(1995) 06 SHI CK 0002

High Court of Himachal Pradesh

Case No: CWP No. 1316 of 1993

Parveen Begum		APPELLANT
	Vs	
State of H.P. and Others		RESPONDENT

Date of Decision: June 8, 1995

Citation: (1995) 2 ILR HP 1400

Hon'ble Judges: S.N. Phukan, C.J; Bhawani Singh, J

Bench: Division Bench

Advocate: Harish Behal, for the Appellant; M.S. Guleria, D.A.G., for the Respondent

Final Decision: Allowed

Judgement

Bhawani Singh, J.

This writ petition has been registered on the basis of communication from the Petitioner to the Chief Justice of this Court. It has been stated that on December 12, 1989, eight months'' female child of the Petitioner-Shaista was vaccinated against D.P.T. at the District Hospital, Chamba negligently with the result that the left-leg got paralysed. On December 29, 1992, when this fact was brought to the notice of Dr. Narang, Senior Medical Officer, the child was referred to Dr. C.B. Singh, who, after examination, declared her paralytic in left-leg. Certain medicines were prescribed but there was no relief. Again, the child was brought to Chief Medical Officer, Chamba who referred the case to some other doctor whose medicines did not improve the position. Thereafter, the child was referred to Post Graduate Institute, Chandigarh where the doctors, after thorough investigation, opined that the child got paralytic due to wrong vaccination of D.P.T. and could not be cured. After two-three months physiotherapy has to be undertaken at the Institute. This all happened due to the negligence of medical officials at the District Hospital, Chamba. The future of her daughter has become dark. Petitioner''s husband Mirza Akhtar Beg, Clerk in the Electricity Board, made an application to the Medical Department for grant of compensation but no attention was paid to it. The family is not in a

position to give the child proper medical treatment.

2. Some time back, her husband made applications to the Chief Medical Officer, Chamba, the Director of Health Services and the Secretary (Health) to the Government of Himachal Pradesh but they did not bother to do something in the matter. The Petitioner has claimed compensation from the Respondents for the lapse which has resulted in paralysis of the left-leg of the child. In support, documents from Post Graduate Institute, Chandigarh have been filed. In one of them, it has been investigated that the child was "Asymptomatic" at the time of vaccination meaning thereby that she was free from any kind of ailment and the problem started on 3rd/4th day of the vaccination with mild, moderate fever, weakness of left-leg. It has also been opined that there was sciatic nerve injury after the D.P.T. injection.

3. The Director of Health Services, Himachal Pradesh has filed affidavit in this case. It has been admitted that the child was vaccinated for D.P.T. at the District Hospital, Chamba on December 12, 1989 but it has been denied that she was negligently vaccinated by the staff. The Chief Medical Officer, Chamba got the matter- inquired into from the Medical Officer (Health), Chamba who has pointed out (Annexure-RA) that Post Graduate Institute, Chandigarh report did not indicate final diagnosis nor the cause for the problem could otherwise be established. The child did not develope paralysis due to immunisation of D.P.T., therefore, negligence on the part of the Medical Officer of District Hospital, Chamba could not be there. It has been pointed out that in all, twelve children including this child were immunised on December 12, 1989 and none developed paralysis or any other complication as no complaint had been received from them.

4. Shri Harish Behal was appointed by the Court to appear for the Petitioner under the Legal Aid Rules since the Petitioner had stated in her petition that on account of financial difficulties, she was not in a position to appear in the Court personally. Shri Behal put up the case of the Petitioner brilliantly. Learned Counsel contended that the child was asymptomatic, at the time of vaccination, meaning thereby that she was without any symptom of any disease. The problem developed on the 3rd/4th day of the injection when the child had mild, moderate fever and weakness of left-leg. Post Graduate Institute, Chandigarh establishes that the child suffered due to the injection administered by the hospital. It was done carelessly and negligently, that is why, sciatic nerve injury was caused by the needle. Due to this injury, the child got paralysed in the left-leg. Alternatively, it was submitted that principle of resipsa-loquitur applies in this case and the burden to explain the cause of the paralysis is shifted on the Respondents which they have failed to discharge. Consequently, in either case they are responsible for the negligence of their officials and, therefore, liable to pay compensation to the Petitioner.

