JAI PRAKASH SAINI Vs DIRECTOR, RAJIV GANDHI CANCER INSTITUTE AND RESEARCH CENTRE

Court: NATIONAL CONSUMER DISPUTES REDRESSAL COMMISSION

Date of Decision: Dec. 23, 2002

Citation: 2003 1 CPJ 305 : 2003 2 CPR 202 : 2003 3 CLT 32

Hon'ble Judges: Lokeshwar Prasad , Rumnita Mittal J.

Final Decision: Complaint dismissed

Judgement

1. THE complainant, Shri Jai Prakash Saini, has filed the present complaint under Section 17 of the Consumer Protection Act, 1986 (hereinafter

referred to as "the Act"), averring therein that the complainant, an ex-serviceman, re-employed with the Reserve Bank of India, New Delhi as a

Clerk-cum-Coin Note Examiner, in August, 1997 suffered stomach ailment, consulted the Medical Officer of the Reserve Bank of India, New

Delhi, for treatment, who, after examining the complainant, gave treatment which provided only temporary relief to the complainant and gradually

two glands on the neck and one gland on the left side of the face of the complainant appeared. THE Medical Officer of the Reserve Bank of India,

under whose treatment the complainant was, after a few days of medication advised the complainant to consult some surgical specialist. On the

advice of the Medical Officer of the Reserve Bank of India, the complainant approached the doctor at the Armed Forces Clinic (for short "the

AFC"), at New Delhi, on 26th August, 1997, where a surgical specialist examined the complainant and a number of medical tests were also

conducted, which included Ultra Sound, X-ray of full chest, Urine Blood, etc. It is stated that in the Ultra Sound report dated 1st September,

1997 some abnormal features were noticed in the abdomen and FNAC report dated 29th August, 1997 diagnosed the complainant as a case of

''Hodgkin''s Disease'' (Cancer).

2. IT is stated that the above said FNAC report was shown by the complainant to Dr. Arun Aggarwal, who immediately referred the complainant,

on 30th August, 1997, for medical check up/treatment to Rajiv Gandhi Cancer Institute and Research Centre (for short "the RGCIRC). IT is

further stated that the complainant went to RGCIRC on 1st September, 1997, where after payment of usual fees he was examined by Dr. D.C.

Dowal, a specialist in the field of cancer. IT is stated that Dr. D.C. Dowal, after examining the reports, asked the complainant to take an early date

for biopsy at RGCIRC to ascertain early detection of cancer. IT is statd that the complainant, without losing much time, immediately reported at

the RGCIRC for biopsy, knowing fully well that if detected early, the cancer is fully curable. IT is stated that the complainant was asked to come

on 3rd September, 1997 for biopsy by the authorities of RGCIRC. On 3rd September, 1997, biopsy could not be done as the complainant felt

severe pain in his left ear and so the complainant went to RGCIRC on 4th September, 1997, and on that day was admitted for biopsy which was

done on the same day under general anaesthesia and the report of biopsy was made available to the complainant on 5th September, 1997. In the

said report, the complainant was diagnosed as a case of ''Lympho-epithelioma (Mickulitz disease) parotid gland''. IT is stated that the report of

biopsy dated 5th September, 1997, conducted at the RGCIRC, was contrary to the report of FNAC of AFC, which caused confusion, acute

tension and mental agony to the complainant.

It is further stated that the complainant reported to Dr. D.C. Dowal (OP No. 2), on 5th September, 1997, with the biopsy report and Dr. D.C.

Dowal, after seeing the above said biopsy report, told the complainant that the report did not show any trace of cancer, that the complainant did

not require any treatment and that the complainant was advised to come for examination only if the complainant felt pain or if there was any

enlargement of the glands. It is stated that the complainant again went to RGCIRC for medical check up/treatment on 12th September, 1997, as

the complainant was feeling increasing heaviness in his abdomen and was facing problem in passing urine. The complainant, on the above visit, also

showed to Dr. D.C. Dowal (OP No. 2) the second Ultra Sound report dated 9th September, 1997 of General William Masonic Polyclinic (for

short, ''the GWMP''). It is stated that even after perusing the above report, Dr. D.C. Dowal and also Dr. A.K. Vaid who was also present,

advised the complainant that no treatment was required for complainant''s ailment. It is stated that Dr. A.K. Vaid told the complainant to bring

FNAC Slide from AFC for his review. It is stated that the complainant again consulted Dr. D.C. Dowal and also Dr. R. N. Verma (OP No. 3),

the Chief of Laboratory Services, for their opinion and treatment and Dr. R.N. Verma very clearly told that the complainant required no treatment

and that the disease would disappear on its own. It is also stated that the complainant was advised not to visit RGCIRC or any other hospital for

his ailment as the same would get cured after a passage of time.

