(2001) 08 KL CK 0041

High Court Of Kerala

Case No: A.S. No''s. 240 and 513 of 1991

Gourikutty		APPELLANT
	Vs	
Raghavan		RESPONDENT

Date of Decision: Aug. 8, 2001

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 43 Rule 1, Order 9 Rule 13, 104, 96

Citation: (2002) ACJ 1356 : (2001) 3 ILR (Ker) 312

Hon'ble Judges: S. Sankarasubban, J; Kum. A. Lekshmikutty, J

Bench: Division Bench

Advocate: Jose Thettayil, Government Pleader, K.P. Dandapani and Sumathi Dandapani, for the Appellant; Mathai M. Paikeday Joe Joseph Kuchukunnel, K.B. Ganesh, P. Mohanan and Biju Abraham, for the Respondent

Judgement

S. Sankarasubban, J.

These two appeals are preferred against the judgment and decree in O.S. No. 37 of 1982 on the file of the Subordinate Judge''s Court, Kozhikode. A.S. No. 240 of 1991 is filed by the 6th defendant, while A.S. No. 513 of 1991 is filed by defendants 1 to 3. The facts relevant for the purpose of the appeal are as follows:

2. The suit was filed for damages. The seventh plaintiff in the suit underwent an operation for Tubectomy conducted by the sixth defendant on 11.9.1971 in the Government General Hospital, Calicut. The fifth defendant performed Anesthesia for the said purpose. After the operation, the seventh plaintiff did not regain consciousness even after so many days. The first plaintiff, the husband of the seventh plaintiff was under the hope that his wife would regain consciousness. It is stated that even today she remains unconscious. According to the plaintiffs, it is due to negligence of defendants 5 and 6 that the mishap occurred. At the time of operation, the seventh plaintiff was only 30 years of age. The said operation was on the 3rd day of the 4th delivery of the seventh plaintiff. Even now she is not able to

recognise her new born child.

3. The seventh plaintiff was an Auxiliary Nurse-cum-Midwife drawing a salary of Rs. 280/- as on 11.9.1971. As a result of the said operation, she could not rejoin service. She has been removed from service. The first plaintiff, the husband of the seventh plaintiff, has been financially ruined on account of the heavy expenditure incurred by him for the medical treatment of the seventh plaintiff. The six plaintiff, who is the sister of the seventh plaintiff is attending on the seventh plaintiff as she is not capable of doing anything. In the suit, the State of Kerala, the Secretary to the Government of Kerala, the Director of Health Services, Dr. B. Mukerjee, Associated Professor, IMCH, Medical College, Calicut, Dr. C.V. Pathi, Anesthesia Specialist, Government General Hospital, Calicut and Dr. Miss Gourikutty, S.A.T. Hospital, Trivandrum, who performed the operation were made parties.

4. Compensation was claimed from all the defendants as they are jointly and severely liable on account of the negligence of defendants 5 and 6th. An amount of Rs. 10,00,000/- was claimed as compensation.

5. In the case, defendants 1 and 3 filed a written statement contending that the claim made by the plaintiffs is exorbitant and unreasonable. The operation was performed at the request of the seventh plaintiff. It is not due to the negligence of defendants 5 and 6 that she did not regain consciousness. There was no negligence on the part of the defendants 5 and 6. During the time of operation, some unfortunate and unforeseen complications arose, which were beyond all human and medical control resulting in the continued unconsciousness. The Medical Board constituted by the Government enquired into the matter. On examination, the Medical Board found that the seventh plaintiff had a cardiac arrest following the P.P.S. operation. It was found that it was an unforeseen accident which unfortunate happened on the table by which the patient sustained some irreparable brain damage as a result of brain anoxia. She continued in the same unconscious condition for the next 42 days in spite of all the efforts made to regain consciousness. She was given all attendance and expert treatment in the Medical College Hospital, Kozhikode. She was then taken to Medical College Hospital, Trivandrum at Government expense and given all possible and available treatment. The Superintendent of Mental Hospital, Trivandrum also certified that she had developed dementia as a result of prolonged cerebral anoxia and that she is totally and permanently incapacitated to do the work of Auxiliary Nurse cum Midwife. The seventh plaintiff was given all treatments at the expense of the State. She was granted earned leave for 59 days and half pay leave for 61 days. Ex-gratia allowance equal to half of her pay from 5.8.1972 to 4.2.1974 was also given. An ex-gratia assistance of Rs. 5,000/- was also paid to her. The period of absence of the first plaintiff as Store Keeper in the Health Service Department from 26.10.1972 to 19.6.1973 was regularised by treating it as on duty. The Government is not directly or indirectly responsible or liable for the acts or misdeeds of defendants 5 & 6.

