

(2000) 01 NCDRC CK 0009

NATIONAL CONSUMER DISPUTES REDRESSAL COMMISSION

Case No: None

Kamta Prasad Singh

APPELLANT

Vs

NAGINA PRASAD

RESPONDENT

Date of Decision: Jan. 3, 2000

Citation: 2000 3 CPJ 283

Hon'ble Judges: A.N.Chaturvedi , V.N.Misra J.

Final Decision: Appeal allowed

Judgement

1. THE present appeal by opposite party appellant is directed against the order dated 4.7.1997 passed by the District Forum, East Champaran, Metihari in Complaint Case No. 70/96 directing the appellant to pay a sum of Rs. 75,000/- as compensation and Rs. 500/- as cost to the respondent-complainant.

2. THE brief facts of the complaint case are that the complainant sustained a severe fracture of bone in left thigh in a bus accident on 6.2.1996. He was brought to the clinic of Dr. Tabrej Aziz where he was kept on traction for ten days. Dr. Aziz referred the complainant to the opposite party on 16.2.1996, who had examined the complainant on 10.2.1996 in the clinic of Dr. Aziz. THE complainant was admitted to the clinic of the opposite party on 17.2.1996 when the opposite party after thorough examination prescribed several medicines, X-ray, needles etc. for proposed operation. THE opposite party performed the operation on the point of fracture in the left thigh and put a nail joining the two parts of the fractured thigh bone and bandaged the same thereafter. THE opposite party realised Rs. 4,000/- towards his operation fee. THE complainant remained in one of the room of the opposite parties clinic on charge of Rs. 40/- per day. But the opposite party left for Patna the next day

leaving the complainant to fend for himself. He had advised his compounder for dressing of the wound. THE opposite party examined the patient on 2.3.1996, 9.3.1996, 20.3.1996, 6.4.1996, 21.4.1996, 1.5.1996 and 8.6.1996 and so on. THE opposite party asked the uncle of the complainant to take him to his home if he so liked and advised him to consult him (the opposite party) in case of any trouble. But unfortunately pus started oozing out of the wound on account of abscess formation in the cavity of fractured bones. THE complainant rushed back to Motihari to consult the opposite party who again examined him on 9.3.1996 and advised him to stay in his clinic where he stayed till 8.6.1996. But coming out of pus did not stop inspite of abundant number of medicines prescribed and administered by the opposite party. THE complainant was always assured by the opposite party that the ailment would be cured and there was no need for any alarm. In this period only dressing was done. THE complainant had strong suspicion that something wrong had gone with the operation. THE complainant alleged that operation was done haphazardly without professional skill and care in the treatment of the ailment. THE complainant had to part with Rs. 33,000/- during that period for treatment. He was taken to Patna for treatment when his condition kept on deteriorating. He consulted Dr. B. Mukhopadhyay who on 17.7.1996 referred him to Dr. John Mukhopadhyay. Dr. John Mukhopadhyay told him verbally, according to the complainant, that the previous operation was not proper to achieve the desired result. Dr. John Mukhopadhyay after necessary investigation operated the complainant second time on 17.7.1996. THE nail was removed, the fractured side was exposed and the ends of bones were freshened. THE wound was thoroughly washed and external fixator was applied. He remained in Popular Nursing Home for 18 days and had to spend huge amount. He paid a sum of Rs. 4,000/- to Dr. John Mukhopadhyay and was granted a receipt for only Rs. 2,000/-. Dr. John Mukhopadhyay according to the complainant, had found that there was no union of fractured bone ends which were drying up. Infection and pus formation were caused on account of wrong nailing. He was released from Popular Nursing Home on 3.8.1996 with the advice to consult the doctor after six weeks. He averred that he started improving after the second operation. But he was concerned that as per the Surgeon even after complete cure and re-union of the ends of the bones in the affected leg, it would be shorter by few inches acquiring a permanent disability for him all his life. This was caused due to the negligence/deficiency in service and lack of professional skill on the part of the opposite party. THE complainant, therefore, prayed that the opposite party may be directed to pay a sum of Rs. 3,00,000/- to him as compensation for mental agony, disability, harassment and expenditure incurred in his treatment. THE content of the complaint petition is supported by an affidavit.

