

## A. XAVIER Vs CANTONMENT POLYCLINIC

**Court:** NATIONAL CONSUMER DISPUTES REDRESSAL COMMISSION

**Date of Decision:** Oct. 25, 2004

**Citation:** 2004 3 CPR 574 : 2005 1 CPJ 229

**Hon'ble Judges:** Chandrashekhar , Rama Ananth J.

**Advocate:** Bhaskar Paul , H.Sulaiman Sait

### Judgement

1. THIS complaint is filed by the complainant under Section 12 of the Consumer Protection Act to direct the O.Ps. (opposite parties) to pay a

compensation of Rs. 19.36 lakhs for their gross negligence in treating the complainant's wife along with interest and cost of the proceedings to the

complainant.

2. THE case of the complainant is that on 29th September, 1996 his wife Smt. Rani Xavier had a slight temperature and body pain due to regular

work and strain as such the complainant i.e., the husband of Smt. Rani Xavier took her to the Cantonment Poly Clinic i.e., O.P. 1 for consultation.

On consultation, she was advised to be admitted by Dr. Fiyasice, 4th O.P. Since Dr. Thomas i.e., 5th O.P. was not available as he had gone to

Vellore, CMC Hospital. As per the advice of 4th O.P., the complainant's wife was admitted in the 1st O.P. clinic on 1.10.1996. She was treated

for 3 days and during that time her temperature was normal and she was cheerful. On 3.10.1996 Dr. Thomas (O.P. No. 5) checked her and

opined that she can be discharged. On 4.10.1996 the complainant's wife had two Poories for her breakfast from the hospital canteen and after

sometime she started vomiting for which she was taken for scanning without the consent of the complainant and they did not discharge the patient

on that day. At about 7 p.m. the O.P. Nos. 2 and 3 checked the patient and informed that she had to undergo a minor operation on 5.10.1996.

THE O.Ps. have insisted the complainant to give his consent for an emergency operation even though the complainant's wife was feeling well and

was not feeling any pain. Hence the complainant was confused and he had no other option but to give his consent for his wife to be operated upon

by the O.Ps. even though he did not know the contents or correct facts stated in the medical papers. THE patient was taken into the OT at 12

noon and she was brought back at about 2 p.m. On 5.10.1996 at about 4 p.m. the patient had an urge to pass urine and at that time she felt very

uncomfortable and uneasiness and she had a feeling of choking while speaking but nothing was informed to the complainant about the condition of

the patient by the O.Ps. AT 2.00 a.m. i.e., at midnight, one of the complainant's relative Miss Gracy saw the blood oozing from the operated place

and the blood had spread upto the patient's head and her clothe was soaked in her own blood even though she was made to lie in a slanting

position after the operation. As Miss Gracy raised an alarm after noticing the blood and serious condition of the patient, the O.Ps. 2, 3 and 4 along

with some other doctors took the patient to the operation table immediately and operated for the second time without any consent from the

complainant. THE O.P No. 2 came out of the OT at 6.00 a.m. i.e., nearly after 4 hours and informed that the patient was alright, but as they have

no ICU facilities they have to shift the patient to St. John's Medical Hospital. THE O.Ps. contacted St. John's hospital and informed them over the

phone about the patient's condition. THE complainant was asked to arrange for an ambulance and when the patient was shifted into the

ambulance, she was not provided with any oxygen since oxygen was not available with the 1st O.P. Hospital. When the patient was admitted to

St. John's Hospital one Dr. Kanneth D'Cruz informed that they require around 15 to 20 bottles of fresh blood for the patient. With great difficulty

and with the best support of relatives, friends and well wishers, they were able to collect about 20 bottles of fresh blood but they could not save

the life of the patient and she breathed her last on 7.10.1996. According to Dr. Kanneth D'Cruz's report the patient's gall bladder had been

removed carelessly and negligently as a result of which her liver kidney surface had been damaged seriously while performing the operation at the

1st O.P. Hospital, due to which the patient was expired on 7.10.1996. THE complainant had filed a criminal case against the O.Ps., which had

been disposed as withdrawn, as per the memo filed by the complainant. In view of the said memo this complaint is adjudicated and proceeded on

merits.