6. The fourth defendant filed a written statement. It is admitted that the seventh plaintiff was operated on 11th September 1971. She was operated by the sixth defendant under the Family Planning Scheme for prevention of further pregnancy. The fifth defendant was the Anaesthesiologist under the Government of Kerala at that time in the Beach Hospital Calicut. It is not correct to say that defendants 5 and 6 are directly under the fourth defendant. Defendants 5 and 6 were not working under the directions of the fourth defendant. The sixth defendant was working under the general direction of the fourth defendant, as the fourth defendant was the Associate Professor. It is true that the seventh plaintiff should have regained consciousness within a couple of hours from the time of anesthesia was administered. All the treatment that was available in the Hospital had been given to the seventh plaintiff, but did not regain consciousness. It is not correct to say that the seventh plaintiff did not regain consciousness due to the callous indifference and total negligence of defendants 5 and 6. It is also false to say that defendants 5 and 6 did not perform their duties and showed total negligence in properly and timely attending the seventh plaintiff. The allegation that it was due to the utter negligence and indifference of defendants 5 and 6 in administering anaesthesia and conducting the operation that Rohini/seventh plaintiff did not regain consciousness is denied. Rohini was given the best of medical attention from the Hospital as well as other Hospitals. It is understood that during the operation, some complications arose, which were beyond all human and medical control and this resulted in the patient not regaining her consciousness. It is understood that the operation was performed after administering epidural anaesthesia. Later, the Government constituted a Medical Board to enquire into the matter and to determine the cause of her condition. The committee submitted a report that Rohini had a cardiac arrest following the operation and that she sustained irreparable damage to the brain as a result of brain anoxia.

7. So far as defendants 5 and 6 are concerned, they were declared ex parte. Necessary issues were raised by the court below. On behalf of the plaintiffs, four witnesses were examined. Exts. A1 to A5(a) were marked on the side of the plaintiffs. On behalf of the defendants, nobody was examined. Exts. B1 was marked on the side of the defendants. Exts. X1 to X2(c) were marked as court Exhibits. PW1 is the first plaintiff. PW2 is the person, who brought Ext. X1 file. PW3 is the second plaintiff. PW4 is the six plaintiff. The Court below, after going through the evidence took the view that the burden was on the defendants to prove that there was no negligence. It was of the view that the facts disclosed that the maxim res ipsa loquitur can be applied, because the seventh plaintiff lost consciousness on the operation table. The defendants also admitted that there was cardiac arrest after the operation and hence it was outside of the knowledge of the defendants as to how this happened. No evidence has been adduced by the defendants to show that they were not negligent. The contention that the State is not vicariously liable was rejected. Regarding compensation, it awarded a total compensation of Rs. 3,38,395/- with

interest at 12% per annum from the date of suit till date of payment. It is against that the above two appeals are filed.

8.In the appeal filed by the Government, defendants 1 to 3, the attack is against the finding regarding their liability and also against the finding that defendants 5 and 6 who were negligent. They have also attacked the quantum of compensation. The other appeal viz., A.S. No. 240 of 1991 is filed by the sixth defendant. The six defendant''s case is that her address given in the plaint is wrong and at no time, summons was served on her and that the knew it only after the suit was decreed. Hence, she has filed the appeal challenging the decree, which says that she is negligent. The appellant in A.S. No. 240 of 1991 had filed a petition to set aside the ex parte decree passed against her. But ultimately that was not pressed and it was dismissed as not pressed. It is on the above background that these appeals are to be considered.

