

**NATIONAL CONSUMER DISPUTES REDRESSAL COMMISSION
NEW DELHI**

FIRST APPEAL NO. 759 OF 2019

(Against the Order dated 12/03/2019 in Complaint No. 163/2006 of the State Commission
Delhi)

1. VIMHANS HOSPITAL

NEHRU NGAR (NEAR LAJPAT NAGAR)

NEW DELHI 110065

.....Appellant(s)

Versus

1. R.C. DALAL & ANR.

R/O. H NO 662, SECTOR 16

FARIDABAD

HARYANA

2. ORIENTAL INSURANCE CO LTD

A25/27, ASAF ALI ROAD,

NEW DELHI 110002

.....Respondent(s)

BEFORE:

HON'BLE MR. SUBHASH CHANDRA, PRESIDING MEMBER

HON'BLE AVM J. RAJENDRA, AVSM VSM (Retd.), MEMBER

FOR THE APPELLANT :

MR. RAJESH MAHNA, ADVOCATE

MR. RAMANAND ROY, ADVOCATE

MR. MAYANK ROUT, ADVOCATE,

MR. AKSHAY BHATIA, ADVOCATE

FOR THE RESPONDENT :

FOR RESPONDENT NO. 1

MS. SANTWANA AGARWAL, ADVOCATE

FOR RESPONDENT NO. 2

MR. K K BHAT, ADVOCATE

Dated : 24 November 2023

ORDER

AVM J. RAJENDRA, AVSM, VSM (RETD.), MEMBER

1. The Appellant filed the instant Appeal under section 19 of the Consumer Protection Act, 1986 (in short "the Act"), against the Order dated 12.03.2019 passed by the State Consumer Disputes Redressal Commission, Delhi (hereinafter referred to as the "State Commission") in Consumer Complaint No. 163 of 2006, wherein the State Commission partly allowed the Complaint (Respondent herein) against the Opposite Party No. 1 (Appellant herein).

2. For the sake of Convenience, the parties in the present matter being referred to as position held in Consumer Complaint before the State Commission. Shri R.C. Dalal is identified as the Complainant who is the father of Master Nishank. While Medical Supdt, Vidya Sagar Institute of Mental Health & Neuro Science, (VIMHANS) is identified as Opposite Party No. 1 & the Oriental Insurance Company Limited is identified as Opposite Party No. 5.

3. Brief facts of the case as per the Complainant are that on 30.03.2004, Mr Nishank, the Complainant's son had symptoms of headache, nausea, and vomiting. Thus, on 01.04.2004, he was admitted to BK Hospital, Faridabad, where a CT scan was taken. He was discharged on 06.04.2004 with a diagnosis of brain tumour with clotting. The MRI on 16.04.2004 suggested chronic infective neoplastic lesion and indicated infiltrating lesion in the right parahippocampal gyrus and inferior temporal lobe. On 12.05.2004, he had vomiting and unconsciousness partially and was admitted to Safdarjung Hospital on 13.05.2004. The CT scan on 14.05.2004, revealed a lesion in the right temporo-occipital lobe with significant midline shift, possibly due to tumour bleeding or medulloblastoma. He was managed conservatively and required neurosurgery. Despite his critical condition, Safdarjung Hospital referred the case to AIIMS on 15.05.2004. Unfortunately, AIIMS did not admit him due to capacity constraints and consulted Vidya Sagar Institute of Mental Health and Neuro Sciences (VIMHANS), Opposite Party No. 1 for better treatment and care of Dr. AK Banerji, a renowned neurosurgery specialist, and former professor who was consulted by the Complainant on 15.05.2004. Dr. Banerji advised his immediate admission for surgery. In the evening on 15.05.2004, the patient was taken to Vimhans. The CT scan taken confirmed earlier findings. The surgery to remove the tumour was performed at 10:30 PM by Dr Alok Gupta and Dr. Anil Kansal (OP-4) and was deemed successful. The complainant's request to wait for Dr. Banerji's review the next day was declined.