5. During the course of arguments, decisions like: Dr. Laxman Balkrishna Joshi Vs. Dr. Trimbak Bapu Godbole and Another, ; Sebastian M. Hongray Vs. Union of India

(UOI) and Others, ; Ram Bihari Lal Vs. Dr. J.N. Shrivastava, ; Peoples'' Union for Democratic Rights Vs. State of Bihar and Others, ; 1988 ACJ 435 , (United India Insurance Co. Ltd. v. Ratnamma and Ors.); Oriental Fire and Genl Ins. Co. Ltd. and Another Vs. Josheda alias Joshoda Bala Ghanta and Another, Rajkot Municipal Corporation Vs. Manjulaben Jayantilal Nakum and Others, ; and 1993 (1) Sim.L.C. 340, (Mohan Lal v. State of Himachal Pradesh and Anr.) were cited.

6. On behalf of the State, Shri M.S. Guleria, learned Deputy Advocate General contended that the official who actually administered the D.P.T. injection, has not been made a party, therefore, the petition is not maintainable against the Respondents. Further, there is no evidence attributing negligence in the administration of D.P.T. injection. This Court may have authority to grant compensation but it can be granted when there is evidence to that effect. For want of evidence in this case, the claim of the Petitioner cannot be accepted. The child was entertaining symptoms of Polio. The injection provocated it that is why Post Graduate Institute, Chandigarh diagnosis has indicated that it could be case of "provocative Poliomyelitis". In support of all these submissions, our attention was drawn to 1957 (2) All E.R. 118 , (Bolam v. Friern Hospital, Management Committee); Philips India Ltd. Vs. Kunju Punnu and Another, ; J.N. Shrivastava Vs. Rambiharilal and Others, ; 1985 (1) All E.R. 635, (Maynard v. West Midlands Regional Health Authority) 1987 SC 1086 , (M.C. Mehta and Anr. v. Union of India and Ors.); and Smt. Kumari Vs. State of Tamil Nadu and others, . In addition, reference to Park''s Textbook of Preventive and Social Medicine (Fourteenth Edn.) p.141 and 142) was made to explain "Poliomyelitis" and risk factors involved in it under title "Host factors".

7. In Dr. Laxman Balkrishna Joshi Vs. Dr. Trimbak Bapu Godbole and Another, it has been held that (para 11):

11. 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 what 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; (of Halsbury''s Laws of England, 3rd ed. vol. 26 p. 17). The doctor no doubt has a discretion in choosing treatment which he proposes to give to the patient and such discretion is relatively ampler in cases of emergency. But the question is not whether the judgment or discretion in choosing the treatment he exercised was right or wrong, for, as Mr. Purshottam rightly agreed, no such question arises in the

present case because if we come to the same conclusion as the High Court, viz., that what the Appellant did was to reduce the fracture without giving anaesthetic to the boy, there could be no manner of doubt of his being guilty of negligence and carelessness...".

8. Finally, in para 17, it has been held that:

17. In our view, there is no reason to think that the High Court was wrong in its conclusion that death was due to shock resulting from reduction of the fracture attempted by the Appellant without taking the elementary caution of giving anaesthetic to the patient. The trial court and the High Court were, therefore, right in holding that the Appellant was guilty of negligence and wrongful acts towards the patient and was liable for damages.

