NATIONAL CONSUMER DISPUTES REDRESSAL COMMISSION
NEW DELHI

FIRST APPEAL NO. 751 OF 2021
(Against the Order dated 06/10/2021 in Complaint No. 32/2013 of the State Commission Uttar Pradesh)

1. DR. YASMEEN KHAN & ANR. .....Appellant(s)

Versus

1. SABIHA HAMID MAJOR & ANR. .....Respondent(s)

FIRST APPEAL NO. 60 OF 2022
(Against the Order dated 06/10/2021 in Complaint No. 32/2013 of the State Commission Uttar Pradesh)

1. SABIHA HAMID .....Appellant(s)

Versus

1. DR. M. KHAN HOSPITAL & 6 ORS. .....Respondent(s)

BEFORE:
HON'BLE MR. SUBHASH CHANDRA,PRESIDING MEMBER
HON'BLE DR. SADHNA SHANKER,MEMBER

FOR THE APPELLANT :

Dated : 23 April 2024

ORDER

FA no. 751 of 2021

For the Appellants Dr Sushil Kumar Gupta, Advocate with

Mr Javed Khan and Ms Aakriti Goel, Advocates

For the Respondents Mr Ashish Yadav and Mr Pawan Kumar Ray

Advocate

FA no. 60 of 2022

For the Appellant Mr Ashish Yadav, Advocate

Mr Pawan Kumar Ray, Advocate

For the Respondents Dr Sushil Kumar Gupta, Advocate with

Complainant – IN PERSON

Ms Aakriti Goel, Advocate

ORDER

PER SUBHASH CHANDRA

1. These two cross appeals filed under section 19 of the Consumer Protection Act, 1986 (in short, the 'Act') challenge the order dated 06.10.2021 of the State Consumer Dispute Redressal Commission, Uttar Pradesh, Lucknow (in short, the 'State Commission') in consumer complaint no. 32 of 2013. FA 751 of 2021 filed by the appellant doctor challenging the order of the State Commission upholding the complaint filed by the respondent patient who has filed appeal no. 60 of 2022 seeking enhancement of the compensation awarded by the State Commission. This order will dispose of both the appeals. In view of both the appeals emanating from the same order, and being based on the same set of facts, FA 751 of 2021 is taken as the lead case.

2. The relevant facts of the case, in brief, are that the appellant doctor who is a gynaecologist in Dr M. Khan Hospital, Stadium Road, Bareilly performed a caesarian section operation on the respondent patient in the above hospital on 01.11.2010 under epidural anaesthesia and the respondent delivered a healthy male child After post operative procedures the respondent and child were discharged on 04.11.2010 when her vitals were found normal with advise to follow up after 10 days. While she did not return for any follow up, on 16.02.2011 the respondent contacted Dr Javed Khan on the said hospital complaining of pain in the abdomen which was diagnosed as acute colitis and she was managed conservatively between 16-23 February, 2011. On getting no relief, she consulted Dr Rajeev Gupta, a gastroenterologist on 28.02.2011 and thereafter went to the Sanjay Gandhi Post Graduate Institute (SGPGI), Lucknow on 08.05.2011. An ultrasound examination done here revealed an air shadow in the Pouch of Douglas with anterior elevation of lower uterine body. On 28.05.2011 she underwent transvaginal scan which revealed bulky uterus and cervix with thickened walls. The culture sensitivity was found sterile. On 10.06.2011 per speculum examination was done, vaginal smear taken for culture and sensitivity, PAP smear taken and scanty curettings sent for histopathological examination. She was managed conservatively till 22.06.2011 when Dr Deepa Kapur found a gauze coming out from a rent in the vaginal wall on per speculum examination. The respondent was operated upon on 23.06.2011 and the gauze (mop) was removed through the vagina. The gauze measured 12 x

12 cm soaked in faecal material and was therefore sent for incineration. As there was a rent in the vagina of 4x3 cm diameter, the respondent was operated on 28.11.2011 and transverse loop colostomy performed. She was discharged after post operative treatment on 02.07.2011. A follow up closure of colostomy was done on 06.01.2012 and she was discharged on 11.01.2012 whereafter her condition improved.