It is stated that thereafter the complainant consulted the Medical Officer of the Reserve Bank of India, who advised the complainant to visit All

India Institute of Medical Sciences (for short "the AIIMS"). The complainant, thereafter, visited AIIMS on 17th September, 1997, where from he

was referred to the Institute Rotary Cancer Hospital (for short "the IRCH"), New Delhi, for opinion. The complainant reported to the above said

IRCH on the same day i.e. on 17th September, 1997, where some clinical tests were carried out, including biopsy. The said IRCH then gave its

report on 30th September, 1997, which was contrary to the report given by RGCIRC. It is stated that while clinical/biopsy tests were being

carried out at AIIMS, the complainant took Homeopathy medicines from the Government Homeopathy Dispensary, Sarojini Nagar, New Delhi,

for a short period but the complainant did not get any relief. It is stated that at AIIMS the complainant was given six cycles of Chemotherapy

treatment for Stage-3 cancer, i.e. Non-Hodgkin"s Lyphoma (NHL) Stage-3 on 10.10.1997, 31.10.1997, 28.11.1997, 19.12.1997, 9.1.1998

and 5.2.1998. It is stated that the complainant was still undergoing treatment/follow up at AIIMS.

3. IT is stated that the complainant had been under intense tension on account of the dreaded disease(cancer) and also due to the contradictory

reports of AFC and that of AIIMS on the one side and that of RGCIRC on the other side. IT is stated that at the instance of the complainant, Dr.

Jogi Mehrotra, the Chief Executive of RGCIRC, agreed to seek opinion/confirmation for Tata Memorial Hospital (for short "the TMH), Mumbai,

and on 10th November, 1997 the paraffin blocks/slides of biopsy were sent by RGCIRC to TMH, Mumbai. IT is stated that the TMH, Mumbai,

sent its report dated 1st December, 1997, which was received by RGCIRC on 13th January, 1998. The above said report of TMH, Mumbai,

which was forwarded to RGCAIRC, reads as under :

features are suggestive of low grade malt associated Non-Hodgkin"s Lymphoma of salvary glands

It is stated that AFC, New Delhi, based on FNAC slides and subsequently the concerned authorities of AIIMS, New Delhi and that of TMH,

Mumbai, on the basis of biopsy slide/paraffin bolcks of RGCIRC, had correctly diagonsed the complainant as a case of cancer, but the concerned

functionaries of RGCIRC (OP No. 1) carelessly and negligently diagnosed the case as a non-cancer case and advised the complainant that no

treatment was required. It is stated that had the RGCIRC correctly diagnosed the ailment of the complainant as cancer in their report dated 5th

September, 1997, the treatment of the complainant could have started at RGCIRC at an early stage of cancer, i.e. in the first week of September,

1997, whereas the same could start only on 10th October, 1997 (the date on which first cycle of Chemotherapy was given at AIIMS). It is stated

that thus there was clearly a time loss of at least one month due to the negligence/carelessness on the part of the concerned functionaries of

RGCIRC. It is stated that had the treatment of the complainant started at an early stage at RGCIRC, the same would have lasted for a shorter

period and the chances of cure would have been better. It is stated that due to the negligence and carelessness on the part of the opposite parties,

complainant''s wife, children and mother were also under severe stress and strain, which adversely affected the health and studies of complainant''s

children, besides giving then mental agony to complainant''s wife and mother.

4. IT is stated that complainant, vide registered letter dated 2nd February, 1998, requested the Director and Chairman of RGCIRC, to investigate

about the wrong diagnosis, which was followed by a reminder dated 26th February, 1998, but no reply/response was received from the end of the

OP No. 1. IT is stated that on not receiving any reply/response from the end of opposite parties, the complainant got served a legal notice dated

5th March, 1998 on the opposite parties, demanding a compensation of Rs. 12,50,000/- for wrong diagnosis and endangering the life of the

complainant. IT is stated that the complainant had not received any reply to the above said notice. Alleging deficiency in service on the part of the

opposite parties, it has been prayed by the complainant that a compensation of Rs. 12,50,000/- be awarded to him to be paid by the opposite

parties, for causing pain, mental agony, tension, harassment and hardship.