4. After the surgery, the patient developed fever that persisted until his death on 01.02.2005, with only brief periods of relief in September and October 2004. During this time, the patient remained unconscious, lost eyesight, and experienced paralysis on the left side. Dr. AK Banerji prepared discharge of the patient on 18.08.2004 and got prepared a referral summery of the case the highlight of which is "Meduloblastome involving right inferior brain with bleeding and bilateral (R>L) basal ganglia damage which was treated surgically on 15.05.2004 with residual semi-comatose GCS-VI and severe quadre paresis (R>L)". The complainant alleged that throughout the patient's stay at Vimhans, the treating doctors maintained an overly secretive approach. They reassured the Complainant by saying they knew what was best for the patient and that he would recover in a few days. He had chosen Vimhans in the hope that Dr. A.K. Banerji would oversee the treatment. However, despite the extensive experience and reputation, Dr. Banerji failed to detect the malignancy of the brain tumour, allowing it to develop into Stage III cancer within five months of initial surgery ultimately leading to the patient's terminal illness and death. Early cancer detection could have provided scope for care and chance for cure. The OPs being motivated by financial gain, rushed into treatment without considering all possible ailments or seeking a second opinion from Dr. Banerji. Had the patient been admitted with proper care, early detection of cancer and proper treatment was possible. The premature death of the child was

due to acts of commission and omission by OP-1 to OP-4, who failed in their duty of care in the patient's treatment.

5. Being aggrieved the Complainant filed consumer complaint (No. 163 of 2006) before the learned State Commission against OPs alleging deficiency in service and sought:-

(a) Award of Rs.1 Lakh as compensation for pain and suffering to the deceased and the complainant during hospitalization in Vimhans from 15.05.2004 to 28.10.2004.

(b) Award of Rs.5 Lakhs to compensate for loss of dependency of the complainant father by his promising and growing son.

(c) Award Rs. 10 Lakh to compensate for the expenditure on surgery and treatment at Vimhans and Batra Hospital.

(d) Award Rs. 5,000 as compensation for cost of cremation and last rites of the deceased.

(e) Award Rs. 5,500 as cost of litigation charges.

(f) Any other order or direction as deem fit and proper.

6. The OPs contested the complaint and raised objections on technical grounds, asserting that the complexity of the case made it unsuitable for adjudication in a summary procedure. The Complainant did not approach the State Commission with clean hands. The patient was in a critical condition while at Safdarjung Hospital and was later referred to the AIIMS as his condition continued to deteriorate. It was only after this he was brought to VIMHANS. The complaint has specific allegations against doctors at AIIMS, and these doctors are necessary parties in the case, which is not done. The complaint was without entire medical records from these hospitals, making it deficient due to the nonjoinder of necessary parties. The Complainant failed to establish any deficiency or negligence on their part. Therefore, the allegations are vague, lacked substance. Thus, the complaint should be dismissed with costs. Furthermore, the OPs stated that they were covered by indemnity insurance, and the insurance companies should also be made necessary and proper parties.

7. The learned. State Commission upon hearing the parties, and considering the facts and the circumstances, of the case partly allowed the Complaint with following observation: -

“27. Keeping in view the principles detailed above and the facts and circumstances of the case, the age of the patient, and other necessary and essential factors, I am of the considered view that it would be just and reasonable to award compensation of Rs. 15 Lakhs (Rupees fifteen Lakhs) to the complainants for the suffering, mental pain and agony caused. The amount so awarded in the preceding paragraph be paid by the OP-1 hospital being vicariously liable, as held by the Hon'ble NCDRC in the matter Post Graduate Institute of Medical Education and Research and Anr Vs Jasmine and Ors as reported in III 2018] CPJ 72 (NC), within a period of three months from the date of receipt of the copy of this order failing which simple interest at the rate of 10% shall accrue till the realization of the amount. This may serve the purpose of bringing about a qualitative change in the attitude of the hospitals for providing service to the human beings as human beings. Human touch is necessary; that is their code of conduct; that is their duty and that is what is required to be implemented. The OPs are directed to pay the compensation as ordered and for this purpose, insurance policy having been obtained, they may approach the insurance Company impleaded as the OPs, for the indemnification.