3. The respondent's husband filed an FIR No. 571/2011 at the Police Station, Baradari, Bareilly and also complaints against the appellant and the hospital alleging medical negligence and claimed damages. The matter was referred to the Chief Medical Officer (CMO) and a Medical Board was constituted comprising two senior gynaecologists and one Additional CMO. The Medical Board, after detailed enquiry, including recording the statement of the Operation Theatre (OT) Assistant Rajveer and inspection of the OT, held that there was no conclusive evidence since the size and shape of the mop used in the hospital was different to the one that was removed from the genitals of the respondent (who did not appear before the Board) and the mop in question was not presented for examination.

4. Subsequently, on the basis of a complaint to the District Magistrate another Medical Board was constituted under the Sub Divisional Magistrate (SDM) which also returned a finding that appellant no. 1 was not guilty of medical negligence. However, a complaint was filed before the UP Medical Council by the respondent which in its order dated 29.04.2013 held the appellant liable for medical negligence and suspended her licence for 6 months from 01.05.2013 to 31.10.2013. Writ Petition 4469 of 2013 filed by appellant was dismissed by the Allahabad High Court.

5. The respondent approached the State Commission praying for the following reliefs:

> (a) Opposite parties No. 1 to 3 may kindly be directed to pay Rs 80,00,000/- (Rupees eighty lakhs only) as compensation for the pains suffered by the complainant due to deficiencies of medical services provided by opposite parties No. 1 to 3
>
> (b) Opposite parties number 1 to 3 be directed to pay a sum of Rs 3,90,107.2/- (Rupees three lac ninety thousand one hundred seven and twenty eight paisa) the complainant had paid as charges towards doctors' fees, hospital charges, other routine checkup, charges of medicines, cost of local travelling in Bareilly for treatment, for travelling from Bareilly to Moradabad, travelling from Bareilly to Lucknow and charges paid for staying at Lucknow
>
> (c) Opposite parties No. 1, 2 and 3 be directed to pay compensation of Rs 84,000/- (Eighty-four thousand only) which the complainant has suffered due to not giving private tuitions to small children
>
> (d) Opposite parties be directed to pay Rs 1,00,000/- (Rupees 1 lac) as cost of proceedings
>
> (e) Pass any other order which may be just and proper in the circumstance of the case

6. On contest, the State Commission ordered as under:

> *The complaint case is allowed with cost. The opposite parties no. 1 and 3 are jointly and severally liable to pay Rs 50 lakhs as compensation with interest at the rate of 12% from 01.11.2010 till the date of actual payment. They are also jointly and severally liable to pay Rs 3,90,107.28 to the complainant for various charges received by them during operation and also incurred by the complainant after discharge for her travelling, check-up and medication. They are also jointly and severely liable to pay Rs 84,000/- for mental agony in addition to Rs 1lakh as cost of the proceedings. All these amounts will carry interest at the rate of 12% from 01.11.2010 till the date of payment. This order shall be complied with within 30 days from the date of judgement otherwise the rate of interest will be 15% per annum. The opposite parties shall be indemnified to the extent they were insured by the opposite parties no. 6 and 7. If the order is not complied within 30 days, the complainant will be free to move an application for execution at the cost of the opposite parties no. 1 and 3.*

This order is impugned before us by both parties. Appellant has prayed for setting aside the order while the respondent has sought enhancement of compensation awarded.