9. Before this Court, the appellant is A.S. No. 240 of 1991 has filed C.M.P. No. 2098 of 2001 to accept additional documents. According to the appellant, she is Dr. M.K. Gourikutty. There was another Doctor by name A.K. Gourikutty. Document No. 1 is with regard to the correction in the final seniority list of Civil Surgeon Gr. II and document No. 2 is with regard to the service details of the sixth defendant. Document No. 2 will show that she was in Medical College, Kozhikode from 4.8.1970 to 21.1.1972. The suit was instituted in 1982. From 8.4.1981 to 17.6.1987 she was Assistant Surgeon, Government Hospital, Thiruvalla. In the plaint, her address was given as Dr. Gourikutty, S.A.T. Hospital, Trivandrum. The case of the appellant is that she was not in Trivandrum and the verification of the court records show that summons was tried to be serviced at Trivandrum. Since it was not served there, it was served by publication.

10. The appellant filed I.A. No. 3476 of 1990 before the lower court to set aside the ex parte decree. In the affidavit filed along with the I.A., it is stated that she was declared ex parte on 31.10.1990. She did not receive any notice from the Court. She came to know it only on 2.11.1990. According to her, she was not working in the S.A.T. Hospital, Trivandrum. At that time, she was studying for M.D. course. She joined Thiruvalla on 8.4.1981 and there she continued upto 17.6.1987. From 25.6.1987 to 1.10.1990 she was working in the Government Hospital, Chengannoor. It is further stated that in the publication dated 3.11.1990, her name was given as merely Gourikutty. There is another Doctor by name Gourikutty in the service. The Government has not taken any action against her regarding the operation. She admitted that she conducted the operation. But there was not surgical complication. I.A. No. 3476 of 1990 was disposed of as follows: "Petition is not pressed. May be dismissed without cost". On the basis of the above endorsement, that petition was disposed of. Regarding this, learned counsel for the respondents submitted that so far as the ex parte decree is concerned, if a petition has been filed to set filed to set aside the ex parte decree and that is dismissed, unless an appeal has filed against

that order, it cannot be challenged in the regular appeal filed against the original decree. No reason is stated for not pressing the petition. Hence, learned counsel submitted that it is not necessary to set aside the ex parte decree unless this court is satisfied that for any other reason an opportunity should be given to the appellant.

11. We heard the matter on merits. Learned Government Pleader, who appeared in other appeal, viz., A.S. No. 513 of 1991 and the learned counsel appearing for the appellant in A.S. No. 240 of 1991 contended that it cannot be said that there was negligence on the part of the Doctor and the Anaesthesiologist. According to them, there is no case that neither the Anaesthesiologist nor the Doctor was not qualified. they refer to Ext. X1 file and said that the committee which met in question was of the opinion that it was not a case of negligence, but the patient had a cardiac arrest. It was an unfortunate incident. Counsel contended that there is a difference between the error of judgment and negligence. It is contended that the operation and the entire process were taken without any negligence. If any complication arises, it cannot be attributed to negligence of the Doctor or the Anaesthesiologist or the persons attending on the patient. They contended that the view of the Court below that the principle of res ipsa loquitur should be applied in the case is not correct. Hence, they prayed for permission to adduce evidence. It was further contended on behalf of the appellant that the compensation awarded is very high. Besides on behalf of the appellants in A.S. No. 513 of 1991, the Government Pleader contended that in any event, the State cannot be mulcted with liability for the negligence of defendants 5 and 6.

12. A cross objection was filed in A.S. No. 513 of 1991, wherein they have prayed for full compensation of Rs. 5 lakhs. Before we go into the details, we will see as to what is the report of the committee, which went into the question regarding the seventh plaintiff. Page 33 of the file is the communication from the Superintendent to the Secretary to Government Health (C) Department, Government Secretariat, Trivandrum. It says as follows:

"The committee met at 12 noon on 13.4.72, the following members were present.

(1) Superintendent Medical College Hospital, Calicut.

(2) Professor of Surgery, Medical College, Calicut.

(3) Professor of Obstetries & Gynaecology, Medical College, Calicut.

(4) District Medical Officer of Health, Kozhikode.

The committee interviewed the patient and considered this particular case in all its aspects and have come to the following conclusions.

I. Smt. Rohini has had cardiac arrest following a P.P.S. operation (Family Planning Procedure). This was an unforeseen accident which unfortunately happened on the table following which she sustained some irreparable brain damage as a result of

brain anoxia. At present, she is a physical and mental cripple. She is not able to talk properly, walk properly and her thinking and memory power is definitely affected because she is not able to remember even the close relatives. She is not able to swallow. She will not be able to lead a wife without constant assistance probably for the rest of her life. She is not fit for any gainful employment at present."