The case of the complainant is that the death of complainant's wife was due to the negligence of the O.Ps. while removing her gall bladder as well

as irresponsible behaviour of the O.Ps. in operating her for the second time without having any necessary facilities. The further case of the opposite

party is that the 1st O.P.'s clinic lacked adequate medical aid and proper care and there was gross dereliction of duty on the part of the O.Ps.

which directly resulted in the death of the patient. Hence, the complainant after issuing legal notice, has filed this complaint before this Commission.

The O.Ps. 1, 2 and 5 have filed a joint version and O.Ps. 3 and 4 have jointly filed their version separately. The O.Ps. 1, 2 and 5 have denied all

the allegations made by the complainant in his complaint and they contended that the patient was fit to be discharged after care and attention given

by them. But these O.Ps. were not aware of what the patient eat on 4.10.1996 and from where the food was brought. The O.Ps. 3 and 4 were of

the view that the patient had suffered a further set back in her health, despite the best of attention and needed other modes of attention and hence

carried out the necessary steps including scanning. They further denied the allegation that complainant's son did not give his consent for the scan,

but the complainant was never available whenever he was sought for. They further contended that on investigation and on seeing the condition of

the patient they felt that the patient required surgery on a most urgent basis, but the complainant was not available in or around the nursing home to

give his written permission, hence the operation was delayed indefinitely which caused worsening the condition of the patient. The operation of the

patient which had to be performed on 4.10.1996 had to be postponed to 5.10.1996 bringing in its wake further damage and deterioration to the

affected organs and naturally making the chance of success of the operation. They further contended that the complainant could have withheld his

consent for the operation till he got a second opinion from other doctor of his choice, but readily gave his consent. The operation was a major

surgery done by 2nd O.P. who had a very glorious career as a top surgeon. A medical professional is only expected to do his duty and cannot be

held responsible for death of the patient. When the patient's condition needed intensive care and as such intensive care facilities were not available

in O.P. 1, O.Ps. made arrangement and shifted the patient to St. John's Hospital which has ICU facilities. According to them there was no injury

caused during the operation or there was no neglect in the operating process. Patient's death was consequent unavoidable natural death. The death

of the patient occurred by the act of God without any negligent act or omission on the part of these O.Ps. Hence, they requested for dismissal of

the complaint.

3. THE O.Ps. 3 and 4 have contended in their joint version that after thorough examination and investigation on the patient, the 3rd O.P came to

the conclusion that fever and other problem were mainly due to inflammation of her gall bladder. Since it was a surgical case, the patient was

referred to surgeon i.e., 4th O.P. THEy further contended that the patient developed complication and bleeding from the operation spot, hence the

2nd O.P. along with Dr. Ebenezer took the patient for 2nd operation to stop the bleeding. Inspite of his efforts the patient was not showing any

improvement. THEy further contended that O.P No. 2 made all the arrangement in St. John's Hospital for ICU and arranged for doctors to take

care of the patient. THE 3rd O.P. went along with patient in his car following the ambulance and handed over the patient to Dr. Kenneth and gave

a detail report on behalf of 2nd O.P. THERE was no negligence or failure of duty or responsibility by the 3rd and 4th O.Ps. On the other hand the

O.P. went out of his way to save the patient and to help the complainant to the maximum. Hence, they requested for dismissal of the complaint.

The complainant has filed his affidavit in support of his complaint and also produced certain documents which have been marked as Exs. C1 to C8

and C9(1) to C9(25), C10(1) to C10 (8) and C11. The O.P. No. 5 has filed his affidavit on behalf of O.Ps.1, 2 and 5 in support of their case.

The complainant was cross-examined by the O.Ps. and O.Ps. were cross-examined on behalf of the complainant. We heard the argument of

learned Counsel on behalf of both the parties. We heard the argument of learned Counsel , Mr. Paul on behalf of the complainant and learned

Counsel Mr. Sulaiman Sait for O.Ps. 1, 2 and 5 and learned Counsel Mr. Shams A. Pathan on behalf of O.P. Nos. 3 and 4.