7. We have heard the learned counsels for the parties and carefully considered the material on the record.

8. Appellant has challenged the impugned order on the grounds that (i) the principle of *res ipsa loquitur* are not attracted in the instant case since the elements of the maxim that injury shall be a result of an act of negligence, lack of or insufficient evidence to establish fault towards the plaintiff, a duty of care which is breached and there is a significant degree of injury caused to the plaintiff; (ii) the establishment of negligence must establish that defendant acted negligently, evidence rules out the possibility that actions of the plaintiff on third party caused the injury and the negligence falls within the scope of the defendant's duty to the plaintiff; (iii) in the instant case the surgical mop recovered from the vagina of the respondent on 23.06.2011 at SGPGI, Lucknow measured 12 x 12 cm and the mop used by the appellant in the hospital was 18 x 20 cm as was established by the Enquiry Committee led by the Additional CMO since it states that the mop differs I shape and size and the OT technician Rajveer's statement was categorically that there was no discrepancy in the number of mops and instruments before and after the caesarean operation; (iv) the investigation by the Police had recorded the statement of Dr Deepa Kapoor of SGPGI, Lucknow that it was not possible to detect whether the mop recovered was left during the first or second caesarean section operation performed on the respondent although it was not self-inserted and that it was sent for incineration and not for histopathological examination as it was soaked in faecal matter; (v) the mop was found in the Pouch of Douglas which is located posterior to the uterus and the appellant had found multiple adhesions during surgery on account of which uterus could not be mobilized and was stitched *in situ* and therefore it was not feasible for her to see what was posterior to the uterus. Further, since the presence of adhesions indicated inflammation in the area posterior to the uterus and surrounding vicinity, and since the mop was found retained in the Pouch of Douglas, the possibilities of the same causing adhesions could not be ruled out and hence the possibility of the mop having been left during the previous surgery cannot be ruled out; (vi) the possibility of the mop being left in the abdomen during the abortion prior to the first caesarean operation in November 2009 also cannot be ruled out in view of the patient's medical history; (vii) the respondent did not cooperate with any of the enquiries, i.e., ordered under the Additional CMO, at the instance

of the District Magistrate and the UP Medical Council and did not furnish details regarding the past history and therefore adverse inference against the respondent should be drawn and (viii) medical literature placed on record by the appellant showed that a foreign body lying asymptomatic in a human body may manifest after a long time, as in the present case.

9. The appellant's case therefore, is that the injury was caused by a third party and the principle of *res ipsa loquitur* could not have been invoked by the State Commission. It was contended that the State Commission erred in disregarding the fact that the mops were of different size and shape as per a categorical finding by the enquiry done by the CMO and the enquiry at the direction of the District Magistrate. The SGPGI had stated the mop had been incinerated and the statement of the OT Assistant, who was present in the absence of the Staff Nurse, clearly stated that he did not find a discrepancy in the number of mops prior to and post the surgery. Apart from the above, it was argued that the State Commission erred in not considering the medical literature brought on record and that the award passed was without any basis amounting to unjust enrichment and interest allowed on the award was unjustified. The State Commission's order was stated to be based upon conjectures and surmises and based on the report of the UP Medical Council which cannot be considered as an 'expert opinion'. Reliance was placed on the judgments of the Hon'ble Supreme Court in ***Malay Kumar Ganguli Vs. Sukumar Singh,*** (2009) 3 SCC 663 and ***Ramesh Aggarwall Vs. Regency Hospital,*** (2009) 9 SCC 789 which held that an expert opinion not supported by reasoning cannot be accepted as an opinion under the law. It was argued that the medical reports of the Committees under the CMO and the ADM could not have been disregarded. The finding of the State Commission that since appellant had not challenged the UPMC's report, there was admission of negligence is contested on the ground that the decision of the UPMC was communicated on 20.10.2014 by when the suspension period from 01.05.2013 to 31.10.2013 was already over, which fact the impugned order erred in not considering. It was also contended that the award of compensation without establishing deficiency in service was not justified and arbitrary and was therefore bad in law. Hence, it was prayed to allow the appeal and set aside the impugned order.

10. On the other hand, challenging the impugned order on ground of inadequately compensating her, the respondent contended that the impugned order overlooked the principle of *restitutio in integrum* while awarding compensation. It was submitted that the Hon'ble Supreme Court had held in ***Malay Kumar Ganguly Vs Sukumar Mukherjee,*** AIR 2010 SC 1162 that the grant of compensation involving an accident is within the realm of torts on the principle of *restitutio in integrum,* that a person entitled to damages 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. It was also submitted that the State Commission erred in overlooking the principle that relief for deficiency in service under Section 14 of the Act can include return of charges paid, payment of compensation for any loss or injury suffered by the consumer due to the negligence of the opposite party and removal of defects or deficiencies in services in question. Reliance was placed on the judgment of the Hon'ble Supreme Court in ***V. Krishnakumar Vs. State of Tamil Nadu & Ors.,*** in Civil Appeal nos.8065 of 2009 and 5402 of 2019 decided on 1st July 2015 which held that compensation should include expenses already incurred, pain and suffering, lost wages and future care that would be necessary. It was submitted that the impugned order erred in not considering the law laid down by the Hon'ble Supreme Court in ***Balram Prasad***