In this connection, we have to state that the defendants have no cared to produce any medical records. Ext. X2 is not a file with regard to medical records. Ext. X2 is a file which was originated when the husband of the seventh plaintiff wanted compensation and wanted employment assistance. No record of the Hospital has been produced before us. During the course of the appeal, we directed the Government Pleader to find out whether any record of this case are available in the Hospital. We were informed that no such records are available. This lead us to think that no useful purpose will be served by remanding this case, because no oral evidence can improve the situation, if there is no documentary evidence with the defendants now.

13. Now, it is admitted that the seventh plaintiff was admitted for P.P.S. operation. It is also admitted that she underwent cardiac arrest, that she sustained irreparable damage to the brain as a result of brain anoxia and that she lost consciousness on the operation table itself and also that she has not regained consciousness so far. One thing we will have to bear in mind that the operation was conducted on 7th September, 1971 and now we are in 2001. The seventh plaintiff is living as a mere vegetable, unable to recognise anybody. During this long span of years, she lost her husband. She underwent operation for the purpose that after the fourth child, she does not want any other child. She never thought that after the operation, she will not be able to recognise her new born child and that she will be returning to her house in the particular stage in which she finds now. Now, the question for consideration is in these circumstances whether the burden was on the defendants. Even if the sixth defendant did not receive notice, we cannot understand why defendants 1 to 3 did not take any steps to examine the Doctor and the Anaesthesiologist, because blame is put on them. No explanation is given why even the records were not produced. It is not enough to merely state that even if an operation is conducted promptly, there may be unforeseen complications and the Doctor or the Anaesthesiologist of the Hospital should not be made responsible for such complications. We know that in certain cases, if an operation is carried on, it may not be successful. But that is different. Here is a case where the seventh plaintiff lost her consciousness after the operation. The defendants could have produced records to show the conditions of the patient before operation, whether the patient was medically fit to undergo operation. If some records have been produced regarding this aspect, probably, there would have been some justification in the case of the defendants. The court below adopted the principle of res ipsa loquitur, which says that "the thing speaks for itself". The case of defendants 1 to 3 in the written statement is as follows: The operation was conducted by Dr.

Gourikutty and the anaesthetist was Dr. C.V. Pathy, both of whom are fully qualified and competent Doctors in their respective spheres. It is learned that during operation some unfortunate complications arose which were beyond all human and medical control, resulting in the continued unconsciousness. Thereupon the Government constituted a Medical Board consisting of the following members of examine the case: 1. Professor of Obstetrics and Gynoecology, Medical college, Calicut. 2. Professor of Surgery, Medical College, Calicut. 3. District Medical Officer of Health, Calicut; and 4. The Superintendent, Medical College Hospital, Calicut. The Board examined the case and found out that Smt. Rohini had a cardiac arrest following the PPS operation. It was also pointed out that this was an unforeseen accident which unfortunately happened on the table by which she sustained some irreparable brain damage as a result of brain anoxia. Thus, it is admitted that the brain anoxia occurred during the time of operation. No doubt, the defendants put it as an unforeseen accident.

14. In "Medical Negligence" by Michael Jones at page 146, the author states thus: "The principle of res ipsa loquitur is in essence an evidential principle, which, in certain instances, allows the court to draw an inference of negligence. Although in come cases it has been suggested that the principle has the effect of reversing the burden of proof, the better view would seem to be that this is incorrect. The burden of proof remains with the plaintiff, but the defendant must adduce evidence to rebut the inference of negligence, in order to avoid a finding of liability. The maxim applies where occurs in circumstances in which accidents do not normally happen unless there has been negligence by someone. The fact of the accident itself may given rise to an interference of negligence by the defendant which, in the absence of evidence in rebuttal, would be sufficient to impose liability. There is no magic in the phrase res ipsa loquitur "the thing speaks for itself". It is simply a submission that the facts established a prima facie case against the defendant. The value of this principle is that is enables a plaintiff who has no knowledge, or insufficient knowledge, about how the accident occurred to rely on the accident itself and the surrounding circumstances as evidence of negligence, and prevents a defendant who does know what happened from avoiding responsibility simply by choosing not to give any evidence." The author referred to a decision in Crits v. Sylvester (1956) 1 DLR 502. There, is was stated that patients under a general anaesthetic are not aware of what is going on about them, and the facts are peculiarly within the knowledge of the anesthetist and others attending them. The author has also quoted the case of Mahon v. Osborne (1939) 2 KB 14. Goddard L.J. has stated thus: "The surgeon is in command of the operation, it is for him to decide what instruments, swabs and the like are to be used, and it is he who uses them. The patient, or if he dies, his representatives, can know nothing about this matter..... If therefore, a swab is left in the patient'' body, it seems to me clear that the surgeon is called on for an explanation....." In Cassidy v. Ministry of Health (1951) 2 KB 343, the plaintiff was suffering from Duputytren''s contraction of the third and fourth fingers