8. Being aggrieved by the impugned order of the State Commission, the VIMHANS Hospital (OP-1)/ Appellant has filed this present Appeal no. 759 of 2019 with the following prayer:

i. Allow the present appeal and set aside the impugned order dated 12.03.2019 passed by the Hon'ble State Commission, New Delhi in CC No. 163/2006.

ii. to call the record from the Hon'ble State Commission, New Delhi in CC No. 163/2006.

iii. to award cost of the present appeal.

iv. the appellant prayed that to add, alter any further ground of appeal if it is necessary.

v. Any other order or direction as the NCDRC may deem fit and proper in the facts and circumstances of the present appeal in the interest of justice.

9. The appellant has raised the following main grounds in the present Appeal:

(a) The State Commission failed to consider the medical background and established legal principles in its decision. The issues raised in the written statement and the medical board's report, which formed the foundation of case, were not properly considered. The State Commission's order lacks a proper understanding of basic law.

(b) The complaint made no specific allegations of deficiency in service against Appellant hospital competence. The doctrine of vicarious liability and the observation of *res ipsa loquitur* were misapplied, as there was no negligence in the treatment. The hospital is not liable for any negligence. No allegation of these deficiencies was made against the appellant.

(c) No cause of action arose for the Complainant as the Appellant hospital was a facilitator and not the primary service provider and no compensation is payable.

(d) The expert opinion did not find any medical deficiency by the treating doctors or hospital. Being misdirected, the State Commission made an award against the appellant hospital.

(e) The privity of contract and the cause of action for medical negligence are interlinked. When no fault in the treatment, the hospital cannot be held liable. The complaint falls outside the purview of the Act and an attempt to extract compensation.

(f) The findings regarding medical negligence and deficiency of service are contradictory. The duties, responsibilities, rights and obligations of the appellant hospital and treating doctors are distinct, which it failed to provide a clear analysis.

10. Upon notice on the memo of Appeal, the Respondent has not filed any reply or objection to the present appeal.

11. The learned Counsel for Appellant reiterated the contentions in the Appeal and emphasized that on 26.10.2004, the second histopathology report revealed a grade-III astrocytoma with notable blood vessels and hemorrhage. He was discharged on 28.10.2004 with the recommendation to undergo radiotherapy and/or chemotherapy. Subsequently, he received radiotherapy at Batra hospital and unfortunately passed away on 01.02.2005, about a month after discharge from Batra Hospital. The State Commission referred the case to Maulana Azad Medical College on 03.05.2010 for expert opinion. The report concluded that there was no apparent negligence and highlighted that proper care had been taken as evidenced by the child's post-surgery improvement. The final diagnosis relied on the histopathology report, where the initial report after the first surgery didn't suggest a tumor. Based on the findings of the expert medical report, it was concluded that there was no negligence on the part of the Appellants. Therefore, the State Commission's decision should be set aside. He further argued that the State Commission lacked the authority to pass the Order, as it was concluded by a single member, which is in contravention of the Consumer Protection Act, 1986, specifically Section 14 read with Section 18. In support of their stance, they cited various legal precedents. He emphasized that courts are ill-equipped to grasp the complexities of medical negligence, underscoring the necessity for expert opinions prior to reaching any conclusions. He further alleged that at page 8 of the Order dated 12.03.2019, the State Commission categorized this as "not a case of complicated surgery" but rather one involving an "improper and unconventional method," invoking the rule of *Res Ipsa Loquitur*.