Vs. Kunal Shah & Ors., (2014) 1 SCC 384 that all relevant facts be considered while awarding just and reasonable compensation and in ***R.D. Hattangadi Vs. M/s Pest Control (India) Pvt. Ltd.,*** 1995 SCC (1) 551 which laid down that damages have to be considered as a sum of 'pecuniary damages' such as medical attendance, loss of earning till trial, other material loss and 'special damages' including for mental and physical suffering, to compensate for loss of amenities of life, life expectancy, hardship, inconvenience, etc. It was submitted that the Hon'ble Supreme Court had, in ***Maharaja Agrasen Hospital & Ors. Vs. Master Rishabh Sharma & Ors.,*** CA No. 6619/2016, enhanced the compensation awarded by this Commission in a matter where the appellant hospital was held guilty of medical negligence.

11. It was contended that she faced a medical issue due to the negligence of the appellants that she was required to travel to Lucknow for treatment which prolonged and aggravated her suffering and was deprived of looking after her newborn child.

12. It is apposite at this stage to refer to the order of the State Commission. The finding of the State Commission is that:

> *" **in view of the decision of the Medical Council of India, there is nothing to presume or nothing to say except that the said Doctor is guilty of showing negligence, deficiency in services and professional conduct.***
>
> *During course of argument**, it has been admitted by the Counsel for the opposite party 3 that she did not practice for six months as directed by the UP Medical Council**. So, **it is clear that against the said enquiry report of UP Medical Council, the aggrieved doctor filed appeal before Medical Council of India which has been dismissed by the Medical Council of India.** So, **by the enquiry of UP Medical Council which has been approved by Medical Council of India the opposite party no. 3 has been held guilty of leaving the mop in the body of the complainant** which was later on removed in SGPGI. During the course of argument, the Counsel argued that the complainant was operated before one year and it may happen that this mop might be left at that time. **If for the sake of argument, it is presumed that this mop was left during first caesarean, during second cesarean the concerned doctor was unable to detect it and if she detected it, she left it unattended.** It is no argument because the complainant did not complain of any pain after the first cesarean and after the second cesarean she continuously suffered from pain and visited various doctors.*
>
> *……*
>
> ***It was the duty of the hospital to provide all the basic facilities and emergency facilities in case of any untoward happenings.** It is the duty of the doctor that she should stay all the time opposite the bed of the patient unless and until the operation is over and the patient has been allowed to go to ICU or Ward. **In this case the hospital is also negligent because they want to make money and they have forgotten their oath which was taken before entering into the medical profession. All the above-mentioned facilities should be there and if anyone lacks, it will come under deficiency of service and negligence.***

……

This is a case where the maxim res ipsa loquitur is applicable in full strength and as per the various judgments of the Hon'ble courts it is clear that it comes under medical negligence without any exception. The guilt has already been admitted during the enquiry as opposite party accepted the enquiry report. So, the complainant has succeeded in proving his case.

[Emphasis added]

The findings of the State Commission are thus based upon the conclusion that appellant no. 1 had accepted the findings of the UP Medical Council, appellant no. 2 hospital lacked in facilities and that the doctor erred in not detecting the mop in case it was on account of the previous cesarean operation and in not supervising the operation in the OT. Hence, *res ipsa loquitur* has been concluded. It has been held that medical negligence stood admitted in view of the fact that the report of the UP Medical Council was accepted by the Medical Council of India and also by the appellant.

13. The issues in this case are whether there was medical negligence on part of the appellants 1 and 2, whether the doctrine of *res ipsa loquitur* was rightfully applied by the State Commission and whether the respondent was eligible for a higher compensation on the principle of *restitutio in integrum.*

14. The law relating to what constitutes medical negligence has been laid down in the Hon'ble Supreme Court's judgment in ***Jacob Mathew Vs. State of Punjab & Anr.***, in Criminal Appeal Nos. 144-45 of 2004 decided on 05.08.2005, (2005) 6 SCC 1. It is based on the ***Bolam Test*** (1957) 2 A11 ER 118. The test for medical negligence is based on the deviation from normal medical practice and it has been held that establishment of negligence would involve consideration of issues regarding

(1) *state of knowledge* by which standard of care is to be determined,

(2) *standard of care* in case of a charge of failure to (a) use some particular equipment, or (b) to take some precaution,

(3) *enquiry to be made* when alleged negligence is (a) due to an accident, or (b) due to an error of judgment in choice of a procedure or its execution. For negligence to be actionable it has been held that the professional either (1) professed to have the requisite skill which he did not possess, or (2) did not exercise, with reasonable competence, the skill which he did possess, the standard for this being the skill of an ordinary competent person exercising ordinary skill in the profession.