The claim of the complainant, in the present complaint, is being resisted by the opposite parties, who have filed a joint reply/written version. In the

reply/written version, filed on behalf of the opposite parties, the opposite parties have taken certain preliminary objections with regard to the

maintainability of the complaint filed by the complainant. In the preliminary objections taken by the opposite parties, it is stated that in the present

complaint prima facie the complainant has no cause of action; that the complaint filed by the complainant is nothing less than a fraud and therefore

merits dismissal with compensatory costs under Section 26 of the Act; that the same is premature; that the allegations of wrong diagnosis are vague

and false and that the complaint has been filed to bring bad name to the noble profession.

On merits, while denying each and every allegation, levelled by the complainant in the complaint, it is stated that the opposite parties, while

diagnosing and thereafter treating the complainant, had acted to the best of their skill and ability, that there was no negligence, that the allegation of

negligence levelled by the complainant are baseless, vague and irrelevant and the complaint has been filed with the ulterior motive of extracting

necessary gains and to gain easy money. It is stated that even the ''Fine Needle Aspiration Cytology'' (FNAC) report dated 29th August, 1997 of

AFC was not conclusive because the above said report says ""however a fresh biopsy for confirmation."" It is stated that the nature of ailment with

which the complainant suffered was such which required extensive tests for purposes of diagnosis and as a matter of fact the complainant did not

co-operate with the opposite parties in the matter of diagnosis and treatment of his illness. Even the follow-up action was not taken up by the

complainant as advised. It is stated that for proper diagnosis, the FNAC test cannot be taken as conclusive proof because as per the comment of

international literature the following four conditions of the disease are :

(a) Benign Lymphoepithelial Lessions; (b) Sajogern''s disease (Mickulitz''s disease); (c) Malignant Lymphoma (Malt Associated Non Hodgkin''s

Lymphoma Salivary Gland); (d) Poorly differentiated Carcinoma (Lymphoepithelioma) of Salivary Gland Sipgerm''s Disease (Mickulitzs disease)

may be associated or transformed into benign Lymphoepioathlian lession, malignant lymphoma or Lympho-epithelioma.

5. IT is stated that these four conditions have the diagnostic problems even in the experienced hands as clinical pictures overlap in these conditions.

At times morphologically, it may be difficult to differntiate these four conditions from each other. To perform these tests it may take many days as

Tata Memorial Hospital has taken. Most benign lymphoepithelial lesions appear in association with Sjogren''s disease and one-third to one-half of

these patients with classically apparent salivary gland enlargement show features of benign lymphoepihelial lesion as per the journal/book of the

text. The Sjogren''s disease and benign lymphoepithelial lesions are a lymphoproliferative disorders that increase chances of malignant

transformation as per the journal/text. Frequent association of benign lymphoepithelial lesions with malignant neoplasm and their possible

transformation to lymphoma and carcinoma is well known. IT is proven that benign lymphoepithelial lesion can be associated with a variety of other

primary salivary gland diseases and that the lesions do not always remain benign. IT is stated that like other aspects of this lesion, its patheogenesis

remains controversial. IT is submitted that in the instant case for confirmation of disease other investigations were to be carried out which was very

clearly explained to the complainant that he has to be kept under observations but the complainant did not cooperate by giving appropriate time

and of his own discontinued attending the OP institute (OP No. 1) to other places and started their treatment. IT is stated by the opposite parties in

their joint reply/written version that the complaint filed by the complainant is nothing less than a mischief and a crude attempt to blackmail the

opposite parties by blatantly abusing and misusing the process of law. IT has been prayed that the present complaint, filed by the complainant, be

dismissed with exemplary costs under Section 26 of the Act, so that the same may act as an effective deterrent to the litigants.

6. THE complainant has filed a rejoinder to the reply/written version filed on behalf of the opposite parties controverting the contentions advanced

by the opposite parties and reiterating the averments made in the complaint.

The parties have adduced evidence by means of affidavits. The complainant, Shri Jai Prakash Saini, has filed his own affidavit, dated 30.9.1999 by

way of evidence, whereas on behalf of the opposite parties affidavits of Dr. R.N. Verma (OP No. 3) and Dr. D.C. Dowal (OP No. 2) have been

filed. The parties have also filed written submissions in support of their respective contentions.