The opposite party in his reply denied the allegations saying that the complaint case is frivolous and vexatious and has been brought about to harass and blackmail him. He accepted that he, as a teacher in Nalanda Medical College resides at Patna and occasionally goes to his home town, Motihari on holidays. The opposite party on

being contacted by the family members of the complainant for treatment, claimed to have advised them to consult some local Orthopaedic Surgeons or shift the patient to Patna. On their repeated requests he agreed to treat the patient for which operation fee was deposited on 16.2.1996 with his men in the clinic at Motihari and risk bond was signed on the same day. On information, the opposite party came to Motihari from Patna on 17.2.1996 and operated upon the complainant under general anaesthesia with all aseptic and antiseptic procedures which include anti-microbial U.V. lamp, formaline fumigator, adequately autoclaved instruments, nail, gauge, cotton, linen etc. Nail had been inserted in the shaft of the femur. Drain was then applied and wound was closed after irrigation with betadin lotion. All necessary drug and fluid transfusion was given. Drain was removed on 18.2.1996 and dressing was changed. X-ray film after surgery showed bone fragments in position and the nail had suitably been placed in position. The patient was put on physiotherapy under P.N. Singh. The opposite party alleged that the family members of the complainant approached him to prepare injury report in such a way that they are able to extract heavy compensation from the bus-owner which was not acceded to by him. He examined the complainant on 19.2.1996 and found him well. He requested Dr. S.K. Singh to take care of the patient as he was leaving Motihari. Dr. Singh visited the complainant every day on 20th, 21st and 22nd February, 1996. The opposite party was at Motihari on 23rd February, 1996 and he found the patient well on examining him. The stitches were removed on 25.2.1996. The wound was found to be dry and there was no sign of infection. But anti-biotic was continued as extra precautionary measure. On 2.3.1996 the complainant complained to the opposite party that he had fever on 29.2.1996 and 1.3.1996. But the opposite party found the complainant having normal temperature on 2.3.1996 and there was no local feature of infection.

The opposite party further averred that the family members of the complainant got one bottle of blood transfused to the complainant without the knowledge of the opposite party. The blood of questionable purity had been procured from commercial donor. The complainant was allowed to go home as he had no complaint. He however, advised to take antibiotic drugs. The complainant came to the opposite party on 9.3.1996 with the complaint that there was discharge of pus from the wound. Pus was discharged and culture and sensitivity tests were got done. The case was diagnosed as post-operative infection of the surgical wound. The family members of the complainant were advised to retain the nail in position for callus and involucrum formation. They were also advised for regular dressing of the wound of the complainant who should take antibiotic and undergo physiotherapeutic exercise. X-ray taken on 6.4.1996 revealed that the bone fragments and the nail were in perfect position. The complainant expressed the desire of going home on 8.6.1996 for 15 days and promised to get sterilized dressing done at home. The complainant left the opposite parties without making payment to the physiotherapist never to come back to the opposite party. The complaint petition

does not contain any proof of negligence on his part. It may be evident from the prescription that he had advised for only four vials of taxim but he has enclosed vouchers of 42 vials. The complainant similarly has tried to inflate his expenditure on treatment by showing professional fee for operation as Rs. 4,000/- when he had paid only 1,500/- for which he had granted receipt. The basis of his complaint case is that Dr. John Mukhopadhyay verbally told him that the first operation was not proper. But this is absolutely not supported by the prescription of Dr. John Mukhopadhyay or Dr. B. Mukhopadhyay. Shortening of the limb of the patient had also not been mentioned in the prescriptions of these Surgeons. The opposite party had given the prognosis to the family members before operation and one of them had signed the risk bond also.