9. In Rajkot Municipal Corporation Vs. Manjulaben Jayantilal Nakum and Others, , it has been said in para 10 that:

10. As noticed above, the case of the Plaintiffs is based on the general law of Torts. The case is also based upon the law of Tort of Negligence. In view of this position, we may have to bear in mind certain salient features or aspects regarding the general law of Torts and especially the tort of negligence. By now it is clear that the field of law of Torts speaks of the recognition of certain civil rights which are available to a victim or the heirs and legal representatives of the victim to claim stipulated amount as damages from the wrongdoer for the negligence. When we talk of negligence, the wrongdoer may be made liable because of a wrongful act or an omission to do something which the wrongdoer was required to do but has not done. The Plaintiff who sues the wrongdoer in tort is required to prove and establish the negligence on the part of the wrongdoer and the resultant loss. In such cases the Plaintiff would also be required to establish a reasonable proximate connection between the damages suffered and the wrong done. We are living in a complex world and, therefore, we have to notice that initially, at the inception, the concept of actionable tort was lying in a narrow compass. By the passage of time and by the increase of eventualities this narrow compass came to be widened, new concepts have been brought in and the domain of law of Torts is being extended daily. In a changed world, new duties, new liabilities and new responsibilities are being fastened on individuals, groups of persons, local authorities and body-corporates. These liabilities are also being fastened on the broad shoulders of the State and certain institutions, which could be said to be the instrumentalities of the State. The direct result of this process is that the area or the field of the law of Torts goes on increasing day by day. We have taken care to emphasize upon the abovesaid aspect because as urged by Mr. Gehani there are rare cases of the tree falling on persons and killing them instantaneously, giving rise to claim the compensation before the civil Tribunal. But as noticed above, in the present complex society the area or the field of the law of Torts is being extended day by day and the courts should not be shy to include any other branch of negligence in the arena of the law of Torts.

10. In Ram Bihari Lal Vs. Dr. J.N. Shrivastava, it has been observed that (paras 9 & 10, p. 157-159):

9. First of all we have to see what are the liabilities of medical practitioners for negligence and what duties they own to patients. In Halsbury''s Laws of England, Fourth Edition, Volume 30 in paragraphs 34 and 35 it has been mentioned that a person who holds himself out as ready to give medical advice or treatment impliedly undertakes that he is possessed of skill and knowledge for the purpose. Whether or not he is a registered medical practitioner, such a person who is consulted by a patient owes him certain duties, namely a duty of care in deciding whether to undertake the case; a duty of care in deciding what treatment to give, a duty of care in his administration of that treatment and a duty of care in answering a question put to him by a patient in circumstances in which he knows that the patient intends to rely on his answer. A breach of any of these duties will support an action for negligence by 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, and a person is not liable in negligence because someone else of greater skill and knowledge would have prescribed different treatment or operation in a different way nor is he guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical mens killed in that particular art, even though a body of adverse opinion also existed among medical men. Deviation from normal practice is not necessarily evidence of negligence. To1 establish liability on that basis it must be shown (1) that there is a usual and normal practice; (2) that the Defendant has not adopted it; and (3) that the course in fact adopted is one no professional man of ordinary skill would have taken had he been acting with ordinary care. It is a defence to a practitioner that he acted on the specific instructions of a consultant who had taken over responsibility for the case. Failure to use due skill in diagnosis with the result that wrong treatment is given is negligence. The Supreme Court relying on this commentary in Dr. Laxman Balkrishna Joshi Vs. Dr. Trimbak Bapu Godbole and Another, has held as under:

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 what treatment to give or a duty of a 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. The doctor no doubt has a discretion in choosing treatment which he proposes to give to

the patient and such discretion is relatively ampler in cases of emergency.

Held, High Court was right in its conclusions that death of patient was due to shock resulting from reduction of the fracture attempted by the doctor without taking the elementary caution of giving anaesthetic to the patient and that he was guilty of negligence and wrongful acts towards his patient and was liable for damages.''Lord Denning M.R. in Hucks v. Cole (1968) 118 New LJ 469 said "A charge of professional negligence against a medical man was serious. It stood on a different footing to a charge of negligence against the driver of a motor car. The consequences were far more serious. It affected his professional status and reputation. The burden of proof was correspondingly greater. As the charge was so grave, so should the proof be clear. With the best will in the world, things sometimes went amiss in surgical operations or medical treatment. A doctor was not to be held negligent simply because something went wrong. He was not liable for mischance or misadventure; or for an error of judgment. He was not liable for taking one choice out of two or for favouring one school rather than another. He was only liable when he fell below the standard of a reasonably competent practitioner in his field so much so that his conduct might be deserving of censure or inexcusab1e.