We have heard the learned Counsel for the complainant, the learned Counsel for the opposite parties and have also carefully gone through the

documents/material on record, including the written submissions/arguments filed on behalf of both the parties. On the basis of pleas taken by the

parties, the contentions advanced at the Bar and the material placed on record, the following questions arise for our consideration in the present

complaint :

(1) Whether the complainant in the present complaint, is a ''consumer'' within the meaning of Section 2(1) (d) (ii) of the Act ? (2) Whether the

opposite parties, in the given facts, were rendering any ''service'' to the complainant within the meaning of Section 2(1)(o) of the Act ? (3) Whether

was there any ''deficiency in service'' (negligence) on the part of opposite parties within the meaning of Section 2(1)(g) of the Act ? and (4)

Whether the complainant, is entitled to any relief ? If so, to what extent and from which of the opposite parties ?

Question Nos. 1 and 2 :

7. SINCE the above mentioned questions are inter-connected, we would be discussing the same jointly. The term ''consumer'' has been defined in

Section 2(1)(d) of the Act, and the same reads as under : ""Consumer"" means any person who-

(i) buys any goods for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred

payment, and includes any user of such goods other than the person who buys such goods for consideration paid or promised or partly paid or

partly promised, or under any system of deferred payment when such use is made with the approval of such person, but does not include a person

who obtains such goods for resale or for any commercial purpose; or

(ii) hires or avails of any services for a consideration which has been paid or promised or partly paid and partly promised, or under any system of

deferred payment and includes any beneficiary of such services other than the person who hires or avails of the services for consideration paid or

promised, or partly paid and partly promised, or under any system of deferred payment, when such services are availed of with the approval of the

first mentioned person; Explanation.-For the purposes of Sub-clause (i) ""commercial purpose"" does not include use by a consumer of goods

bought and used by him exclusively for the purpose of earning his livelihood, by means of self-employment.

On a bare perusal of the above provisions of the Act, it is apparent that the definition of the word ""consumer"", as defined in Clause (d) of Sub-

section (1) of Section 2 of the Act, is of a wide sweep which also includes a person who hires or avails of any service for a consideration which

has been paid or promised or partly paid or partly promised or under any system of deferred payment and also includes any beneficiary of such

service. The above provision of the Act, as contained in Section 2(1)(d) of the Act, came up for consideration before the Hon"ble Supreme Court

in case Lucknow Development Authority v. M.K. Gupta, III (1993) Consumer Protection Judgments 7 (SC)=(1986-95) Consumer 278 (SC),

and their Lordships of the Supreme Court in the above said case have held :

To begin with the Preamble of the Act which can afford useful assistance to ascertain the legislative intention, it was enacted, to provide for the

protection of the interest of consumers. Use of the word ''protection'' furnishes key to the minds of makers of the Act. Various definitions and

provisions which elaborately attempt to achieve this objective have to be construed in this light without departing from the settled view that a

preamble cannot control otherwise plain meaning of a provision. In fact, the law meets long felt necessity of protecting the common man from such

wrongs for which the remedy under ordinary law for various reasons has become illusory ... The word ''consumer'' is a comprehensive expression.

It extends from person who buys on, commodity to consume either as eatable or otherwise from a shop, business, house, corporation, store, fair

price shop to use of private or public services. In Oxford Dictionary a consumer is defined as a ''purchaser of goods or services''. In Black''s Law

Dictionary it is explained to mean, ''one who consumes. Individuals who purchase, use, maintain and dispose of products and services. A member

of that broad class of people who are affected by pricing policies, financing practices, quality of goods and services, credit reporting, debt

collection and other trade practices for which State and Federal Consumer Protection Laws are enacted ''xxx xxx xxx'' The Legislature has taken

precaution not only to define ''complaint'', ''complainant'', ''consumer'', but even to mention in detail what would amount to unfair trade practices by

giving an elaborate definition in Clause (r) and even to define ''defect'' and ''deficiency'' by Clauses (f) and (g) for which a consumer can approach

the Commission. The Act thus aims to protect the economic interest of a consumer as understood in commercial sense as a purchase of goods and

in the larger sense of user of services.

8. AS already stated, the opposite parties in the written version inter alia have taken a preliminary objection that in the given facts, the opposite

parties were not rendering any ''service'' to the complainants within the meaning of Section 2(1)(o) of the Act. This very question also came up for

consideration before the Hon''ble Supreme Court - in case Indian Medical ASsociation v. V.P. Shanta & Ors., III (1995) Consumer Protection

Judgments 1 (SC)=JT 1995 (8) SC 119. In the above said case, it was inter alia pleaded before the Hon''ble Supreme Court that the medical

practitioners belonged to medical profession and were subject to the disciplinary control of the Medical Council of India and/or State Medical

Councils, constituted under the provisions of the Indian Medical Council Act and, therefore, were excluded from the ambit of the Act and the

service rendered to a patient by a medical practitioner did not fall within the ambit and scope of ''service'' as defined in Section 2(1)(o) of the Act.