of his left hand. The hand was operated on and following the operation the hand and arm had to be kept in a rigid splint for 8 to 14 days. When the hand was released from the splint it was found to be virtually useless. The two fingers which had been operated on were completely stiff and the trouble had spread to the other two goods fingers as well. The Court of Appeal held that, on the basis that the hospital was responsible for all those who treated the plaintiff, the facts raised a case of res ipsa loquitur. Denning L.J. commented as thus: "If the plaintiff had to prove that some particular doctor or nurse was negligence, he would not be able to do it. But he was not put to that impossible task: he says, ''I went into the hospital to be cured of two stiff fingers. I have come out with four stiff fingers, and my hand is unless. That should not have happened if due care had been used. Explain it, if you can''. I am quite clearly of opinion that raises a prima facie case against the hospital authorities". It is true that medical treatment carries risks and that the occurrence of injury is not necessarily evidence of a lack of reasonable care. Nonethe less, even within medicine, there are some circumstances where harm to the patient does not normally occur in the absence of negligence and the maxim res ipsa loquitur will apply. The same author has referred to the decisions in Mahon v. Osborne (1939) 2 KB 14 and also Saunders v. Leeds Western Health Authority (1993) 4 M. L.R. 355. In the latter case, a child suffered cardiac arrest lasting 30 to 40 minutes while undergoing an operation, suffering quadriplegia. The evidence was that the heart of a fit child does not arrest under anaesthesia if proper case is taken in the anaesthetic and surgical processes. The defendants accepted that prima facie this was correct, but sought to explain the accident by suggesting that the child''s normal pulse has suddenly stopped. This evidence was rejected as mistaken, and the inevitable inference was that proper monitoring of the pulse would have given a forewarning of the arrest, and that in those circumstances the anaesthetic procedure, or the system for monitoring it on the execution of it was performed negligently. The author at page 152 in the same book gives a list of such circumstances in which the maxim res ipsa loquitur will apply, which includes that where following an operation under general anaesthetic, a patient in the recovery ward sustained brain damage caused by hypoxia for a period of four to five minutes. For this, the author refers to the case of Coyne v. Wigan Health Authority (1991) 2 M. L.R. 301. It is further stated by the author that there are circumstances where the maxim res ipsa loquitur will not apply, where the injury sustained by the plaintiff is of a kind recognised as an inherent risk of the treatment, since such accidents can occur without negligence.

15. The decision reported in Dr. Pinnamaneni Narasimha Rao Vs. Gundavarau Jayaprakasu and another, , deals with a case where a patient went for tonsillectomy operation. But after the operation, he became unconscious and suffered from dementia. Of course, it was a case where evidence was adduced by the Doctors. In that case, what happened was that about one and half hours after the plaintiff was taken inside the operation theatre, he was brought out in an unconscious state. The

plaintiff was kept in the E.N.T. ward of the Hospital. For the next three days he did not regain consciousness and thereafter, for another fifteen days he was not able to speak coherently. The treatment was entrusted to two other Doctors of the same Hospital. He was discharged from the Hospital on 28.8.1966 and his condition at the time of discharge was that he was just able to recognise the persons around and utter a few words. He could not even read or write numericals. He lost all the knowledge and learning acquired by him. The contention taken was that it was a misfortune, which rarely happens. In paragraph 16 of the judgment, the learned Judge, after considering the different aspects, quoted from the decision in Dr. Laxman Balkrishna Joshi Vs. Dr. Trimbak Bapu Godbole and Another, , which is as follows:

"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 person 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."