10. In Encyclopedia Britannica, 1970 Edition, IInd volume at page 135 Appendicitis is the inflammation of the vermiform appendix, which is a vestigial wormlike structure attached to the caecum. The caecum is the pouchlike beginning of the large intestine; into the caecum empties the small intestine. The appendix does not serve any useful purpose as a digestive organ in man. It is essentially a "blind Alley" kind of organ with a channel that is two inches or more in length, closed at one end and communicating at the other with the caecum. Intestinal contents may work their way into the appendix and then be expelled by the muscular activity (persistalsis) of the walls of the appendix. Any factors that prevent the appendix from propelling its contents into the caecum may lead to appendicitis, as pointed out by O.H. Wangensteen. Intestinal material in the appendix may be prevented from escaping into the caecum by a failure of peristalsis or by a blocking of the opening into the caecum. The blocking can be caused by faecal concretions (fecaliths), undigested food particles such as seeds or by swelling of the lining of the appendix. When the appendix is prevented from emptying itself a chain of events develops. Increasing pressure within the appendix leads to edema, swelling and distention of the appendix; the swelling is further increased by mucoid secretions from the lining of the appendix. As the distention increases the blood vessels of the appendix may become closed off, leading to gangrene. Meanwhile, the bacteria normally found in this part of the intestine (colon bacillus especially) proceed to propagate in this closed off pocket. The combination of increasing tension from within and weakening of the wall by gangrene may lead to a rupture or perforation of the appendix. If this intestinal pus pocket spills into the peritoneal cavity, peritonitis, a very serious and often fatal condition, develops. Fortunately, peritonitis is usually prevented by the protective mechanisms of the body. The omentum, a sheet of fatty tissue, often

wraps itself bout the inflamed appendix. Exudate that has the clot-forming properties of fibrin normally develops in the areas of inflammation, behaving like paste or glue and sealing off the appendix from the surrounding peritoneal cavity with the help of the omentum. This prevents, in many instances, the direct spread of pus or intestinal contents into the peritoneal cavity. By this localizing process a reptured appendix may lead to an abscess instead of a generalized peritonitis.

Occurrence and symptoms. Appendicitis is most common in the second and third decade of life but may occur in the every young or old. Males are afflicted in somewhat greater numbers than females. The symptoms ofappendicitis are varied. In the sc-called typical case the pain may first be noticed all over the abdomen, or only in the upper abdomen, or about the navel. It is often described as a "gas pain". It is usually not as severe as the excruciating colic of gal1 bladder or kidney stones. After one to six hours or more the pain may become localized to the right lower abdoment. Nausea and vomititing may develop some time after the onset of the pain. Fever is usually present but is seldom high in the early phase of the disease. The leucocytes (white blood cells) are usually increased from a normal count of 5,000-10,000 in an adult to 12,000-20,000. Tenderness develops in the right lower abdomen, and the sudden release of pressure of the palpating hand may cause pain (rebound tenderness).