He argued that the experts' report acknowledged the challenges in diagnosing tumours within the brain, even for skilled neuropathologists. Astrocytoma Grade 3 is a high-grade brain cancer with a dismal survival rate despite comprehensive treatments such as surgery, radiotherapy, and chemotherapy. Given these considerations and the prevailing circumstances, he contended that there exists no evidence of medical negligence. The learned Counsel relied upon the following judgements: -

(a) State of Rajasthan Vs. Rajendra Tanwar in Civil Writ Petition 4105/2018; & Divisional Manager NIC Ltd. Jodhpur Vs. Rajasthan State Consumer Disputes Redressal Commission (S.B Civil Writ No. 1972/2012).

(b) The New India Insurance Company Ltd. Vs. M/s. Bhagwandas Vyapar Upyog Ltd; AIR2014Cal194;

(c) Guljari Lal Aggarwal Vs. The Accounts Officer; III (1996) CPJ 12 (SC);

(d) Dr. Harish Kumar Khurana v. Joginder Singh & Others; AIR2021SC4690;

(e) Sanjeevan Medical Research Vs. State of NCT of Delhi. In Crl M.C. No. 2358 of 2010.

(f) Martin D'souza Vs. Mohd Ishfaq; (2009) 3SCC1.

(g) Jacob Mathew v. State of Punjab 2005 CTJ 1085 (SC) (CP).

12. The learned Counsel for the Appellant further argued that during the course of this Appeal, the Complainant unfortunately passed away, leading the legal heirs of the Complainant to file a request for substitution. The substitution of parties can only occur in a lawsuit, as governed by Order XXII Rule 3 and 4 of the Code of Civil Procedure, 1908. The appellant substantiated these contentions by referencing a range of legal precedents.

13. On the other hand, the learned Counsel for the Complainant/ Respondent reiterated the issues raised in the Complaint and affidavit of evidence filed before the State Commission. He argued that the doctors of the Appellant hospital failed to conduct proper tests and kept the child/deceased in the hospital for five months just to make money. The doctors failed to consult the oncologist or rule out the possibility of cancer, despite noticing continuous fall in his health condition such as loss of vision, speech and hearing and not regaining the consciousness. He, however, admitted during the argument that the doctors were giving symptomatic treatment. The child was operated without knowing the actual ailment. Even as per expert opinion, cancer was there since beginning. Child was brought to the Appellant hospital because of the reputation of Dr AK Banerjee, but the surgery was not conducted by him on 15.05.2004. Despite having wide experience, he failed to overrule the possibility of any other ailment under his observation in five months. All medical records reflect that the

health of the patient was not in good condition and during his stay in appellant hospital, he was in serious condition. Medical negligence of the doctors is clearly evident from the medical documents and the omission on their part to take precaution and timely treatment.

14. We have examined the pleadings and associated documents placed on record and rendered thoughtful attention to the arguments advanced by learned Counsels for both the Parties.

15. The main issues raised by the Appellant are that the Order of the learned State Commission was passed by a single member in violation of the Act and orders of the Hon'ble Supreme Court. The order lacks reasoning and failed to consider medical history, established legal principles, absence of specific allegations against the appellant hospital, misapplication of vicarious liability and *res ipsa loquitur*, failure to address various factors not alleged against the Appellant, absence of a cause of action in favor of the complainant, misdirection in seeking expert opinion, no cause of action for medical negligence in the absence of any deficiency.

16. As regards the contention that the order was passed by a single and lone member of the learned State Commission, perusal of the Order dated 12.03.2019 in Consumer Complaint No. 163 of 2006 reveals that the same was heard by Shri Anil Srivatsava, learned Member of the SCDRC, Delhi on 26.02.2019 and the Order passed on 12.03.2019 bears the signature of Shri Anil Srivatsava, Member of the said learned State Commission. In this regard, the learned Counsel relied on the judgment of the High Court of Rajasthan at Jodhpur in Divisional Manager NIC Ltd., Jodhpur vs Rajasthan State Consumer Disputes Redressal Commission and Ors., in S.B. Civil Writ no.1972 of 2012, decided on 25.10.2018 holding that a Member of the State Commission sitting singly does not have the jurisdiction to decide matters. It was further contended by the Appellant that the same issue was upheld by the Hon'ble Supreme Court in SLP (C) no. 4969 of 2020 in State of Rajasthan & Ors. Vs. Kamal Travels and Ors, decided on 30.09.2021. Therefore, it was argued that a jurisdiction issue can be raised at any point and since the jurisdiction of the State Commission comprising of single Member Bench was no longer *res integra*, the impugned order should be set aside being without jurisdiction and thus void ab-initio.

