

(2001) 01 NCDRC CK 0080

NATIONAL CONSUMER DISPUTES REDRESSAL COMMISSION

Case No: None

NADIYA

APPELLANT

Vs

PROPRIETOR, FATHIMA
HOSPITAL

RESPONDENT

Date of Decision: Jan. 12, 2001

Citation: 2001 1 CPC 492 : 2001 1 CPR 559 : 2001 2 CPJ 93

Hon'ble Judges: L.Manoharan , R.Vijayakrishnan J.

Final Decision: Complaint allowed with costs

Judgement

1. COMPLAINANT, a minor represented by her father seeks for a direction to pay compensation on the allegation of negligence committed in the surgery conducted by the second opposite party, doctor who was then working in the first opposite party hospital.

2. THE allegations in brief are that the complainant aged 15 years and a student of VIII Standard had a height of 136 cm. which for her age since was felt to be less, attracted by the advertisement Exbt. P19 approached the first opposite party hospital in July, 1996 where the second opposite party assured her increase in the height by 10 cms. in six months by surgery and the charge for the same was fixed at Rs. 32,000/-. In view of the same she got herself admitted on 24.7.1998 in the first opposite party hospital and her right leg below the knee was operated on 25.7.1996 and the left leg below the knee was operated on 1.8.1996. Ring fixator was fixed on the legs, the one on the right leg was adjusted from 2.8.1996, and one on the other was adjusted from 10.8.1996, the same had to be adjusted every six hours. THE staffs of the hospital were not trained for the said purpose and the father of the

complainant was instructed to attend the same as per the instruction of the doctor, and he was attending the same. THE fact that the nurse and staff were not equipped to attend the same itself would amount to negligence. On 16.9.1996 she was discharged with instruction that every 15 days X-ray has to be taken and has to be consulted. At the time of discharge the length of the two legs were not the same and hence she could not walk. By September, 1996 pain increased and when she met the second opposite party she informed him as to the same but he consoled her stating that the Ring fixator adjustment must be continued. By the same the feet as well as the leg below the knee got curved. Later when she met him in the same month he instructed her to stop the adjustment of the Ring fixator on the left leg and to continue with respect to the right leg. Afterwards she was required to stop adjustment of the Ring fixator for the right leg also and in April, 1997 the Ring fixators were removed and plaster was applied. But the left leg was short by 1 inches, the second opposite party said that the same was due to the curve in the lower part of the leg. As per the instruction of the second opposite party physiotherapy was being continued. On 17.9.1997 operation was conducted on the left foot and on 1.11.1997 skin grafting was also conducted. Though the different in the length of the leg was brought to the notice of the second opposite party he got wild and instructed to continue of the physiotherapy A physiotherapist was engaged to attend the physiotherapy at her home and the same was intimated to the second opposite party. Since the length of the left leg is shorter, she leans on the left; there was also deformity for the foot. After the operation on 25.7.1996 she was bed-ridden till March, 1998. A home nurse had to be appointed. Every 15 days X-ray had to be taken and the second opposite party was being consulted. THE deformity and the disability of the complainant is on account of the negligence in conducting the aforesaid surgery. She had to incur an expense of Rs. 2,43,000/- for the operation and hospital expenses. Apart from the same, she has to incur other expenses for future treatment also, therefore, the opposite parties are liable to compensate the complainant for the said injury caused to her due to their negligence.

In the version by the first opposite party it is contended, the hospital is a reputed one having several qualified doctors in different specialties and also has qualified staff .The second opposite party is a qualified doctor and the deficiency in service alleged by the complainant is not true or correct; but admits that the complainant was treated in the said hospital, the treatment given to her is borne out by the hospital records and she was given the best possible treatment. She has no cause of action against this opposite party. The nurses attached to the hospital are well-qualified and well-trained. The allegations of negligence is denied.

In the version by the second opposite party he contended that, he has taken a professional indemnity policy for doctors and medical practitioners from the New India Assurance Company Limited having their Head Office at M.G. Road, Bombay. The Policy No. is 46721200 01833. Therefore, the said Insurance Company also is a necessary party to the proceedings. The fact that the complainant approached the

