative mis-diagnosis. The pre-operative CT scan of the femur neck for all such patients was to be done before intra-medullary nailing of shaft fracture, i.e. closed nailing. The CT scan was to be repeated after closed nailing to confirm the condition of the femoral neck, unless a fracture was seen on a plain film or during intra-operative fluoroscopy. If the fracture of neck femur is suspected / evident, then in one sitting both the surgeries for fracture neck and the shaft of femur shall be performed.

16. Having regard to the settled law that an error of judgment/failure to make diagnosis of a complicated condition by itself does not amount to negligence, but it can be said that missing fracture neck femur which normally is missed in 50% cases, is an act of negligence.

17. Another article titled “Ipsilateral femoral neck and shaft fractures: current diagnostic and treatment strategies” Orthopedics. 2015 Apr;38(4):247-51, states that about 1% to 9% cases reported as the femoral shaft fractures are associated with ipsilateral femoral neck fractures. The associated femoral neck fracture is often non-displaced, and in 1/3 rd cases, the diagnosis is delayed or missed. Thus, it is essential to carefully evaluate the femoral neck in all patients sustaining high-energy femoral shaft fractures. Although there are a number of different implant options available for management of this challenging injury, most authors recommend that priority be given to anatomic reduction and optimal stabilization of the femoral neck fracture because nonunion, malunion, or avascular necrosis of this injury is more difficult to treat successfully.

18. It is therefore important to understand that, especially in polytraumatized patient, present with femoral shaft fracture, the highest level of suspiciousness must be maintained for the concomitant presence of an ipsilateral femoral neck fracture. Thus the combination of specific radiographic preoperative, intraoperative and postoperative views of the femoral neck should be integrated in the ATLS algorithm of the polytraumatized patient to help reduce the incidence of a missed femoral neck fracture.

19. Many times it is possible for an individual never to realize he or she has a fracture. Most individuals experience pain in the affected limb, especially when moving or rotating it. In the case of ipsilateral femoral neck fractures, the diagnosis was missed almost 30% of the time. Despite the bone being fractured all the way through, it can still move and rotate without issue. This makes it essential for doctors to carefully examine any patient who has experienced a high-energy
trauma event.

20. We note that in the instant case the patient was evaluated with a pre-operative X-ray AP pelvis, which was negative. It was unclear whether a lateral view of the hip taken could have been more sensitive in detecting the femoral neck fracture. In our view the antero-posterior internal rotation hip X-ray if taken intra-operatively or immediately after the reduction of the femoral shaft fracture, could have helped in detecting the minimally displaced fracture of the femoral neck. Thus the intra-operative manoeuvres and radiographs should be used to rule out concomitant femoral neck fractures.

21. Among the elements of medical negligence the complainant will have to prove the doctor's violation of a duty was the actual and proximate cause of his/her injuries. In this case on hand the onus was on the Complainants to establish the causation. The doctor treated only fracture shaft of femur but failed to diagnose the fracture neck femur. In our view the " *but for* " causation test is applicable. The test depends on the balance of probabilities, " *but for* " the negligent act of doctor/ hospital, the injury would not have occurred.The Supreme Court of Canada in **Clements v. Clements,** 2012 SCC 32 (Can LII),Chief Justice McLachlin described this test as follows:

    8. The test for showing causation is the "but for" test. The plaintiff must show on a balance of probabilities that "but for" the defendant's negligent act, the injury would not have occurred. Inherent in the phrase "but for" is the requirement that the defendant's negligence was necessary to bring about the injury - in other words that the injury would not have occurred without the defendant's negligence. This is a factual inquiry. If the plaintiff does not establish this on a balance of probabilities, having regard to all the evidence, her action against the defendant fails.

    In the instant case on hand the complainant established that the delay/failure in diagnosis of fracture neck femur contributed to the unfavorable outcome.

22. We are of the considered view that in the instant case, the treating doctor failed in the duty of care in the administration of treatment.The Hon'ble Supreme Court laid down the duties of doctor towards the patient. In the case of **Dr. Laxman Balkrishna Joshi v. Dr. Trimbark Babu Godbole and Anr.,** AIR 1969 SC 128 and **A.S. Mittal v. State of U.P.** , AIR 1989 SC 1570, laid down that—

    "when a doctor is consulted by a patient, the doctor owes to his patient certain duties which are: (a) duty of care in deciding whether to undertake the case, (b) duty of care in deciding what treatment to give, and (c) duty of care in the administration of that treatment. A breach of any of the above duties may give a cause of action for negligence and the patient may on that basis recover damages from his doctor."

23. The Hon'ble Supreme Court has consistently in its decisions reiterated the principle of standard of care which is expected from a medical professional with a reasonable degree of skill and knowledge.

24. In the decision of **Kusum Sharma v Batra Hospital and Medical Research Centre** (2010) 3 SCC 480, the duty of care which is required of a doctor is one involving a reasonable degree of skill and knowledge.

25. In the **Jacob Mathew v State of Punjab** (2005) 6 SCC 1 , a three judge Bench of Hon'ble SupremeCourt upheld the standard of the ordinary competent medical practitioner exercising an ordinary degree of professional skill, as enunciated in Bolam's principle. It held that the standard of care must be in accordance with "general and approved practice":

"24. The classical statement of law in Bolam has been widely accepted as decisive of the standard of care required both of professional men generally and medical practitioners in particular. It has been invariably cited with approval before the courts in India and applied as a touchstone to test the pleas of medical negligence. In tort, it is enough for the defendant to show that the standard of care and the skill attained was that of the ordinary competent medical practitioner exercising an ordinary degree of professional skill. The fact that a defendant charged with negligence acted in accord with the general and approved practice is enough to clear him of the charge. Two things are pertinent to be noted. Firstly, the standard of care, when assessing the practice as adopted, is judged in the light of knowledge available at the time (of the incident), and not at the date of trial. Secondly, when the charge of negligence arises out of failure to use some particular equipment, the charge would fail if the equipment was not generally available at that point of time on which it is suggested as should have been used."

Thus, the doctor would be liable only where the conduct falls below the standards of a reasonably competent practitioner in the field.

26. The District Forum awarded Rs. 5.0 lac; whereas the State Commission reduced the award to Rs.2.5 lac. We disagree with the view taken by the State Commission to reduce the quantum of compensation, that there was limited deficiency and negligence from the Opposite Party No. 1.It is to note that after the treatment, subsequently, the Complainant underwent operation twice in Hedgewar Sansthan at Delhi but his physical condition did not improve. The doctors informed him about no possibility of complete cure in the future. He was the sole earning member in the family. The Complainant had been suffering since the year 2003 and we are now in 2021. Considering the loss of earning capacity and future prospects, in our view, the compensation of Rs.5.0 lac is just and fair.

27. Based on the discussion above, the Order of State Commission is set aside. The Revision Petition No. 2912 of 2008 is dismissed and the Revision Petition No. 2699 of 2008 is partly allowed. The Opposite Party No. 1 is directed to pay compensation of Rs.5 lac with interest @ 6% per annum from the date of filing of the Complaint and Rs. 25,000/- towards the cost of litigation within 4 weeks from today, failing which the entire amount shall carry 10% interest till its realization.

The Registry is directed to send the copy of this Order within 3 days to all the Parties by speed post and email.

.....J
R.K. AGRAWAL
PRESIDENT

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DR. S.M. KANTIKAR
MEMBER