Diagnosis.- When there is some variation in the anatomical location of the appendix the pain and tenderness may be misleading. If the appendix is lateral to or behind the caecum the tenderness may be in the right flank. If the appendix lies deep in pelvis one may detect tenderness only on rectal or pelvic examination and even then it may not be easily demonstrated. When the appendix lies on the left side due to transposition of viscera or failure of normal bowel rotation during embryonic life, the symptoms occur on the left. In the youngster and the elderly person the symptoms are more difficult to evaluate. Appendicitis is one of many causes of abdominal pain. Various diseases produce symptoms that closely resemble appendicitis; these diseases include acute inflammation of the gall bladder, perforating ulcer of the stomach or duodenum, diverticulitis (inflammation of a small pouch) of the sigmoid colon, intestinal obstructions, inflammation of the uterine tubes (salpingitis), rupture of a tubal pregnancy, twisted ovarian cyst, bleeding from a ruptured corpus luteum of the ovary and perforating cancer of intestine. In addition, appendicitis-like symptoms may be produced by pneumonia, heart disease, herpes zoster (shingles) and kidney infection or stones. Many abdominal pains are due to digestive disturbances related to food and have no serious significance. Diarrhoea is generally a symptom that goes with digestive disturbances, but its presence does not necessarily exclude the possibility of an infected appendix.

Removal of a Diseased Appendix.-Once a diagnosis of acute appendicitis has been made the appendix should be removed by surgery as soon as the patient''s

condition permits. In the early phase of the disease, i.e. upto 12-20 hours after the onset of symptoms, the mortality and disability rates arising from an appendectomy performed by a qualified surgeon in a wel1-equipped hospital are extremely low. On the other hand the mortality rate after an abscess has formed may be 3% - 5% and if spreading peritonitis has set in the death rate may be 10% - 15% or even higher.

Non-surgical treatment.- There is evidence that the use of antibacterial drugs instead of surgery for the treatment of appendicitis is hazardous because important symptoms may become masked. The antibacterial drugs are, of course, of tremendous value in postoperative management and in preventing some of the complicated problems for surgery. Many patients will survive an attack of appendicitis without developing a serious complication, such as abscess or peritonitis. However, it is much safer to have the acute appendix removed early in an attack than to resort to any type of non-surgical treatment except where medical facilities or personnel are not available or adequate for safe surgical treatment.

11. In Saheli, A Women''s Resources center, Through Ms Nalini Bhanot and Others Vs. Commissioner of Police Delhi Police Headquarters and Others, it has been held in paras 11 to 13 that:

11. An action for damages lies for bodily harm which includes battery, assault, false imprisonment, physical injuries and death. In cases of assault, battery and false imprisonment the damages are at large and represent a solatium for the mental pain, distress, indignity, loss of liberty and death. As we have held hereinbefore that the son of Kamlesh Kumari aged 9 years died due to beating and assault by the S.H.O., Lal Singh and as such she is entitled to get the damages for the death of her son. It is well settled now that the State is responsible for the tortious acts of its employees. The Respondent No. 2, Delhi Administration is liable for payment of compensation to Smt. Kamlesh Kumari for the death of her son due to beating by the S.H.O. of Anand Parbat Police Station, Shri Lal Singh.

12. It is convenient to refer in this connection the decision in Joginder Kaur v. The Punjab State 1968 A CJ 28 : (1969) Lab IC 501 wherein it has been observed that:

''In the matter of liability of the State for the torts committed by its employees, it is now the settled law that the State is liable for tortious acts committed by its employees in the course of their employment.''

13. In State of Rajasthan v. Mst. Vidhyawati 1962 Supp (2) SCR 989 : The State of Rajasthan Vs. Mst. Vidhyawati and Another, it has been held that:

Viewing the case from the point of view of first principles, there should be no difficulty in holding that the State should be as much liable for tort in respect of a tortious act committed by its servant within the scope of his employment and functioning as such as any other employer. The immunity of the Crown in the United Kingdom was based on the old feudalistic notions of Justice, namely, that the King

was incapable of doing a wrong, and, therefore, of authorising or instigating one, and that he could not be used in his own Courts. In India, ever since the time of the East India Company, the sovereign has been held liable to be sued in tort or in contract, and the Common Law immunity never operated in India....

(See" Sebastian M. Hongray Vs. Union of India (UOI) and Others, ; Peoples'' Union for Democratic Rights Vs. State of Bihar and Others, ; and 1993 (1) Sim.L.C. 340, (Mohan Lal v. State of Himachal Pradesh and Anr.).