hospital for surgery for increasing her height is not disputed. She has the "adoloscentidiopathic scoliosis" of the dorso lumber spine. The cause of her present position is the said condition, the same could not be noticed initially and the said condition is not caused by surgery. The present condition of the complainant cannot be attributed to the surgery performed by him, the father and daughter were informed as to the complications inherent in the said operation. They were also informed as to the nature of co-operation required from the patient for the success of the surgery. The corticotomy surgery with external fixator on the complainant's right leg was done on 25.7.1996. The method of adjusting Ring fixator has explained, the staff are qualified to adjust the Ring fixator. There are trained nurses in the hospital. After due surgery the complainant was discharged on 16.8.1996 with an advice to take X-ray and report back once in 15 days. In September, 1996 it was found that the complainant was not adhering to the instruction as to the stretching exercise; during that period though the bone was lengthening the muscles did not adequately stretch on account of the failure on the part of the complainant to attend the exercise as instructed. The X-ray showed, there was lengthening of both bones of the right leg. But there was contractures of the calf muscles, that was only due to inadequate stretching of the right calf muscles while bones continued to be lengthening. She and her father were told to do vigorous stretching exercise of the calf muscles. She was told as to the cause for her deformities of the feet, and if further lengthening of both the legs was not stopped, she would need corrective surgery. But she was adamant and wanted the lengthening process to continue and was prepared for the soft tissue correction surgery later. Later it was decided to further lengthening of the left leg to achieve equality in the length of both legs. The length of both the legs of the complainant was found equal on clinical examination as well as radiological examination. It is incorrect to say that her left leg was shorter by 1" inch, by the end of November, 1997 she could walk. On 11.5.1998, the opposite party explained to the complainant, that the length of her both legs is equal, even then she was not convinced. On a detailed examination on 8.1.1998 it was found that she was developing a deformity of the "spine" called "Adoloscent Idiopathic Scoliosis" of Dorso Lumber Spine which caused lifting up of the left side of the pelvis and along with it the whole left lower leg. Therefore, while standing, the level of the Pelvis, instead of being horizontal became oblique with the left lower limb going up which produced an apparent and not true shortening of the left lower limb. He denied the allegation, there was deficiency of service. He also disputed the quantum of compensation claimed. He wanted dismissal of the complaint.

3. COMPLAINANT filed affidavit and offered for cross-examination, she was examined as P.W. 1. COMPLAINANT produced Exbts. P1 to P20. On behalf of the opposite parties no affidavit was filed and none was examined. The points that would arise for consideration are :

(1) Is the complaint maintainable ? And whether the negligence and deficiency of service alleged is true ? (2) What, if any, is the compensation to which the complainant is entitled to ? (3) Relief and costs.

Point No. 1 : It is settled position that in a complaint which alleges negligence on the part of a Medical Practitioner the burden of proof is on the complainant. The fact that the complainant got herself admitted in the first opposite party hospital on 24.7.1996 for improving her height is not in dispute, surgery was conducted by the second opposite party on 25.7.1996 on the lower part of the left leg and conducted surgery on 1.8.1996 on the lower part of right leg also is not in dispute. Ring fixator was fixed on the legs, the one on the left leg was adjusted from 2.8.1996 and the one on the right leg was adjusted from 10.8.1996 every six hours is also not in dispute. Whereas the complainant would allege that at her discharge on 16.8.1996 with the instruction that X-ray should be taken and must report back after 15 days, both legs were not of the same length, the second opposite party would not admit the same. The affidavit and the evidence of P.W. 1 would show that she was required to continue to the adjustment of the Ring fixator, later at stages she was asked to stop the adjustment. What she would swear is, because of the defect in the operation and treatment, her left leg remained shorter by 1 inch than the right leg and hence she leans on the left. But the second opposite party would contend that the said condition was because of the failure of the complainant to adhere to the instructions, and also would maintain that the same was due to the complication "Adolescent idiopathic scoliosis of the dorso lumbar spine".

Now the question for consideration is whether the materials placed by the complainant along with her evidence would discharge her burden as to the alleged negligence. The probative value of the evidence tendered by the complainant by affidavit, as P.W. 1 and the documents produced, Exbt. P1 to Exbt. P20 has to be considered in the context of the attending circumstances and the nature of the contentions raised. One important aspect to be kept in view is, complainant was 17 years at the time when she got admitted in first opposite party hospital. Her height was 136 cms. Admittedly she consulted not for treatment of any illness or ailment. According to the complainant she did not suffer from any ailment and she approached the opposite parties for improving her height attracted by Exbt. P19 advertisement. Exbt. P19 advertisement in the newspaper declares that a "dwarf could become Amitabh Bachan of tomorrow". It states that by the Illizorove method the height can be increased by one inch within a period of 25 days and it mentions the second opposite party as the surgeon. This advertisement is not denied. The second opposite party would plead ignorance of such an advertisement; the first

opposite party does not deny it. What is important is, the occasion for the complainant to solicit the service of the opposite parties was the said advertisement. She underwent the said cosmetic surgery. One of the aspects to be seen in this connection is whether there was informed consent for the said operation. The second aspect would be whether there was actual negligence in conducting the surgery resulting injury to the complainant. As regards the question whether there was informed consent the very allegation in para 3 of the complaint would support a conclusion that the second opposite party informed the complainant and her father as to the benefits of such surgery and that the achievements. P.W. 1 admitted in the cross-examination that on 24.7.1998 she signed a paper giving consent to the operation. When the said testimony of the complainant is understood in the context of para 3 of the complaint it is probable that necessary consent was given.