Their Lordships of the Supreme Court, in the above landmark decision, while rejecting the plea taken by the appellants, held : ""On the basis of the

above discussions we arrive at the following conclusions :

1. Service rendered to a patient by a medical practitioner (except where the doctor renders service free of charge to every patient or under a

contract of personal service), by way of consultation, diagnosis and treatment, both medicinal and surgical, would fall within the ambit of ''service''

as defined in Section 2(1)(o) of the Act.

2. The fact that medical practitioners belong to the medical profession and are subject to the disciplinary control of the Medical Council of India

and/or State Medical Councils, constituted under the provisions of the Indian Medical Council Act would not exclude the services rendered by

them from the ambit of the Act.

3. A contract of personal service has to be distinguish from a ''contract for personal service. In the absence of a relationship of master and servant

between the patient and medical practitioner, the service rendered by a medical practitioner to the patient cannot be regarded as service rendered

under a ''contract of personal services''. Such service is service rendered under a ''contract for personal services'' and is not covered by

exclusionary clause of the definition of "service" contained in Section 2(1)(o) of the Act.

4. The expression "contract of personal service" in Section 2(1)(o) of the Act cannot be confined to contracts for employment of domestic

servants only and the said expression would include the employment of a medical officer for the purpose of rendering medical services to the

employer. The services rendered by a medical officer to his employer under the contract of employment would be outside the purview of "service"

as defined in Section 2(1)(o) of the Act.

5. Service rendered free of charge by a medical practitioner attached to a hospital/Nursing Home or a medical officer employed in a

hospital/Nursing Home where such services are rendered free of charge to everybody, would not be "service" as defined in Section 2 (1)(o) of the

Act. The payment of a token amount for registration purpose only at the hospital/nursing home would not alter the position.

6. Service rendered at a non-Government hospital/Nursing Home where no charge whatsoever is made from any person availing the service and

all patients (rich and poor) are given free service is outside the purview of the expression "service" as defined in Section 2(1)(o) of the Act. The

payment of a token amount for registration purpose only at the hospital/Nursing Home would not alter the position.

7. Service rendered at a non-Government hospital/Nursing Home where charges are required to be paid by the person availing such services falls

within the purview of the expression "service" as defined in Section 2(1)(o) of the Act.

8. Services rendered at a non-Government hospital/Nursing Home where charges are required to be paid by persons who are in a position to pay

and persons who cannot afford to pay are rendered service free of charge would fall within the ambit of the expression "service" as defined in

Section 2(1)(o) of the Act irrespective of the fact that the service is rendered free of charge to persons who are not in a position to pay for such

services. Free service, would also be "service" and the recipient a "consumer" under the Act.

9. Service rendered at a Government hospital/Health Centre/dispensary where no charge whatsoever is made from any person availing the services

and all patients (rich and poor) are given free service - is outside the purview of the expression "service" as defined in Section 2(1)(o) of the Act.

The payment of a token amount for registration purpose only at the hospital/Nursing Home would not alter the position.

10. Service rendered at a Government hospital/health centre/dispensary where services are rendered on payment of chargers and also rendered

free of charge to other persons availing such services would fall within the ambit of the expression"service" as defined in Section 2(1)(o) of the Act

irrespective of the fact that the service is rendered free of charge to persons who do not pay for such service. Free service would also be "service"

and the recipient a "consumer" under the Act.

11. Service rendered by a medical practitioner or hospital/Nursing Home cannot be regarded as service rendered free of charge, if the person

availing the service has taken an Insurance Policy for medical care where under the charges for consultation, diagnosis and medical treatment are

borne by the Insurance Company and such service would fall within the ambit of "service" as defined in Section 2(1)(o) of the Act.

12. Similarly, where, as apart of the conditions of service, the employer bears the expenses of medical treatment of an employee and his family

members dependent on him, the service rendered to such an employee and his family members by a medical practitioner or a hospital/Nursing

Home would not be free of charge and would constitute "service" under Section 2(1)(o) of the Act.