It was further held that simply because a patient did not respond favourably to a treatment or a surgery failed, the doctor cannot be held liable *per se* under the principle of *res ipsa loquitur*. In a claim of medical negligence, it was laid down that it was essential to establish that the standard of care and skill was not that of the ordinary competent medical practitioner exercising an ordinary degree of professional skill. For negligence to be actionable it has to be attributable and three essential components of "duty", "breach" and "resulting damage"

need to be met, i.e.: (i) the existence of a duty to take care, which is owed by the defendant to the complainant; (ii) the failure to attain that standard of care, prescribed by the law, thereby committing a breach of such duty; and (iii) damage, which is both causally connected with such breach and recognised by the law, has been suffered by the complainant. In this connection, it is apposite to consider that the Hon'ble Supreme Court in ***Jacob Matthew*** (supra) laid down as under:

> **Paras 12,13,38 and 48(5).** The jurisprudential concept of negligence differs in civil and criminal law. What may be negligence in civil law may not necessarily be negligence in criminal law. Generally speaking, it is the amount of damages incurred which is determinative of the extent of liability in tort; but in criminal law it is not the amount of damages but the amount and degree of negligence that is determinative of liability. To fasten liability in criminal law, the degree of negligence has to be higher than that of negligence enough to fasten liability for damages in civil law, i.e., gross or of a very high degree. Negligence which is neither gross nor of a higher degree may provide a ground for action in civil law but cannot form the basis for prosecution.
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> **Paras 16, 14, 17**. While negligence is an omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do; criminal negligence is the gross and culpable neglect or failure to exercise that reasonable and proper care and precaution to guard against injury either to the public generally or to an individual in particular, which having regard to all the circumstances out of which the charge has arisen. It was the imperative duty of the accused person to have adopted. A clear distinction exists between 'simple lack of care' incurring civil liability and 'very high degree of negligence' which is required in criminal cases.
>
> **Paras 31, 30.** The subject of negligence in the context of the medical profession necessarily calls for treatment with a difference. There is a marked tendency to look for a human actor to blame for an untoward event, a tendency which is closely linked with the desire to punish. Things have gone wrong and, therefore, somebody must be found to answer for it. An empirical study would reveal that the background to a mishap is frequently far more complex than may generally be assumed. It can be demonstrated that actual blame for the outcome has to be attributed with great caution. For a medical accident or failure, the responsibility may lie with the medical practitioner, and equally it may not. ….. To hold in favour of existence of negligence, associated with the action or inaction of a medical profession, requires an in-depth understanding of the working a professional as also the nature of the job and of errors committed by chance, which do not necessarily involve the element of culpability.
>
> **Paras 48(2), 48(4), 19 and 24**. Negligence in the context of medical profession necessarily calls for a treatment with a difference. To infer rashness or negligence on the part of professional, in particular a doctor, additional considerations apply. A case of occupational negligence is different from one of professional negligence. A simple lack of care, an error of judgment or an accident is not proof of negligence on the part of a medical professional. So long as a doctor follows a practice acceptable to the medical professional of that day, he cannot be held liable for negligence merely because a better alternative course or method of treatment was also available or simple

because a more skilled doctor would not have chosen to follow or resort to that practice or procedure which the accused following. The classical statement of law in Bolam case, (1957) 2 AII ER 118, at p.121.D F) [set out in para 19 herein], has been widely accepted as decisive, of the standard of care required both of professional men generally and medical practitioners in particular, and holds good in its applicability in India. 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 practitioners 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. It is not necessary for every professional to possess the highest level of expertise in that branch which he practises. Three 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 (that is, the time of incident) on which it is suggested as should have been used. Thirdly, when it comes to the failure of taking precautions, what has to be seen is whether those precautions were taken which the ordinary experience of men has found to be sufficient; a failure to use special or extraordinary precautions which might have prevented the particular happening cannot be the standard for judging the alleged negligence.