In that case, the learned Judge further in paragraph 17 said thus: Adjudged in the light of the legal practice referred to above and from the evidence available on record, which has already been discussed by me, it is clear that both the Surgeon and the Anaesthetist have failed to exercise reasonable care. There have been breach of duty on the part of the Anaesthetist by reason of his failure, an act per se negligence in the circumstances, to administer respiratory resuscitation by oxygenating the patient with a mask or bag. He exposed the plaintiff to the room temperature for about three minutes and this coupled with his failure to administer fresh breathes of oxygen before the tube and removed from the mount of the plaintiff had resulted in respiratory arrest: these are foreseeable factors. There is proximate connection between the Anaesthetist''s conduct and the resultant injury - cerebral anoxia. The learned trial Judge very rightly recording the finding after evaluating the evidence... "Recording the evidence, the court said that on the fact of the case, the Doctor was also negligent.

16. As to what is brain annoxia, we refer to Harrison''s "Principles of Internal Medicine", Ninth Edition at page 1977. Anoxic encephalopathy: This is one of the most frequent and disastrous accidents encountered in the emergency and operating rooms of every general hospital. The basis disorder is a lack of oxygen supply to the brain, the result of failure of the heart and circulation or of the lungs and respiration. Often both are responsible, and one cannot say which

predominates- hence the ambiguous allusion in clinical records to "cardiorespiratory failure". The condition which most often lead to anoxic encephalopathy are (1) suffocation (from drowning, strangulation, aspiration of vomitus or blood, surgical pack, or foreign body in the trachea) (2) CO poisoning,....." The author states that mild degrees of hypoxia induce only in-alternativeness, impaired judgment, and motor incoordination and have no lasting effects. With severe hypoxia or anoxia, as occurs with cardiac arrest, consciousness is lost within second, but recovery will be complete if breathing, oxygenation of blood, and cardiac action are restored within 3 to 5 min. If anoxia persists beyond this time, serious and permanent injury to the brain results, particularly to those parts with marginal efficiency of their circulation. Clinically, it is difficult to judge the precise degree of hypoxia since slight heart action or an imperceptible blood pressure may serve to maintain the circulation to some extent. Hence some individuals have made in excellent recovery after cerebral anoxia that allegedly lasted 8 to 10 min. or longer. An important clinical rule is that degrees of hypoxia which at no time abolish consciousness rarely if ever cause permanent damage to the nervous system". Regarding treatment, the author says that the treatment of anoxic encephalopathy is directed mainly at the prevention of a critical degree of hypoxic injury. After a clear airway is secured, artificial respiration, external thoracic cardiac massage, open-chest surgery, and the use of a cardiac defibrillator or pacemaker all have their place and every second counts in their prompt utilization. Once cardiac and pulmonary function are restored, there is some evidence that reducing cerebral metabolic requirements by continuous hypothermia for 48 to 72 h may prevent the delayed worsening referred to above. Oxygen may be of value during the first hours, etc.

17. Thus, we find that here it is a case where if proper care had been taken, damage to the brain could have been avoided. Whether proper care had been taken was not proved. Hence we are of the view that the court below was correct in holding that there was negligence on the part of the defendants.

18. The next point argued by the learned Government Pleader is regarding the liability of the State. According to the learned Government Pleader, they cannot be vicariously liable for the negligence of the Doctor and the Anaesthetist. We are of the view that this plea cannot be now encountered. There are a number of decisions regarding this aspect and very recently, the Supreme Court in State of Haryana & Ors. v. Santra AIR 2000 SCW 1491 , corresponding to State of Haryana and Others Vs. Smt. Santra, , had occasion to consider that question. That was a case where compensation was claimed for the birth of a child even after sterilisation operation under P.P.S. scheme. Dealing with the contention regarding State''s liability, the Supreme Court held as follows: "The contention as to the vicarious liability of the State for the negligence of its officers in performing the sterilisation operation cannot be accepted in view of the law settled by this Court in N. Nagendra Rao and Co. Vs. State of Andhra Pradesh, , Common Cause, A Registered Society Vs. Union of India and Others, and Achutrao Haribhau Khodwa and Others Vs. State of

Maharashtra and Others, The last case, which related to the fallout of a sterilisation operation, deals, like the two previous cases, with the question of vicarious liability of the State on account of medical negligence of a doctor in a Government Hospital. The theory of sovereign immunity was rejected". Further we are of the view that a patient is admitted to a hospital for the purpose of treatment. The patient is not particular about the Doctor and the other staff attending on him. He will have the confidence that goods treatment and good medical attendance will be given by the hospital and hence if any mishap happens due to the negligence of the Doctor or the staff, the hospital authorities will be responsible.