On the basis of material on record it is not in dispute that RGCIRC is a non-government hospital (Medical Research Centre) where patients, on

payment of fees (consideration) are diagnosed and treated for cancer and Dr. D.C. Dowal (OP No. 2) and Dr. R.N. Verma (OP No. 3) are

treating the patients in the above said RGCIRC (OP No. 1). Thus, in the given facts, it is not in dispute that the opposite parties are rendering

service to the patients for consideration (on payment of fees). On the basis of material on record, it is also not in dispute that the complainant, Shri

Jai Prakash Saini, approached OP No. 1 on 1st September, 1997 for diagnosis and treatment of the ailment with which he was suffering and had

paid a sum of Rs. 25/- as registration fees and other sum of Rs. 200/- as consulation fees, vide receipt No. 9730350 dated 1.9.1997. It is also not

in dispute that in the RGCIRC (OP No. 1), the complainant was examined on 1.9.1997 by Dr. D.C. Dowal (OP No. 2) and OP No. 2 advised

the complainant for biopsy at RGCIRC (OP No. 1). The biopsy of the complainant was done on 4.9.1997 at RGCIRC (OP No. 1) and the

report of biopsy was given on 5.9.1997. The complainant was again examined by OP No. 2 on 5.9.1997 and the complainant again consulted OP

No. 2 and OP No. 3 (Dr. R.N. Verma), the Chief of Laboratory Services of OP No. 1, for opinion and treatment. In the presence of the above

undisputed facts, it is apparent that the complainant had availed of the services of the opposite parties, on payment of fees (consideration), for

treatment. In the light of the provisions contained in the Act, law laid down by the Hon''ble Supreme Court in the above noted decisions and in the

presence of the above facts, the correctness of which is not disputed by any of the parties, we have no hesitation in holding that the complainant is

a "consumer" within the meaning of Section 2(1)(d)(ii) of the Act and OP Nos. 1, 2 and 3 were rendering "service" within the meaning of Section

2(1)(o) of the Act. Question No. 3 :

The case of the complainant, in the present complaint, as already stated, in brief, is that there was negligence/deficiency in service on the part of the

opposite parties in diagnosing the ailment and thereafter treating him. On the other hand, it is contended by the learned Counsel for the opposite

parties that while diagnosing and treating the complainant, the opposite parties were not at all negligent and have diagnosed and treated the

complainant with reasonable standard of care and competence expected from any Medical Practitioner while treating a patient. It was contended

by him that as a matter of fact the opposite parties were not lacking in any manner whatsoever and it was the non-cooperative attitude of the

complainant which was responsible for the alleged shortcomings, if any, because the complainant did not follow the instructions and did not take

the follow-up action and on his own had gone even to the extent of consulting and taking treatment from a Homeopathic Dispensary at Sarojini

Nagar, New Delhi.

9. BEFORE discussing the merits of the above aspect, we would like to first examine the legal position with regard to duties and obligations of a

medical practitioner towards his patients.

10. THE civil liability of medical men towards their patient 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 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 unskilfulness..... 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 rare.... (See Charlesworth on Negligence, Fifty Edn., Pages 181 and 182,

Para 272).

(Underlined by us)

Lord Denning M.R. rightly pointed out in Hucks v. Cole, 1968 118 New Law Journal 469, as follows :

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 skill 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 inexcusable.

(Emphasis supplied)

In Halsbury"s Laws of England, Volume 26, at Page 17, the law is stated as under :

Negligence : duties owed to patient-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. Such a person, whether he is a registered medical practitioner or not, 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; and a duty of care in his administration of that treatment. A breach of any of these duties will support an action for negligence by the patient.

Degree of skill and care required-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 : a person is not liable in negligence because someone else of better skill and knowledge

would have prescribed different treatment or operated in a different way; nor is he guilty of negligence if he has acted in accordance with a practice

accepted as proper by a reasonable body of medical men skilled in that particular art although a body of adverse opinion also existed among

medical men.

11. THE principles so stated by Halsbury were affirmed by the Supreme Court in Dr. Laxman Balkrishna Joshi v. Dr. Trimback Bapu Godbole,

AIR 1969 SC 128 at p. 131.

Taylor"s Medical Jurispudence, 12th Edition, at Page 55, states :

Doctors must be profoundly indebted to Lord Justice Denning for his summing up in the case of Hatcher v. Black. The details of the negligence

alleged are of no importance to the principles involved, but the generalization made in the Judge"s summing up speech was vital to a fair and just

appraisal of doctors responsibilities. He said, in a hospital, when a person was ill and came in for treatment, no matter what care was used, there

was always a risk; and it would be wrong and bad law to say that simply because a mishap occurred the hospital and doctors were liable "...." The

Jury must not, therefore, find him negligent simply because one of the risks inherent in an operation actually took place, or because in a matter of

opinion he made an error of judgment. They should find him guilty when he had fallen short of the "standard of reasonable medical care, when he

was deserving of censure.