12. In Philips India Ltd. Vs. Kunju Punnu and Another, it has been held by the Division Bench of Bombay High Court that (para 14):

14. The concept of negligence as a tort is expressed in the well-known definition of Alderson B. in Blyth v. Birmingham Waterworks Co. (1856) 11 Exch 781, as under:

''Negligence is the 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.''

Lord Wright in Lochegelly Iron and Coal Co. v. M''Mullan (1934) ACC 125 said:

''In strict legal analysis, negligence means more than heedless or careless conduct, whether in omission or commission; it properly connotes the complex concept of duty, breach and damage thereby suffered by the person to whom the duty was owing.''

Doctors owe to their patients a duty in tort as well as in contract. It is expected of such a professional man that he should show a fair, reasonable and competent degree of skill; it is not required that he should use the highest degree of skill, for there may be persons who have higher education and greater advantages than he has, nor will he be held to have guaranteed a cure. Although the standard is a high one, a medical practitioner should not be found negligent simply because one of the risks inherent in an operation of that kind occurs, or because in a matter of opinion he made an error of judgment, or because he has failed to warn the patient of every risk involved in a proposed course of treatment. (See Salmond on the Law of Tort s, 16 th Edition, p. 232).

Again, in para 15, it has been held that:

15. The civil liability of medical men towards their patients is perhaps compendiously stated in R. v. Bateman (1925) 94 LJ KB 791, as follows:

''If a person holds himself out as possessing special skill and knowledge and he is consulted, as possessing such skill and knowledge, by or on behalf of a patient, he owes a duty to the patient to use due caution in undertaking the treatment. If he accepts the responsibility and undertakes the treatment and the patient submits to his direction and treatment accordingly, he owes a duty to the patient to use diligence, care, knowledge, skill and caution in administering the treatment. No

contractual relation is necessary, nor is it necessary that the service be rendered for reward ...The law requires a fair and reasonable standard of care and competence. This standard must be reached in all the matters above mentioned. If the patient''s death has been caused by the Defendant''s indolence or carelessness, it will not avail to show that he had sufficient knowledge; nor will it avail to prove that he was diligent in attendance, if the patient has been killed by his gross ignorance and unskill fulness...As regards cases where incompetence is alleged, it is only necessary to say that the unqualified practitioner cannot claim to be measured by any lower standard than that which is applied to a qualified man. As regards cases of alleged recklessness, juries are likely to distinguish between the qualified and the unqualified man. There may be recklessness in undertaking the treatment and recklessness in the conduct of it. It is no doubt, conceivable that a qualified man may be held liable for recklessly undertaking a case which he knew, or should have known, to be beyond his powers, or for making his patient the subject of reckless experiment. Such cases are likely to be rare... ''(See Charlesworth on Negligence, Fifth Edn., pages 181 and 182, para 212).

The duty of a medical practitioner arises from the fact that he does something to a human being which is likely to cause physical damage unless it is done with proper care and skill. There is no question of warranty undertaking or profession of skill. The standard of care and skill to satisfy the duty. in tort is that of the ordinary competent medical practitioner exercising the ordinary degree of professional skill. A Defendant charged with negligence can clear himself if he shows that he acted in accordance with general and approved practice. It is not required in discharge of his duty of care that he should use the highest degrees of skill, since they may never be acquired. Even deviation from normal professional practice is not necessarily evidence of negligence.

13. In J.N. Shrivastava Vs. Rambiharilal and Others, it has been held in paras 15 and 25 that:

15. Let me now deal with each charges of negligence pleaded against the operating surgeon.

Diagnosis: The diagnosis of an ailment is normally the first matter with which the medical man is concerned. There can be no doubt that he may find himself held liable in an action for negligence if he makes a wrong diagnosis and thereby causes injury to the patient. But it must be remembered that a mistaken diagnosis is not necessarily a negligent diagnosis.