19. Charrlesworth & Percy on Negligence, Seventh Edition at page 551, states as follows: The distinction drawn by Kenedy L.J. between professional duties and ministerial or administrative duties has been disapproved, and, today, the law is that hospitals are liable for the negligence of the members of the hospital staff, whether they are nurses or doctors. Accordingly, when a patient in a hospital was injured by the negligence of the radiographer, a whole time servant of the hospital, in failing to provide adequate screening material during the use of X rays, the hospital was held liable. The hospital has also been held liable, when the house surgeon, who was unqualified, negligently injected a patient with cocaine in mistake for procaine, a harmless drug; when the medical staff were negligent in the post-operational treatment of a patient; when an anaesthetic was negligently administered by a physician on the hospital staff; and when the casualty officer failed to discover a depressed fracture...."

20. Regarding the question of sovereign immunity, the Supreme Court in the decision reported in Achutrao Haribhau Khodwa and Others Vs. State of Maharashtra and Others, , held as follows: "Running a hospital is a welfare activity undertaken by the Government but it is not an exclusive function or activity of the Government so as to be classified as one which could be regarded as being in exercise of its sovereign power. In Kasturi Lal case itself, in the passage which has been quoted hereinabove, this Court noticed that in pursuit of the welfare ideal the Government may enter into many commercial and other activities which have no relation to the traditional concept of government activity in exercise of sovereign power. Just as running of passenger buses for the benefit of general public is not a sovereign function, similarly the running of a hospital, where the members of the general public can come for treatment, cannot also be regarded as being an activity having a sovereign character. This being so, the State would be vicariously liable for the damages which may become payable on account of negligence of its doctors or other employees". Regarding negligence the Court quoted from Street Torts (1983) (7th Edn.) which is as follows:

"...Where unexplained accident occurs from a thing under the control of the defendant, and medical or other expert evidence shows that such accidents would not happen if proper care were used, there is at least evidence of negligencer for a

jury".

21. The next aspect is regarding the plea of the appellant in A.S. No. 240 of 1991. According to her, her name as given in the plaint is not correct. As a matter of fact, she was not employed in S.A.T. Hospital, Trivandrum at that time. Further she stated that she has not received summons. She came to know it only when the publication come in the newspaper. The additional documents produced will show that her name has not been correctly described in the plaint. Further, it also show that she was not employed in the S.A.T. Hospital. She filed a petition to set aside the ex parte decree in the lower court. That petition was dismissed as not pressed. Learned counsel for the respondents submits that since the petition was dismissed as not pressed, the question whether she was declared properly as ex parte cannot be agitated before this Court. On the other hand, learned counsel for the appellant submitted that the petition was not pressed because of the pendency of the appeal. We called for the above I.A. and the order thereon. Nothing is found there as to why the petition was not pressed. It is not stated that it is because of the pendency of the appeal that the petition was not pressed. When the petition is not pressed it means that the petitioner accepts that she was properly declared as ex parte.

22. Learned counsel for the respondents brought to our notice a decision of the Bombay High Court reported in Mangilal Rungta Vs. Manganese Ore (India) Ltd., , wherein it is stated that where an application to set aside the ex parte decree is dismissed and that is not challenged in appeal, then the appeal against the decree cannot be put forward. This is what the Division Bench of the Bombay High Court said:

"Can a grievance about proceeding ex parte be made again in this appeal is the first point. Now order rejecting an application under O.9R. 13 is appealable under S. 104 read with O.43, R. 1(d), CPC. Undoubtedly in appeal under S. 96 against the decree this grievance can be made. S. 105 CPC makes this position clear. Crux of the controversy is whether the same question can be allowed to be reopened in a case where other remedy has been availed of, the decision has gone against the defendant and the said decision has become final. In our view, this point must be answered against the defendant. Well recognised public policy of avoiding conflicting decisions on the same point is the reason behind this conclusion. Two High Courts (i) in the case of Badvel Chinna Asethu v. Vettipalli Kesavayya AIR 1920 Mad 962 and (ii) Munassar Bin Jan Nisar Yarjung (died) his Lrs. Marian Begum and Others Vs. Fatima Begum and Others, have taken the same view and it has our respectful concurrence."