17. Examination of the same reveals that, the order was passed by the Hon'ble Rajasthan High Court in Divisional Manager NIC Ltd., Jodhpur Vs Rajasthan State Consumer Disputes Redressal Commission and Ors., in S.B. Civil Writ No. 1972 of 2012 on **25.10.2018**. The same in Appeal, was upheld by the Hon'ble Supreme Court in SLP (C) No. 4969 of 2020 in State of Rajasthan & Ors. Vs. Kamal Travels and Ors, decided on **30.09.2021**. In the present case, the order was passed by the State Commission in C.C. No. 163/2006 on 12.03.2019 and the Order of the Hon'ble Supreme Court was on 30.09.2021. This being a summary procedure under the Act, with due regard to completion of pleadings in the case on two occasions, including before this Commission in this Appeal, and the delay involved in again rehearing the matter before the learned State Commission, the Appeal is being passed on its merits.

18. As regards the contention that the order of the learned State Commission lacked reasoning and failed to consider the patient's medical history, established legal principles, absence of specific allegations against the appellant hospital, misapplication of vicarious

liability and *res ipsa loquitur* etc, the records reveal that vide Order dated 03.05.2010, the State Commission has duly considered issues necessary and passed detailed speaking order.

19. The main issue for consideration is whether the allegation of negligence against the OPs is established? Medical negligence is a complicated subject, and the liability of a doctors' in such cases depends upon the facts and circumstances that are brought on record. There may be cases of apparent deficiency/negligence in service by the doctors which is direct and conspicuously visible. Whereas, the others require critical evaluation. In any case, a doctor is expected to take due care and caution while giving timely treatment as per the established norms of medical jurisprudence. That is to say, if the doctors have acted as per the medical practices and procedures which are accepted as proper and standard by a responsible body of medical men skilled in that particular art, no deficiency arises.

20. In the present case, it is an uncontested position that Master. Nishank, the son of the Complainant had developed symptoms of headache, nausea, and vomiting on 30.03.2004. He was admitted to BK Hospital, Faridabad on 01.04.2004, where a CT scan was taken and was discharged on 06.04.2004 with a diagnosis of brain tumour with clotting. The MRI on 16.04.2004 suggested chronic infective neoplastic lesion and indicated infiltrating lesion in the right parahippocampal gyrus and inferior temporal lobe. On 12.05.2004, he had vomiting and partial unconsciousness. He was admitted to Safdarjung Hospital on 13.05.2004 where the CT scan on 14.05.2004 revealed a lesion in the right temporo-occipital lobe with significant midline shift, possibly due to tumour bleeding or medulloblastoma. He was managed conservatively and required neurosurgery. While in critical condition, Safdarjung Hospital referred the case to AIIMS on 15.05.2004. AIIMS did not admit him due to capacity constraints and consulted Vidya Sagar Institute of Mental Health and Neuro Sciences (VIMHANS), the OP-1. The CT scan at VIMHANS confirmed earlier findings and the surgery to remove the tumour was performed on 15.05.2004 at 10:30 PM by Dr Alok Gupta and Dr. Anil Kansal (OP-4). After the surgery, the patient developed fever which persisted. Dr. AK Banerji prepared discharge of the patient on 18.08.2004. The referral summary of the case prepared was "Medulloblastome involving right inferior brain with bleeding and bilateral (R>L) basal ganglia damage which was treated surgically on 15.05.2004 with residual semi-comatose GCS-VI and severe quadre paresis (R>L)". In the present case is a complicated surgery of a patient who is in critical state requiring immediate surgical intervention. Post surgery on 15.05.2004, a sample was taken for biopsy and was sent for malignancy test. It was reported Negative. The patient remained in the hospital as he had multiple infections and medical conditions affecting different organs and he was treated by different specialists. However, his health condition gradually deteriorated. Later, a sample was taken again for malignancy test, which came positive and further treatment was done in a different hospital. The expert opinion dated 28.07.2010 from Maulana Azad Medical College brought out that the inability of the OP Hospital to detect the cancer on first pathology was due to technical reasons rather than negligence. The complainant alleged that despite extensive experience and reputation, Dr. Banerji failed to detect the malignancy of the brain tumour. Early detection could have provided scope for cure. It was allowed to develop into Stage III cancer within five months of initial surgery leading to patient's death on 01.02.2005.