3. THE opposite party profusely quoted a number of text books on Orthopaedic Surgery that nailing is a suitable method of treatment in such fracture which was done in this case. Post-operative care was also given to the complainant in accordance with the standard practice prescribed in the text books. He further averred that rate of post-operative infection in orthopaedic surgery even in developed countries is 10% like in U.K. and U.S.A. In 1993 Dr. B. Mukhopadhyay had said that rate of post-operative infection in Bihar has been found to be as high as 85% in orthopaedic operation in such cases done in Govt. Medical College Hospitals and 45% in specialised private clinics. It will thus be evident that post-operative infection is a known common complication. His diagnosis of post-operative infection was correct and it has not been challenged by the complainant. He has quoted Campbell Orthopaedic Operation to support his contention. He contended that it may be clear from the extracts from the above text books that the treatment of the complainant was done according to internationally accepted practice. Shortening of leg was not exhibited in the X-ray films taken on 17.2.1996, 6.4.1996 or 15.7.1996 at the time of examination by Dr. B. Mukhopadhyay and Dr. John Mukhopadhyay at Patna and the bone fragments and nail were perfectly in position. Thus the complaint is not based on facts. THE opposite party further contended that when there are two alternative methods of treatment the Court may not place the hall marks of legality upon one form of treatment. THE opposite party, therefore, cannot be said to be guilty of deficiency in service on his part as he opted for internal fixator and not the external fixator. Both the alternative methods of treatment have been prescribed by the text books. THE complainant has thus failed to prove negligence on the part of the opposite party. He, therefore, prayed that the complaint case may be dismissed with cost.

The complainant filed rejoinder to the written statement saying that the family members had not consulted the opposite party of their own accord but they were referred to the opposite party by Dr. Tabrej Aziz. The complainant denied that he had been explained the pros and cons of the operation. He further averred that the money receipts produced by the opposite party are fabricated ones. The opposite party runs a full-fledged clinic at Motihari where he regularly visits every Saturday and Sunday. The story that the complainant sought injury report is totally false. He also averred that the complainant was never advised by anyone for blood transfusion and no blood was transfused also. He also alleged that nailing was not properly done as a result of which the fractured ends had started drying which had been freshened by Dr. John Mukhopadhyay. Dr. Mukhopadhyay had to remove the nail and had to fix external fixator. Although the surgeon at Patna did not give in writing about shortening of the leg but this was verbally told to him by the Surgeon at Patna. The complainant accepted that post-operative complication cannot be ruled out. But the opposite party failed to take adequate care as he was only occasionally available at Motihari. The statement of the opposite party that he had requested Dr. Sudhir Kumar Singh to take care of the complainant is not correct and he does not know that doctor. He also alleged fabrication in the risk bond. The written statement, according to the complainant has no merit.

4. THE District Forum held that there was deficiency in service on the part of the opposite party and directed him to make payment of Rs. 75,000/- as compensation and Rs. 500/- as cost to the complainant. Being aggrieved by the impugned order, the opposite party filed the present appeal praying that the impugned order may be set-aside as deficiency in service on his part had not been established by the complainant-respondent. THE opposite party-appellant filed a petition on affidavit enclosing copies of legal notice to Dr. B. Mukhopadhyay and Dr. John Mukhopadhyay and a letter of Dr. John Mukhopadhyay in reply at the appellate stage. Copies of the same were served on the complainant-respondent also.

The learned Lawyers on behalf of both the parties were finally heard. On perusal of the record it is found that certain facts are undisputed. It is not disputed that the complainant sustained severe fracture in the left thigh in an accident on 6.2.1996 and he was under the treatment of Dr. Tabrej Aziz from 6.2.1996 to 16.2.1996. It is also not disputed that the complainant had been referred to the opposite party by Dr. Aziz on 16.2.1996 and the opposite party had operated upon the complainant on 17.2.1996 and had inserted a nail in the shaft of the femur of left thigh. It is also not disputed that the complainant had gone to his village home after consulting the opposite party on 2.3.1996. Drain was removed on 18.2.1996, and stitches had been