4. THE undisputed facts show that the complainant's wife had approached the O.P. 1 Hospital on 1.10.1996 with the complaint of fever and

body pain and his wife was got admitted and took treatment for three days at the O.P. 1 hospital. At the time of discharge from the O.P. 1 hospital

on 4.10.1996, the patient had developed some complication. She started vomiting after her breakfast brought from the canteen of O.P. No. 1 for

which she was taken for scanning without the complainant's consent and, therefore, she could be discharged on that day. As per the advice of

O.Ps. 2, 3 and 5 doctors, the patient had underwent a surgery called cholecystectomy i.e., removal of the gall bladder on 5.10.1996. After the

operation, the patient's blood was oozing profusely from the operated place. On seeing the serious condition of the patient, O.Ps. took the patient

to OT immediately for 2nd operation to trace the point of bleeding and to stop the same, this fact is also not in dispute. As they could not do so

and to avoid possibilities of further complication, the patient was shifted to higher hospital where she breathed her last on 7.10.1996. This fact is

also not in dispute.

The main allegation of the complainant in its complaint against O.Ps. is that the deceased Rani Xavier i.e., complainant's wife who died on

7.10.1996 was due to O.Ps. gross dereliction of duty, negligence and did not possess reasonable degree of skill and knowledge while treating the

patient. There is deficiency in services on the part of O.Ps. The complainant has stated in his affidavit that without his consent the patient was taken

for scanning by the opponents when she started vomiting. The O.P. No. 5, Dr. Thomas, who is the owner of O.P. 1 clinic, has stated in his

affidavit filed on behalf of himself and other O.Ps. 1 and 2 doctors, that the complainant was never available to the team of O.P. doctors to render

any assistance to the medical requirements of the patient. He further stated that in the case of scan as there is no external or internal incision in the

body but it is conducted as a matter of routine investigation if found necessary and no specific consent is required as in the case of surgery. We are

of the opinion that if something happens suddenly it is left to the doctors to investigate and find out the cause for such sudden happening hence

scanning was done. But it does not require any consent from the complainant as it is of routine investigation but not a surgery. Hence we cannot

blame the O.Ps. for not having obtained consent prior to scanning of the complainant's wife.

The next averment against O.Ps. is that the O.Ps. have informed the complainant that his wife had to undergo a minor operation on 5.10.1996 but

he was totally confused as his wife was cheerful and she was alright and though there was no need for any emergency operation the O.Ps. forced

him to give his consent for an emergency operation and, therefore, he had no other option but to give his consent for his wife to be operated upon

by the O.Ps. The O.Ps. have denied the averment made against them and they have stated in their joint version as well as in their affidavits that

after scanning they decided that the gall bladder had to be removed very urgently and its non removal would result in the infection spreading to

other organs. It is evident in the cross-examination of R.W. 1 where he has admitted that the patient was suffering from acute cholecystitis and it is

a major operation. The complainant could have obtained a second opinion before giving his consent for the operation. Hence the complainant

cannot blame the O.P. doctors and they are right in conducting emergency operation on the wife of the complainant. When we see Ex. C2, the

scanning report dated 8.10.1996, issued by Dr. Kanan J. Gharpure, consulting surgical pathologist, it shows that the patient was suffering from

chronic cholecystitis but not a acute cholecystitis as stated by O.Ps. in their version as well as in their affidavits. It is evident in the cross-

examination of R.W. 1 where he says that chronic means that which prolongs. At one instance he says that the patient was suffering from acute

cholecystitis which need their immediate act or act fast, but at another instance he admits that the patient had chronic cholecystitis. In his affidavit he

has stated that the complainant did not seek or suggest that the operation should be postponed till a second opinion was obtained. The 3rd and 4th

O.Ps. have admitted in their joint affidavit that they did not advise for emergency operation. Hence we see there is inconsistency in the statements

of the O.Ps. These facts go to show that though there was no need for any emergency operation, the O.Ps. have done the operation on an urgent

basis.