Para 26. No sensible professional would intentionally commit an act or omission which would result in loss or injury to the patient as the professional reputation of the person is at stake. A single failure may cost him dear in his career. Even in civil jurisdiction, the rule of *res ipse loquitur* is not of universal application and has to be applied with extreme care and caution to the cases of professional negligence and in particular that of the doctors. Else it would be counter-productive.

Paras 10, 11, 48(1). Negligence is the breach of a duty caused by omission to do something which a reasonable man guided by those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do. Negligence becomes actionable on account of injury resulting from the act or omission amounting to negligence attributable to the person sued. The essential components of negligence, as recognised, are three: “duty”, “breach” and “resulting damage”, that is to say:

> (i) The existence of a duty to take care, which is owed by the defendant to the complainant;
>
> (ii) The failure to attain that standard of care, prescribed by the law, thereby committing a breach of such duty; and
>
> (iii) Damage, which is both casually connected with such breach and recognised by the law, has been suffered by the complainant.

If the claimant satisfies the court on the evidence that these three ingredients are made out, the defendant should be held liable in negligence.

The Hon'ble Supreme Court has thus clearly laid down the criteria of a failure to provide the standard of care expected of a prudent doctor of reasonable skill resulting in damage and held that the adherence to established medical protocols and practice would define standard of care.

15. From the facts of this case and the submissions of the learned counsel of the respondent, the case as set out relates to medical negligence on part of the appellant no.1 doctor *qua* the respondent in leaving behind a mop of gauze in the abdomen of the respondent patient during the caesarean operation conducted on her on 01.11.2010 in the appellant no. 2 hospital. It is argued based on the detection of the mop following a sonography at the SGPGI, Lucknow while investigating complaints of persistent abdominal pain by the respondent after a few months of the caesarean operation, that the mop had been left in the abdomen during the surgery on 01.11.2010 which amounted to medical negligence. The mop extracted through colostomy performed on the respondent from the Pouch of Douglas at SGPGI was incinerated as it was soiled with faecal matter. The reports of the two separate medical enquiries ordered by the district administration under the CMO and the ADM concluded that there was no confirmation that the mop recovered was identical to the one used in the appellant no. 2 hospital as the shape and size were different, based on the details of the same recorded at SGPGI. However, the UP Medical Council concluded that the appellant was negligent, and the conclusion was upheld by the Medical Council of India. The State Commission has held this conclusion to be valid.

16. It is apposite to refer to these reports of the UP Medical Council and the Medical Council of India. The UP MC report reads as under:

> *During the course of investigation Dr Yasmeen Khan and her husband Dr Md. Javed Khan has attended meetings of Ethical Committee and Governing Body also. Patient's attendant too was present in meeting of Ethical Committee.*
>
> *…….*
>
> *After taking treatment from Dr Yasmeen Khan and developing problems, the complainant approached SGPGIMS, Lucknow where Dr Deepa Kapoor, Gynecologist, found a piece of cloth/mop hanging from Pouch of Douglas during vaginal investigation. After pulling; mop came out which was laden with feacal matter. Patient alleged that Dr Yasmeen Khan had left the mop during surgery.*
>
> *Governing Body of Uttar Pradesh Medical Council decided that Mrs Sabina Hamid should also be seen and cross-examined especially by Dr S P Jaiswar, Professor, Gynecology, KGMC, Lucknow before coming to a conclusion. On 19/03/2013, Mrs Sabiha Hamid attended the Ethical Committee meeting and was particularly examined and interrogated by Dr Jaiswar.* ***Ethical Committee decided that it is beyond doubt that mop was left negligently by Dr Yasmeen Khan in the abdomen during surgery.***
>
> *DECISION*

Ethics Committee and later Governing Body of UP Medical Council have approved the levelled charges of lackadaisical/negligent performance of surgery and carelessly leaving the mop.