removed on 25.2.1996. This could be done by the Surgeon and not by the compounder. It is also not disputed that the complainant consulted the opposite party on 9.3.1996 with the complaint that pus had started coming out of the wound. It is also not disputed that the complainant had remained under the treatment of the opposite party till 8.6.1996. But coming out of pus had not stopped inspite of medicines and dressing. It is also not in dispute that the complainant had consulted Dr. B. Mukhopadhyay at Patna who referred in to Dr. John Mukhopadhyay. Dr. John Mukhopadhyay operated upon him when the nail was removed. The ends of fractured bones were freshened and external fixator was applied after thoroughly washing the wound. The case of the complainant is that infection and pus formation had been caused due to lack of profession skill on the part of the opposite party in inserting nail in the shaft of the left femur. He had started improving with the external fixator applied by Dr. John Mukhopadhyay. Further case of the complainant is that his left leg has become shorter by few inches because of the defective treatment of the opposite party. It is clear that the complainant had been examined by the opposite party on 18.2.1996 and 25.2.1996. The opposite party-appellant has claimed that he had examined the patient on 19.2.1996 and 23.2.1996 also. As per the opposite party the wound was found to be dry on removal of the stitch on 25.2.1996. This appears to be reasonable or the complainant would not have opted for going home had the wound any feature of infection. The opposite Party has categorically stated in his written statement that as the complainant had no complaint he was, therefore, allowed to go to his village home. The complainant apparently contracted infection in his village home - may be because of improper draining and non-sterilised bandaging in an unhygienic way in rural area.

It is seen that the complainant has filed copies of prescriptions, cash memos for purchase of medicines, investigation reports and several vouchers. But strangely enough, X-ray films have not been brought on record. The opposite party has stated in para-8 of his written statement that shortening of leg was not exhibited in any of the X-ray films taken on 17.2.1996, 6.4.1996 or 15.7.1996. There is no mention of shortening of leg in the prescription of Dr. John Mukhopadhyay and the bone fragments and nail were in perfect position. The complainant in his rejoinder has not controverted this assertion of the complainant. The complainant has himself averred that freshening of fractured ends of bones had been done by Dr. John Mukhopadhyay before applying external fixator. The reason for shortening of leg cannot be attributable to the opposite party as he had not interfered with the fractured bones. He had only inserted a nail in the shaft to strengthen the fractured bones by allowing formation of callus and involucrum. Campbell's Operative Orthopaedics at page-566 says that infection usually remains localised to the fracture site and although drainage may continue indefinitely and an "intramedullary sequestrum" may form, the medullary nail should be left in place, involucrum and callus will form despite infection and continued drainage. The nail should not be removed until the involucrum is strong enough to support the

fracture. The nail was removed by Dr. John Mukhopadhyay only because of persisting infection which goes against the recommendation in Campbell's Operative Orthopaedics quoted above. Ronald M.R. Rae in his "Practical Fracture Treatment" has at page 60 said "If the internal fixation device is removed, it may not be possible to maintain adequate fixation of the fracture by external support and the ensuing movement is almost invariably followed by non-union. Not infrequently the situation arises where the fracture is unlikely to unite if the fixation device is removed and where infection is likely to remain if it is not. In these circumstances, it is unusually wiser to retain the fixation device until union is reasonably well-advanced, only then should its removal be undertaken when healing may be achieved". Watson Jones in "Fractures and Joint Injuries" has said at pages 43-44 that infection is not a cause of non-union but it is only a cause of delayed union. That union can occur rapidly in the presence of infection, provided there is adequate immobilisation. The mere presence of plate, screw or intramedullary nail does not in itself aggravate the infection. Metal is inert it cannot necrose nor can it harbour bacteria in parts inaccessible to blood supply, the presence of metal does, however, interfere with natural healing and it is unlikely that general and local antibiotic therapy will render the area around the appliance completely sterile, even though in certain circumstances, such as in the case of an infected prosthetic replacement for fractured neck of femur, it is justifiable to make every attempt to do this".