We agree with the learned counsel for the respondents that as much as the petition under O.IX R.13 was dismissed as not pressed, the question regarding the ex parte nature of the decree cannot be agitated before this Court in the present appeal. Even otherwise we are of the view that the position will not improve because as we already stated no medical records are produced by the defendants to show how the

incident happened in 1971 and now we are in 2001. Nearly 30 years have lapsed. Excepting that the appellant can give oral evidence, no further improvement can be had. Hence, we are not inclined to set aside the ex parte decree.

23. The next question is regarding compensation. The court below has given compensation under the following heads: Rs. 1,58,395/- as the amount she would have received towards salary, if she were in service. Rs. 60,000/- towards pension for 10 years. Rs. 60,000/- will be the amount spent for a person to look after the seventh plaintiff. Rs. 20,000/- will be for pain and suffering. Rs. 10,000/- will be for loss of consortium to the husband. Rs. 10,000/- will be granted to plaintiffs 2 to 5 for loss of affection and Rs. 20,000/- towards gratuity. Thus a total amount of Rs. 3,38,395/- has been decreed. This is challenged by the appellants, while the respondent has filed a cross objection in A.S. No. 513 of 1991 that he would have awarded Rs. 5 lakhs. The first question is regarding the salary. A statement was filed to show the salary of the seventh plaintiff, if she were in service. The total amount comes to Rs. 2,06,392/-. But the court below reduced it by 40% stating that this would have been spent for the seventh plaintiff for herself. We don''t think, this reduction is proper. Taking into account the fact that the seventh plaintiff is now bedridden and the entire expenses are to be incurred for her, we are of the view that she is entitled to the entire amount of Rs. 2,06,392/-. So far as the other amount awarded is concerned, we are of the view that it is just and proper. Nothing has been brought to our notice that the amount awarded is not correct.

24. Thus, in modification of the decree of the court below, we decree a sum of Rs. 3,80,944/- instead of Rs. 3,38,395/- awarded by the Court below. The Court below has decreed the suit jointly and severally against defendants 1, 2, 3, 5 and 6. Sixth defendant had preferred an appeal. But since the Government could not produce any records she was not able to adduce any evidence to show that there was not negligence. Further, notice was not properly served on her. Hence, we absolve her from the liability to pay the amount. The decree will be against defendants 1, 2, 3 and 5 jointly and severally.

A. Lekshmikutty, J.

I agree.

25. The joint family system once prevailed in the State has undergone substantial change due to the social outlook and State policy developed in the past two decades. The concept of family welfare has given emphasis on the reduction of child birth and Government had encouraged birth control by even providing incentive. The State has organised scheme for promoting awareness among the people on the need for building small families with healthy children. Medical termination of pregnancy in deserving case is also made lawful. Contraceptive devices are also made familiar to the people through Government media. Woman has become entitled to special status and recognition in the society because of her biological

specialisation and privilege to bear and rear children. Her status assumed social and economic dimension, when Thavazhy system developed and marumakkathayam got established. Now the Marumakkathayam system had abolished by law. Nuclear family has become an acceptable idea and women citizen are solicited to shoulder the pressure of the demand for preventing child birth. Post partem sterilization is advisable for the couple who no longer deserve to have any addition to her family. The surgical process involved in the sterilization is simplified if it is done along with the delivery and family doctors in appropriate cases advice the couple to adopt it. The sixth respondent in the case on hand has become a victim to the sterilization in quite unfortunate circumstances considered and discussed above. She resorted to the P.P.S. considering the welfare of the family as she had already given birth to four children. But ended in attracting irreducible agony to herself and her family. She was not even have a glance at her last born child and she has become destined to live like a vegetable. Left alone to suffer all the miseries in silence due to the negligence of the doctors.

In the result, A.S. No. 513 of 1991 is dismissed wit costs and the Cross Objection is allowed in part with proportionate costs. A.S. No. 240 of 1991 is concerned, the decree of the court below making the appellant liable to pay the amount of compensation is set aside. No costs.