[Emphasis supplied]

The report of the Executive Committee, Medical Council of India (MCI), dated 21.08.2014, before which this order was appealed by appellant no 1, conveyed vide letter dated 20.10.2014 states that:

> The Ethics Committee noted that both the parties i.e. Smt Sabiha Hamid, Dr Yasmeen Khan (treating doctor) and Dr Mohd. Javed Khan have appeared before the Ethics Committee for hearing.
>
> **The Ethics Committee heard the deposition of both the parties in detail and after going through the clinical records and due deliberation on the issue, the Ethics Committee decided to uphold the decision of U.P. Medical Council.**
>
> **The above recommendation of the Ethics Committee was approved by the Executive Committee at its meeting held on 21st August, 2014.**

[Emphasis supplied]

17. The reliance of the respondent on ***Malay Kumar Ganguly*** (supra) is contested by the appellant on the ground that in that case the Hon'ble Supreme Court considered an issue of medical negligence based on lack of requisite expertise on the part of the doctors and imposed exemplary costs in view of failure to diagnose the disease of a patient who was also a doctor at the initial stage and excessive use of steroids without considering the harmful effects of the same and the hospital was held guilty of failure to prevent nosocomial infections (diseases originating in hospitals). In the instant case the issues are different and this case is therefore distinguishable.

18. The rival claims of the parties have been considered. From the foregoing it is apparent that both the UPMC and the MCI have concurrently held that the appellant was liable for the negligence of the mop being left in the abdomen of the respondent. The State Commission has relied upon these documents to conclude that medical negligence on part of the appellant stood established. The appellant has contended that the past medical history of the respondent of an abortion and a previous caesarean operation in 2009 have not been considered and the evidence of the OT Assistant that all mops used during surgery on 01.11.2010 had been accounted for had not been controverted. Appellant also contends that she had not accepted the decision of UPMC suspending her licence till 31.10.2014 and that the decision of the MCI on her appeal could not be appealed against since it was conveyed on 20.10.2014, a few days before the suspension ended.

19. It is evident that both the UP MC and the MCI have considered the matter through their Ethics Committees. The penalty imposed is the suspension of licence of the appellant. However, the conclusion of the UPMC that the charge of "*lackadaisical/negligent performance of surgery and carelessly leaving the mop"* stood established is not supported

by any reasoning that can support the case for civil liability. In light of the judgment of the Hon'ble Supreme Court in ***Jacob Matthew*** (supra), medical negligence needs to be established on the basis of the essential components of negligence, as recognised, of "duty", "breach" and "resulting damage". The order of the State Commission has not provided any evidence-based arguments in support of this conclusion. Before concluding civil liability on part of the appellant, it is essential that the "breach" be established.

20. We find that in this case the breach of duty resulting in medical negligence has not been categorically proven since neither the mop is available as evidence, nor its dimensions conform to the ones used in the appellant no. 2 hospital apart from the evidence of the OT Assistant not being controverted. Further, while the conduct of the appellant has been held deficient from an ethical point of view by the two professional bodies which considered the matter, their reports do not support the claim of the respondent for civil liability of medical negligence. The issue of criminal liability has not been raised since no *mens rea* has been alleged. In order to establish deficiency in service, it is imperative that negligence be established. As held by the Hon'ble Supreme Court in ***Jacob Matthew*** (supra), "*negligence becomes actionable on account of injury resulting from the act or omission amounting to negligence attributable to the person sued*." The State Commission's order in relying merely upon the reports of the UPMC and the MCI has not determined the above. The reliance on the principle of *res ipsa loquitor* in the present case by the State Commission is also based on the assumption that the mop extracted from the Pouch of Douglas of the respondent was due to the negligence of appellant no. 1 in leaving it in the abdomen during surgery. As is evident from the records of this case, the respondent patient had admittedly undergone an earlier abortion and a caesarean section operation for the birth of another child. There is no evidence on record to establish whether the mop in question pertained to any of these surgeries or was due to negligence of the appellant doctor during the caesarean section operation conducted by her on 01.1.2010. No reasoning for the finding arrived at by the UP Medical Council or the Medical Council has been provided to bring out the basis for concluding the appellant liable for medical negligence. There is no evidence on record that has been relied upon to reach this conclusion. In the absence of any evidence based finding, the conclusion of these bodies cannot be sustained legally.

21. In view of the discussion above, we find that liability of appellants no. 1 and 2 as determined by the State Commission cannot be sustained. We therefore set aside the impugned order of the State Commission. Parties shall bear their own costs.

22. In view of the conclusion above, FA 60 of 2022 filed by the respondent patient seeking enhancement of compensation fails.

23. All pending IAs, if any, stand disposed by this order.

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SUBHASH CHANDRA
PRESIDING MEMBER

.....

DR. SADHNA SHANKER
MEMBER