21. It is an admitted position that the patient was in a critical condition at Safdarjung Hospital itself, referred to the AIIMS as his condition continued to deteriorate and then brought to VIMHANS. As per the Complainant, the doctors of the Appellant hospital failed to conduct proper tests and kept the child/deceased in the hospital for five months just to make money. They failed to consult the oncologist or rule out the possibility of cancer, despite noticing continuous fall in his health condition such as loss of vision, speech and hearing and not regaining the consciousness and persisted with symptomatic treatment. It was the second histopathology report on 26.10.2004 that revealed a grade-III astrocytoma with notable blood vessels and hemorrhage. He was discharged on 28.10.2004 with the recommendation to undergo radiotherapy and/or chemotherapy. Subsequently, he received radiotherapy at Batra hospital and unfortunately passed away on 01.02.2005, about a month after discharge from Batra Hospital.

22. In the present case, the learned State Commission had called for expert opinion from Maulana Azad Medical College. The Expert Committee Report from Maulana Azad Medical College dated 29.07.2010 consisting of professors of Neurosurgery, Radiotherapy, Pediatrics and Pathology observed as follows: -

“To summarize, the patient was a case of Astrocytoma Grade III which is a serious condition by virtue of its high-grade malignancy. Patient presented in unconscious state which was managed efficiently at VIMHANS. All care was taken in his management which is evident from the fact that the child improved after first and second surgery.

The inability to pick up cancer on first pathology was due to technical reasons rather than negligence. The second biopsy reported by the same pathologist diagnosed Astrocytoma grade III which was subsequently treated at Batra Hospital. Based upon the ‘observations on records and clinical course of such disease, the board is of the Opinion that there is no prima facie negligence in this case.’

23. The said expert committee examined the records and comprehensively replied to certain questions as follows: -

.....c) is it necessary to eliminate..... to rule out cancer ?

Yes, it is necessary to eliminate tumour as early as possible so that a chances to treat the cancer can be provided to the patient.

However, the diagnosis of tumour may pose several challenges in brain even to expert Neuropathologists. A highly vascular tumour which has several blood vessels in it may mimic arteriovenous malformation (AVM). AVM was the first histopath report in this case

More over the representative sample of the suspected tumour tissue send to pathologist may not be the actual culprit. If tissue is from the periphery of the tumour and has several blood vessels in it, it may mimic AVM. It is further clarified that in presence of bleeding in the tumour (which did happened in this case), the diagnosis of astrocytoma may he missed.

As such Astrocytoma Grade 3 is a high grade of brain cancer with low survival rate despite best treatments including surgery, radiotherapy and chemotherapy collectively. After Second operation the diagnosis of Astrocytoma was confirmed as the final diagnosis. It is pertinent to mention that the pathologist did review the previous slides and had found no evidence of tumour in the first set of slides.

d) MRI by VIMHANS.... aware of it.

Between May to August 2004 several CT scans had been done at VIMHAS. MRI was already done in the pre-op period on 16.4.2004 which was suggestive of cancer of the brain. Patient was operated as brain cancer only. However, histopath report was negative for brain tumour. The CEMR or spectroscopy are only suggestive of any lesion in the brain and not the final word In the diagnosis. In any case final diagnosis is based upon the findings of the tissue sent to pathologist for histopath report. The histopath report in such cases determines the further treatment. However, in this case pathology was not ' suggestive of tumour after the first surgery.