''No human being is infallible and in the present state of science, even the most eminent specialist may be at fault in detecting the true nature of a diseased condition. A practitioner can only be held liable in this respect if his diagnosis is so palpably wrong as to prove negligence, that is to say, if his mistake is of such nature as to imply an absence of reasonable skill and care on his part, regard being had to

the ordinary level of skill in the profession.'' (See: Medical Negligence by Nathan 1957 Edi. 44).

25. No fault has been found with the surgery performed by the Defendant. The diseased gall bladder had been preserved in a jar and was produced in Court. No attempt was made to show that the gall bladder which had been removed, was normal and contained no stones. It was in a highly pathological condition, could not be doubted at all. In order to save the life of the patient, the Defendant felt that cholecy-stectomy was imminent. In his opinion, no risk was involved. The patient was tolerating the anaesthetic alright and her general condition throughout the operation remained good. No negligence could, therefore, be attributed to the surgeon when he decided to remove the diseased gall bladder whether or not there was consent, express or implied, of the patient, for such removal. An emergency had arisen which the surgeon, when he opened the abdomen, had not anticipated and he had to take a quick decision in the honest execution of his duty towards his patient in order to save her life or preserve her health. Dr. Datta was the person who alone could be consulted. He was assisting the Defendant. He also approved of the course adopted.

The surgeon, therefore, was not negligent in undertaking the second operation when the emergency arose, and that was considered best and the only inevitable course in the interest of the patient.

14. In 1985 (1) All E.R. 635, (Maynard v. West Midlands Regional Health Authority), it has been held that differences of opinion and practice exist in the medical profession and that there was seldom any one answer exclusive of all others to problems of professional judgments. Although the court may prefer one body of opinion to the other, but that is not a basis for a conclusion that there had been negligence on the part of the doctor. In 1957 (2) All E.R. 118, (Bolam v. Friern Hospital, Management Committee), it has been said that different views may be held by competent professional men about the treatment to be administered to a patient. Adopting of one method against the other may not point out negligence in the administration of the treatment.

15. Poliomyelitis has been defined as under (Park''s Textbook of Preventive and Social Medicine) (p.141):

Poliomyelitis is an acute viral infection caused by an RNA virus. It is primarily an infection of the human alimentary tract but the virus may infect the central nervous system in a very small percentage (about 1 per cent) of cases resulting in varying degrees of paralysis, and possibly death.

Under "Host factors" it has been stated that (p.142):

(a) AGE: In India, polio is essentially a disease of infancy and childhood. About 50 per cent of cases are reported in infancy. The most vulnerable age is between 6 months

and 3 years (Table 2).

(b) SEX: Sex differences have been noted in the ratio of 3 males to one female.

(c) RISK FACTORS: Several provocative or risk factors have been found to precipitate an attack of paralytic polio in individuals already infected with polio viruses. They include fatigue, trauma, inframuscular injections, operative procedures such as tonsillectomy undertaken especially during epidemics of polio and administration of immunizing agents particularly a lumcontaining DPT.

(d) IMMUNITY: The maternal antibodies gradually disappear during the first 6 months of life. Immunity following infection is fairly solid although reinfection can occur since infection with one type does not protect completely against the other two types of viruses. Type 2 virus appears to be the most effective antigen. Neutralizing antibody is widely recognized as an important index of immunity to polio after infection.

16. Adverting to the facts of the case, it may be stated that the case of the Petitioner is not that the medicine was defective. The allegation is that the official who administered the same, acted negligently. Due care was not adopted while injecting the instrument with the result that injury to the sciatic nerve was caused. The contention that many other children were subjected to the same treatment, cannot be accepted in defence since the problem in this case did not arise due to the medicine but on account of human lapse. The diagnosis of the Post Graduate Institute, Chandigarh is quite clear on this question and the submission that it is not final or that the child had already developed the symptoms of the disease and the vaccination provocated the problem, is hardly convincing.