5. THE next serious allegation of the complainant in his complaint against O.Ps. is that they conducted the major surgery like cholecystistomy i.e.,

the removal of the gall bladder of the complainant's wife in O.P.1 poly clinic without having ICU and ventilator facilities and without adequate

medical aid and proper care. THE blood clotting test was not done before the operation and while conducting the surgery/operation the opponents

have damaged the liver and further complication arose due to gross negligence on the part of O.P. doctors.

6. THE learned Counsel on behalf of O.Ps. 1, 2 and 5 has stated in his argument that the complainant was fully aware that the ICU facility was not

available with the 1st O.P. clinic. Many Nursing Homes/clinics do not normally have ICU facility. An ICU is necessary for taking care of very

serious cases. He further stated that operation can be conducted without ICU and ventilator facility. After conducting the surgery for removal of

gall bladder of the complainant's wife and since the gall bladder is closely attached to liver, the blood was oozing from the surface of the liver but

not due to negligence on the part of O.Ps. and death occurred due to no fault of any of O.Ps. Hence, he requested for dismissal of the complaint.

It is evident in the affidavit of 5th O.P. where he has stated that the ICU facility is very costly and requires certain infrastructure and requires an

expert to handle the same. In the cross-examination of R.W. 1 he has clearly stated that pre-operative assessment for abnormal bleeding tendency

has not been done in this case. It is evident in the version and affidavits of O.Ps. that no blood clotting test was done before the operation.

It is admitted by all the O.Ps. that the patient's blood was bleeding profusely after the operation from the operated place. It is evident in their

version as well as in their affidavits and in their cross-examination where they have stated that the complication had set in after the operation

conducted by the O.Ps. Due to which the patient was subjected to the 2nd operation. It is evident in the cross-examination of R.W. 1 where he

admits that 2nd operation was done since the patient's blood was bleeding profusely and in order to save her life. But bleeding could not be

controlled by the O.Ps. As the O.Ps. were not in a position to control the bleeding, they could have immediately shifted the patient to the higher

hospital, instead of doing second operation in the midnight even without obtaining the consent either from the patient or from her husband when

they don't have ICU and ventilator facility. But in the instant case, after the second operation as they were not in the position to control the

bleeding, decided to shift the patient after heavy loss of blood to St. John's Hospital.

7. It is evident in the discharge summary report of St. John's Medical College/Hospital that re-laparotomy was performed for persistent

hypotension due to haemorrhage from the liver surface and as the patient continued to be in shock, she was referred to St. John's Medical

Hospital for ICU and ventilator facility. At the time of admission, the patient's condition was unconscious, no response to pain, peripheral pulses

not felt and BP was not recordable. Subsequently the BP fell despite all supportive measures and the patient expired on 7.10.1996 at 11.40 a.m.

The cause of death was disseminated intravascular coagulation and severe haemorrhagic shock. These facts clearly go to show that all these above

complications arose due to gross negligence and deficiency in service on the part of O.P.s. while conducting the surgery/operation.

The complainant has relied upon two books i.e., (1) General Surgery by Harold Ellis and others, where the author of the book says that ""chronic

cholecystitis is almost invariably associated with the presence of gall stones. Repeated episodes of inflammation result in chronic fibrosis and

thickening of the entire gall bladder wall which may contain thick, sometimes infected bile"". In case of chronic cholecystitis, he says that

cholecystectomy is performed, either by laparoscopy or laparotomy. The cystic duct is intubated and an operative cholangiogram performed by

injecting radio-opaque contrast medium into the common duct. If stones are demonstrated the common bile duct is explored, the stones removed,

a T tube inserted into the common duct and a check X-ray performed. The T tube is removed 10 days post operatively, provided a check

cholangiogram taken through the tube confirms that the ducts are clear and that there is free flow into the duodenum. Alternatively, at laparoscopic