The reasons for no evidence of cancer in first report has already been covered In question c (vide supra).

It is being clarified that the operation at first stage was proper surgery of craniotomy and decompression rather than biopsy by minor incision as alleged. The aim of the surgery in this case was to relieve the pressure in the brain by decompression which was done by the treating doctors as per standard practice.

It is further clarified that the grade of tumour (Astrocytoma Grd III with stage of tumour as understood by the complainant. It is also clarified that the word 'cure' is hot used for brain cancer."

e) Whether the learned doctors..... great concern

All due care in the diagnosis and treatment have been taken by the team of doctors. The cancer of brain has not developed after 15.5.2004 but was pre-existing.

f) That the attending doctors....an oncologist

*The patient had presented to VIMHANS in unconscious state, had several sequelae of brain herniation including other body dysfunctions like chest, ENT and other problems e.g. infection. He was therefore attended by the respective specialist of that field. **The role of oncologist would arise once the diagnosis of cancer is confirmed.** Upon confirmation of brain tumour (high grade cancer) after second surgery, patient was referred for the oncology treatment. It is further clarified that the Radiotherapy in such cases is also dependent upon clinical fitness of the case. Even at Batra Hospital radiation therapy was stopped after 9 cycles due to unfavorable condition of the child. In normal settings of Astrocytoma, radiation therapy will be given for nearly a month.*

g) Medical treatment...knowledge and skills

All care of treatment have been exercised with expert degree of competence. It is evident from the records that child improved from unconscious state GCS (E1M5MV1) to E4M6VT.

h) That whether failure to..... medical ethics

It is not evident from the records available that the patient had inadequate Information regarding the disease and various options/risk involved in the treatment. The board, however, cannot comment upon the communication skills and behavior of the treating doctors in this case.

24. The Hon'ble Supreme Court in **Dr. Laxman Balkrishan Joshi Vs. Dr. Trimbak Babu Godbole and Anr.**, AIR 1969 SC 128 laid down certain duties of doctor towards treating patients:

"The duties which a doctor owes to his patient are clear. 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 him certain duties, viz., a duty of care in deciding whether to undertake the case, a duty of care in deciding whether treatment to give or a duty of care in the administration of that treatment. A breach of any of those duties gives a right of action for negligence to the patient. The practitioner must bring to his task a reasonable degree of skill and knowledge and must exercise a reasonable degree of care. Neither the very highest nor a very low degree of care and competence judged. In the light of the particular circumstances of each case is what the law requires.

25. The Hon'ble Supreme Court in **Jacob Mathew v. State of Punjab**, (2005) SSC (CrI) 1369 which followed the Bolam's principles and observed that:

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

"25.....At times, the professional is confronted with making a choice between the devil and the deep sea and he has to choose the lesser evil. The medical professional is often called upon to adopt a procedure which involves higher element of risk, but which he honestly believes as providing greater chances of success for the patient rather than a procedure involving lesser risk but higher chances of failure. Which course is more appropriate to follow, would depend on the facts and circumstances of a given case. The usual practice prevalent nowadays is to obtain the consent of the patient or of the person in-charge of the patient if the patient is not be in a position to give consent before adopting a given procedure. So long as it can be found that the procedure which was in fact adopted was one which was acceptable to medical science as on that date, the medical practitioner cannot be held negligent merely because he chose to follow one procedure and not another and the result was a failure."