17. Immunization of small children at a very young stage is expected to be handled with great care. Great degree of responsibility is cast on professional men to undertake it. Gone are the days when there were only a few methods of disease diagnosis. Now-a-days, medical science has developed enormously. Doctors are no longer expected to treat the patients in the same old style. Higher degree of care and skill is required from them and it is their duty to treat the patients dexterously. Entrusting the patients to subordinate staff may amount to actionable negligence. Facts of the present case plainly demonstrate that the child was not treated properly. Injuring the sciatic nerve indicates negligence. Subsequently, when the parents complained about the problem, no much attention was paid to attend it with the result that the child had to be shifted to Post Graduate Institute, Chandigarh and by that time the disease had ''aggravated considerably. The Respondents should have come forward to accept the lapse, treated the child and paid compensation. But, instead of taking that course, they continued V to sit over the matter unreasonably thereby making the child and the parents to suffer abnormally. The decisions on which reliance was placed by the Respondents, turn on their own facts and are not, therefore, helpful to resolve the question involved in

this case.

18. Now, the question is whether it was necessary for the Petitioner to implead the officials who actually handled the child in this case? We examined this question. Shri Behal, learned Counsel for the Petitioner, placed reliance on 1988 ACJ 435 , (United India Insurance Co. Ltd. v. Ratnamma and Ors.) and contended that it is not necessary to do so. We are in agreement with this submission of the learned Counsel for the Petitioner and hold that absence of these officials does not defeat the claim of the Petitioner. They are the officials of the State. It has to satisfy the claim of the Petitioner being vicariously liable for the torturous act of its servants. (See: Sebastian M. Hongray Vs. Union of India (UOI) and Others, ; Peoples'' Union for Democratic Rights Vs. State of Bihar and Others, ; and Saheli, A Women''s Resources center, Through Ms Nalini Bhanot and Others Vs. Commissioner of Police Delhi Police Headquarters and Others,

19. Now, the question arises, what damages should be allowed to the Petitioner? It is, ubdoubedly, a vexed question. It is really difficult to assess the exact amount of compensation which may be equivalent to the pain, suffering and the loss suffered by the child. True it may be that no amount of money can restore the physical condition of the child, yet the Court has to make an effort to asses compensation which may provide some relief to the child. It is a female child. Left-leg has become paralytic. All efforts to treat it have failed upto now. The parents were advised surgical operation but they could not undertake it for want of money.

20. It was contended that such a small child may have suffered physically and mentally but there is hardly any scope for awarding compensation for future earning. Shri Behal opposed this submission and submitted that the child had every prospect of being educated and employed thereafter.

21. The position of female child is all the more serious since she will have to bear the brunt of the problem throughout her life. In such like cases, there is no settled formula to determine the damages, however, assistance can be taken from principles laid down in cases under the motor accident claims resulting from the negligence of the owners and drivers and Tort cases, therefore, taking into consideration such principles and facts of this case, instead of awarding compensation on various factors, it would be appropriate to award lump sum amount to the child to enable her to depend on it in her life. Accordingly, we direct the Respondents to pay rupees two lac fifty thousand to the Petitioner. This amount will be deposited in the Registry of this Court. It would be invested in fixed deposit with a nationalised bank in the name of the child through Petitioner Parveen Begum. Interest accruing on the fixed deposit would be payable to Petitioner Parveen Begum and in her absence to Mirza Akhtiar Beg (father of the child) to be utilised for the welfare of the child. The principal amount would not be paid to any one except with the prior permission of this Court.

22. Future treatment of the child for the injury in the Government hospitals would be free.

23. It is also directed that the amount would carry interest at the rate of 12% per annum, in case it is not deposited in the Registry of this Court within a period of two months from today.

24. No other point was urged by any of the learned Counsel for the parties.

25. The result, therefore, is that the writ petition is allowed in the aforesaid terms wit costs assessed at rupees one thousand. Petition all owed in the aforesaid terms with costs assessed at rupees one thousand.