5. DR. B. Mukhopadhyay in his article "Imminent Post Operative Infection following Operative Care of Fractures" (Annexure-58 to written statement) has stated that post-operative infection had been found in 412 cases out of 481 patients operated upon in Medical College Hospitals in Bihar. The rate of occurrence of infection thus works out to 85.6% M.R.B., Kieghley, MS, FRCS in "Anti-Microbial Prophylaxis in Surgery is as under : "Many of the bacteria responsible for surgical sepsis arise from the patient's own skin or nose or occasionally from the intestinal tract."

6. SUCH being the situation it is nothing extraordinary that post-operative infection occurred in the case of the complainant. The complainant has himself accepted in para-17 of the rejoinder that such post-operative complication cannot always be ruled out. His complaint is that the opposite party was only occasionally available to him at Motihari. This fact must have been in the knowledge of the members of the

family of the complainant before consulting the opposite party. The family members still chose the opposite party to operate upon the complainant. Further the complainant was referred by a qualified practitioner Dr. Tabrej Aziz to the opposite party. This in itself may be a testimony of the professional of skill and capability of the opposite party. The opposite party could not be expected to leave his job for the period that the complainant was under his treatment. But it appears however that the opposite party had examined him on 18.2.1996 and 19.2.1996 and did the needful like removal of drain and bandaging. We may accept the version of the complainant that Dr. S.K. Singh never visited him. The complainant had again been examined by the opposite party on 23.2.1996 and the stitches were removed by him on 25.2.1996. The complainant had consulted him on 2.3.1996. In such situation the services of a qualified compounder may be sufficient thereafter for the purpose of drainage and bandaging. It is, therefore, not correct that the opposite party left the complainant to fend for himself after 17.2.1996. There are more than umpteen number of instance of visiting specialists who cannot be expected to remain by the side of the patient all the time. This was however, not a very complicated case of brain or heart surgery. What in this case was essential to be done was draining and bandaging for which a compounder is sufficient. The complainant has accepted that there was a compounder for such jobs. Again the complainant alleged in his rejoinder that pros and cons of the operation had not been explained to him. But a mere look at the risk bond signed by the relation of the complainant will clarify the position wherein all possible consequences of operation have been indicated. The complainant merely says that the risk bond is fabricated, but he has not, however explained as to how was the bond fabricated. The complainant did not choose to examine Sitaram Prasad who signed the risk bond which is clearly and unambiguously written in Hindi.

We have now to see if the doctor had adopted approved method of treatment of the complainant or not. It is apparent from the extracts of the text books on Orthopaedic supplied (Annexures 31, 33, 34, 38) that such fractures could be treated by using intermedullary fixator or external fixator. Internal fixator was used in this case. The complainant has not proved with the help of X-ray films that the fractured bones or nail were not in a position. But unfortunately infection developed in this case which cannot be totally ruled out in view of the article of Dr. B. Mukhopadhyay, who says that rate of infection in such operation is very high. It may be seen that the wound was dry when stitch was removed. The complainant alleged that he was told by Dr. John Mukhopadhyay that the method of treatment adopted by the opposite party was not right. This is not supported by any document. The onus lay with the complainant to prove that fixing of intermedullary nail was wrong. This was not done. On the other hand the opposite party has filed the letter of Dr. John Mukhoapadhyay on affidavit with a copy of the same to the complainant at the appellate stage. Dr. John Mukhopadhyay has categorically said that he never verbally or otherwise said that the earlier treatment was wrong. There was no defect

or deficiency in service on the part of Dr. K.P. Singh. The complainant has not thus succeeded in proving if post-operative infection or shortening of leg of the complainant was because of the fault on the part of the opposite party.

It is now a settled principle of law that a medical practitioner will bring to his task a reasonable degree of skill and knowledge and must exercise reasonable degree of care. Neither the very highest nor the very low degree of care and competence judged in the light of circumstances in each case is what the law requires. Judged from this yardstick post, operative infection or shortening of the leg was not due to any negligence or deficiency in service on the part of the opposite party-appellant. Deficiency in service thus cannot be fastened on the opposite party. The impugned order passed by the District Forum, therefore, cannot be sustained.

7. IN view of the above discussion, this appeal is allowed. The impugned order of the District Forum is set aside. There is no order as to cost. Appeal allowed.