26. In a recent case, the Hon'ble Supreme Court in **Devarakonda Suryasesha Mani v Care Hospital, Institute of Medical Sciences IV** (2022) CPJ 7 (SC) has held that:

“..2. Unless the appellants are able to establish before this Court any specific course of conduct suggesting a lack of due medical attention and care, it would not be possible for the Court to second-guess the medical judgment of the doctors on the line of medical treatment which was administered to the spouse of the first appellant. In the absence of any such material disclosing medical negligence, we find no justification to form a view at variance with the view which was taken by the NCDRC. **Every death in an institutionalized environment of a hospital does not necessarily amount to medical negligence on a hypothetical assumption of lack of due medical care.**”

27. It is an established position that the boy was brought under reference from Safdarjung Hospital and AIIMS in a critical condition on 16.05.2004 and the surgery was performed in

the late evening on the same day. The biopsy of the tumor was sent for examination, which came in negative. The expert opinion in the case by Maulana Azad Medical College revealed that the diagnosis of tumour may pose several challenges in brain even to expert Neuropathologists. A highly vascular tumour which has several blood vessels in it may mimic arteriovenous malformation (AVM), which was the first histopathology report in this case. Moreover, the sample of the suspected tumour tissue of the location where the surgery was done and sent to pathologist may not be the that of actual location. If tissue happens to be from the periphery of the tumour and has several blood vessels in it, it may mimic AVM. In the presence of bleeding in the tumour, which happened in this case, the diagnosis of astrocytoma may be missed. It is also a matter of fact that, between May 2004 to August 2004 number of CT scans were. MRI done in the pre-op stage on 16.04.2004 was suggestive of cancer of the brain. While he was operated as brain cancer case, however, histopathology report was negative for brain tumour. The CEMR or spectroscopy are only suggestive of any lesion in the brain and are not conclusive of the diagnosis. The final diagnosis is based upon a histopathology report which determines the treatment. In this case, however, pathology report did not suggest tumour after the first surgery, which was proper surgery of craniotomy & decompression, to relieve the pressure in the brain by decompression as per standard practice. It was not merely for biopsy by minor incision as alleged. While the brain cancer detected later was pre-existing as on 15.5.2004, admittedly the patient was brought to VIMHANS in unconscious state, had several sequelae of brain herniation including other body dysfunctions like chest, ENT and other problems. He was, therefore, attended to by respective specialists. The role of oncologist would arise once the diagnosis of cancer is confirmed. Upon confirmation of brain tumour after second surgery, he was referred for oncology treatment. The scope for radiotherapy is dependent upon patient's clinical fitness. Even at Batra Hospital radiation was stopped after 9 cycles due to his unfavorable condition. As per the expert opinion, all care of treatment was exercised with expert degree of competence by the OPs.

28. Thus, in the case in question, the Complainant's son was the patient who is a 11 years old boy and was diagnosed with Grade 3 Anaplastic Astrocytoma and unfortunately succumbed to the illness within six months of diagnosis. When he was referred to and admitted in VINHAMS Hospital, the patient was already in a critical state. The doctors and the hospital performed their duty with reasonable care. The expert opinion supports the notion that the initial non-detection of symptoms of cancer was due to technical factors rather than negligence. While the death of the patient at very tender age of 11 years is very unfortunate, he was in critical condition with multiple medical conditions. Considering the entire facts and circumstances of the case, in our considered view, there is no reason disagree with the said independent and comprehensive medical opinion. The allegation of medical negligence on the part of the hospital and its doctors is unsubstantiated.

29. In view of the aforesaid discussion, we do not find any negligence of the OP (Appellant) in the treatment of Grade 3 Anaplastic Astrocytoma of the patient. The findings recorded by the State Commission are not sustainable. Therefore, order of the learned State Commission in CC 163 of 2006 is set aside and the present Appeal is allowed. Consequently, the complaint filed by the Complainant before the State Commission is dismissed.

30. There shall be no orders as to costs.

31. All pending application, if any, stand disposed of.

32. The Registry is directed to release the amount, if any, deposited by the Appellant before this Commission or the State Commission, with accrued interest, if any, to the respective Appellants.

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SUBHASH CHANDRA
PRESIDING MEMBER

.....
AVM J. RAJENDRA, AVSM VSM (Retd.)
MEMBER