12. IT is also necessary to bear in mind the following warning given to Courts by Godard L.J., as he then was, in Mahon v. Osborne (1939) 2 KB

14 at p. 47 :

I would not for a moment attempt to define in vacuo the extent of a surgeon"s duty in an operation beyond saying that he must use reasonable

care nor can I imagine anything more disastrous to the community than to leave it to a Jury or to a Judge, if sitting alone, to lay down what it is

proper to do in any particular case without the guidance of witnesses who are qualified to speak on the subject.

Moreover, it is a principle of civil liability, subject only to qualifications which have no present relevance, that a man must be considered to be

responsible for the probable consequences of his act. To demand more of him is too harsh to rule. In the law of negligence, the test whether the

consequences were reasonably foreseeable is a criterion alike of culpability and of compensation, as held by the Privy Council in Overseas

Tanskship (U.K.) Ltd. v. Morts Dock and Engineering Co. Ltd., (1961) 1 ALL. ER 404.

In Lord Nathan"s Medical Negligence, 1957 Edition, the following observations of Lord President Clyde in Hunter v. Hanley, (1955) SLT 213 is

relied upon at page 21 :

The true test for establishing negligence in diagnosis or treatment on the part of a doctor is whether he has been proved to be guilty of such failure

as no doctor of ordinary skill would be guilty of it acting with reasonable care.

At page 22 of the Book, it is stated :

The medical man must, therefore, exercise reasonable skill and care, measured by the standard of what is reasonably to be expected from the

ordinarily competent practitioner of his class. If he does so, he will have discharged his duty and cannot be held answerable even if the treatment

has untoward results. For the medical man is not an insurer; he does not warrant that his treatment will succeed or that he will perform cure.

Naturally he will not be liable if, by reason of some peculiarity in the frame of constitution of a patient which was not reasonably to be anticipated, a

treatment which, in ordinary circumstances, would be sound has unforeseen results. But will not even be liable for every slip or accident. The

standard of care which the law requires is not insurance against accidental slips. It is such a degree of care as a normally skilful member of the

profession may reasonably be expected to exercise in the actual circumstances of the case in question. It is not every slip or mistake which imports

negligence.

13. THEIR Lordships of the Hon''ble Supreme Court in case Achutrao Hari Bhavu Khodwa & Ors. v. State of Maharashtra & Ors., (1996) 2

SCC 634, while placing reliance on earlier decisions of the Hon''ble Supreme Court, including the decision in the case of Indian Medical

Association (supra), have held :

The skill of medical practitioners differs from doctor to doctor. The very nature of the profession is such that there may be more than one course

of treatment which may be advisable for treating a patient. Courts would indeed be slow in attributing negligence on the part of a doctor if he has

performed his duties to the best of his ability and with due care and caution. Medical opinion may differ with regard to the course of action to be

taken by a doctor treating a patient, but as long as a doctor acts in a manner which is acceptable to the medical profession and the Court finds that

he has attended on the patient with due care, skill and diligence and if the patient still does not survive or suffers a permanent ailment, it would be

difficult to hold the doctor to be guilty of negligence.

(Emphasis supplied)

14. THUS, in order to decide whether negligence is established in any particular case, the alleged act or omission or course of conduct,

complained of, must be judged not by ideal standards nor in the abstract but against the background of the circumstances in which the treatment in

question was given and the true test for establishing negligence on the part of a doctor is as to whether he has been proved to be guilty of such

failure as no doctor of ordinary skill would be guilty of if acting with reasonable care. Merely because a medical procedure fails, it cannot be stated

that the medical practitioner is guilty of negligence unless it is proved that the medical practitioner did not act with sufficient care and skill and the

burden of proving the same rests upon the person who asserts it. The duty of a medical practitioner arises from the fact that he does something to a

human being which is likely to cause physical damages unless it is not done with proper care and skill. There is no question of warranty,

undertaking or perfection of a 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. As per the (sic.) charged with negligence can clear himself if he shows that he acted in

accordance with the general and approved practice. It is not required in discharge of his duty of care that he should use the highest degree of skill,

since they may never be acquired. Even deviation from normal professional practice is not necessarily in all cases evidence of negligence.