cholecystectomy the surgeon may elect to wait for a post operative endoscopic sphincterotomy and extraction of the stones with a Dormia

basket"". ""The diagnosis of gall stones is becoming increasingly common during routine ultrasound examination of the abdomen. Cholecystectomy

may be advised when the patient is young and otherwise well as symptomless stones may eventually produce the numerous problems listed above. If

the patient is elderly or unfit, symptomless stones are left untreated"". ""At least 90% resolve on bed rest with antibiotic is and pain relief. Elective

cholecystectomy is usually performed about 6 weeks later because of the undoubted danger of further attacks. Cholecystectomy is routinely

performed laparoscopically rather than at open operation with the advantages of minimal scarring of the abdominal wall and rapid convalescence.

The procedure requires a surgeon well trained in the technique who can also proceed to open operation if technical difficulties are encountered at

laparoscopy". "If diagnosis is in doubt in the early stages of acute cholecystitis, laparotomy is performed. Cholecystectomy is comparatively easy in

the first 24-48 hours of the illness; dissection is facilitated by the edema of adjacent tissues, although after this time operation becomes difficult

because of the inflammatory adhesions. Many surgeons advise early surgical intervention in acute cholecystitis". (2) In another book i.e., Bailey and

Love's Short Practice of Surgery where the author of the book says that in "chronic calculous cholecystitis the gall bladder which contains stones

may have a thickened fibrotic wall. Bacteria can be cultured from the bile in less than 30 percent of cases, and from the gall bladder wall slightly

more. Failure to detect organisms in all cases has led to the suggestion that in some cases the inflammatory changes are a response to chemical

irritants in the bile." "Ultrasonography is usually the only investigation needed to show gall stones. The examination must be done with care, with

description of the stones, the thickness of the wall, the presence of inflammation and the size of the common bile duct. A bile duct more than 8 mm

in size requires investigation by endoscopic cholangiography to determine the cause of the dilatation. In the acute calculous cholecystitis, "the gall

bladder, often already affected by chronic cholecystitis, is acutely inflamed. In 95 percent of cases a gall stone is found impacted in Hartman's

pouch or obstructing the cystic duct. In most cases, bacteria can be cultured from the bile or the gall bladder wall". Clinical features of acute

cholecystitis are, "the onset is sudden, and pain is located mainly in the right hypochondrium. Severe nausea and vomiting are features in the early

stages".

8. WHEN we come to the quantum of compensation, the complainant has stated in his complaint as well as in his affidavit that he had spent

towards medical expenses of the deceased about Rs. 40,000/- for which he has produced certain bills. In addition the complainant claims Rs.

18,36,000/- towards loss of earning of the deceased for which he has not produced any materials to show that his wife was earning Rs. 9,000/-

per month from her cooking classes and sari business. He has claimed Rs. 60,000/- towards his medical expenses during the said traumatic period

for which no material is produced to substantiate his claim. The complainant is aged about 51 years and has children. In order to look after the

children he has to take assistance of some attendant and at this age he is also deprived the services of his wife and companionship. Hence we are

of the view that awarding of Rs. 2,00,000/- as compensation would meet the ends of justice.

The doctor i.e., O.P. No. 2 is now dead during the pendency of the complaint. O.P. No. 1 is hospital and O.P. No. 5 is the owner of the hospital.



O.P. Nos. 1 and 2 are vicariously liable for the negligent act of its doctors. Hence, we hold that O.P. Nos. 1 and 2 are liable to pay compensation

to the complainant. In the result, we pass the following order. ORDER Complaint is allowed in part. The opposite party Nos. 1 and 2 are directed

jointly and severally to pay Rs. 2,00,000/- (Rupees two lakhs only) to the complainant within two months from the date of receipt of this order. In

the event if the opposite party Nos. 1 and 2 fail to pay the amount as ordered above they are liable to pay interest at 12% per annum from the date

of the complaint till realisation. In addition the O.P. Nos. 1 and 2 are directed to pay Rs. 5,000/- (Rupees five thousand only) as cost of this

proceedings to the complainant. Complaint partly allowed.