If the above criterion is applied to the present case, it is noticed by us that the complainant on the basis of FNAC report dated 29.8.1997 of the

AFC, was diagnosed as the case of Hodgkin''s disease (Cancer) and was referred for further investigation/diagnosis to O.P. No. 1, a Medical

Institute and Research Centre for Cancer. In the Research Centre of O.P. No. 1, the complainant was examined by O.P. No. 2, a Specialist in the

field of Cancer, who after examining the complainant and the documents/papers, advised for biopsy. The biopsy was done and on the basis of the

biopsy report, advice was tendered to the complainant regarding the line of treatment to be followed by him. The allegation of the complainant in

the present complaint, as contended by the learned Counsel for the complainant before us, in brief, is two fold - firstly the report of biopsy

conducted by O.P. No. 1 was contrary to the FNAC report of the AFC and secondly O.P. No. 2, a cancer Specialist in the Research Centre of

O.P. No. 1, was negligent in not diagnosing the disease of the complainant properly and thereafter in not treating him properly. As per settled law,

the onus to prove that there was negligence/deficiency in service on the part of the opposite parties, while diagnosing and treating the complainant,

lay heavily on the complainant. The complainant in the given facts has failed to discharge the onus which was on him. Moreover, in the case of

medical negligence, again as per settled law, as already discussed only a fair and reasonable standard of care and competence is expected from a

medical practitioner while treating his patient. A doctor while treating his patient is not to be held negligent simply because something went wrong.

In the RGCIRC (O.P. No. 1), the complainant, soon after registration, was referred to O.P. No. 2, who is a specialist in the field of cancer, as per

complainant''s own averments. Thus, no negligence can be attributed on the part of O.P. No. 1. O.P. No. 2 also followed the prescribed

procedure in diagnosing the ailment and thereafter following the line of treatment. The complainant was advised for biopsy and on the basis of the

biopsy report the line of treatment was advised to the complainant. Thus, no fault can be found with the conduct of O.P. No. 2 in diagnosing and

treating the complainant. Moreover, the disease, for the diagnosis and treatment of which the complainant was referred to O.P. No. 1, was not an

ordinary disease. The diagnosis of the same is not that easy like other common diseases. Even the FNAC report, relied upon by the complainant,

was not conclusive because the said report inter alia stated that a fresh biopsy for confirmation was required. Even the report given by the

authorities of AIIMS was not conclusive. The same was only suggestive and the treatment given by the authorities of AIIMS was not for the

disease diagnosed by FNAC report dated 29.8.1997 of the AFC. The case as set up by the opposite parties in their defence, is that the treatment

for the type of cancer with which the complainant diagnosed to be suffering from, was to be given only after the confirmation of the diagnosis of the

disease and not prior to that on account of other side effects. It is stated that even the authorities of TMH took more than two months to give their

report which is also not conclusive but only suggestive and as the report was not confirmed but was only suggestive, the same was required to be

confirmed by molecular genetic study for monoclonality. It is stated that as the diagnosis of TMH was also suggestive, therefore, there was no

urgency to start the cancer treatment immediately in the first instance by RGCIRC and the opposite parties had asked for clarification, vide their

FAX letter dated 20th January, 1998 and subsequent letter dated 14th February, 1998, and response to the above said communication was

awaited from TMH, Bombay. It is contended that when the observations and treatment were in progress and difference of opinion existed, in such

a situation the appropriate treatment was carried out for the diagnosis of the disease on the basis of the condition of the patient, which was done in

the present case. The learned Counsel for the opposite parties vehemently contended that in such like situation, it is the basic duty of a patient

towards the doctor that the patient must cooperate with the doctor for investigation which may be necessary for diagnosing the disease. It is

contended that in the instant case, the complainant did not cooperate with the opposite parties as is evident from the conduct of the complainant. It

is contended that the condition of the complainant was being monitored and the case of the complainant was handled with due care and skill.

In the presence of the above facts, it cannot be stated by any stretch of imagination that the opposite parties in diagnosing and thereafter in treating

the complainant, have not shown the reasonable standard of care and competence expected from a medical man while treating the patient as per

settled law.

15. IN view of the position explained above, in our opinion, the complainant has not been able to prove that there was any negligence or deficiency

in service on the part of the opposite parties while treating him within the meaning of Section 2(1)(g) of the Act. Question No. 4 : IN view of our

finding in respect of Question No. 3 above, the complainant, in the given facts, is not entitled to any relief. The present complaint, filed by the

complainant, therefore, deserves to be dismissed. Accordingly, the same is dismissed. IN the facts and circumstances of the case, the parties are

left to bear their own costs. Complaint dismissed.