4. THEN the question for consideration whether there was negligence in conducting the said operation. In appreciating the case of the complainant in this regard certain factors have to be kept in view; particularly her condition when she consulted the opposite parties and her condition after the surgery. As she was a healthy girl of 17 having no complication and there being no dispute that she came walking and it was only a cosmetic surgery just to improve her height, at that stage there is no case that she had any ailment. Exbt. P1 discharge summary from 24.7.1996 to 16.8.1996 does not mention any particular ailment. Thus, from the evidence the complainant was a young girl of 17, healthy had no complaint when she approached the first opposite party hospital and consulted the second opposite party surgery except that she felt that her height has to be improved. She underwent cosmetic surgery with Rings fixator.

Having regard to the said details it would be necessary to see her present condition in the matter of judging as to whether she has discharged the burden of proof. As has noticed, she was healthy and the surgery which she underwent was not for any complaint or on account of her suffering from any illness or malfunctioning of the system. But at trial she required to be helped to reach the witness box and she had to be permitted to sit while giving evidence. In the affidavit filed by the complainant it is averred that for correcting the deformity after the surgery she had to consult Dr. Gopalakrishnan of Appolo Hospital, Madras in December, 1998 and she was admitted on 2.12.1998 in Appolo Hospital and had to undergo surgery on 3.12.1998. The said fact is averred in para 36 of the affidavit, the reason for approaching the Appolo Hospital is also averred in para 35 of the affidavit. Exbt. P9 is the discharge summary of the Appolo Hospital which is proved by the affidavit of the complainant, the diagnosis mentioned therein, left tibial varus, intorsion deformity and left foot

equino varus deformity. On the date of discharge her condition is stated to be "NWB left side with walker" Exbt. P9 shows that she has to have a walker on the left side, in the affidavit also she says, the deformity of the left leg reduced and movement was restored. Though she was cross-examined by first and second opposite parties there is no effective cross-examination on the aforesaid aspects, averred in the affidavit. Thus what is to be noted is a healthy girl after the surgery needs the aid of a walker, she had to lean on the left.

Another aspect to be noted in this connection is, the nature of the defence taken by the opposite party particularly the second opposite party. As has noted whereas the complainant would maintain that she followed the instructions and performed the exercise as was instructed and ultimately physiotherapist too was engaged still said deformity on the performance of the surgery persists. One defence of the opposite party is, she did not comply with the instructions, at the same time he seeks to maintain that it is due to "adolescent idiopathic scoliosis of the dorso lumber spine". Exbt. P9 does not mention such a complication, Exbt. P3, the out-patient record has an entry on 8.1.1998 "DL. Spine across of lumber region to the left. Now it is necessary to note, whereas the complainant maintained her left leg is short by 1 inch, the second opposite party would deny the same and seeks to maintain that both the legs have same length. Incidentally Exbt. P8 photo- graph with the negative proved by affidavit shows the features of the leg, it shows the deformity. In paragraph 15 of the second opposite party's version it is contended, on 11.5.1998, the opposite party showed the complainant that on Rongerograms both legs were of equal length. But she was not convinced, the second opposite party contends on detailed examination, the opposite party found on 8.1.1998 that she was developing a deformity of the spine called Adoloscent Idopathic Scoliosis" of Dorso Lumber Spine which in ordinary words is a curvature of the spine caused lifting up of the left side of the pelvis and along with it the whole left lower leg. So, while standing, the level of Pelvis, instead of being normal horizontal became oblique with the left lower limb also went up. This produced, an apparent and not true shortening of the left lower limb". This pleading would go against his case that the deformity came into existence because of the negligence of the complainant in not adhering to the instructions. The effect of the same is also described in para 3 of the version he says as regards the said condition "Cause of this is not known and occurs between 10 years and skeletal maturity". If that is the position, as has been noticed his case that the complication arose because of failure to adhere to the instructions cannot be supported. Thus in the very case of the opposite party there is inconsistency. It is significant, the second opposite party admits when the complainant stands her left limb would not touch the ground because it would be lifted. The cause he says is, a complication which as noticed is not disclosed till 8.1.1998. The complainant as P.W. 1 denied the said suggestion saying that she has no such disease or complication.

5. THE burden on a complainant to establish negligence has to be judged on the facts of each case. In this case the complainant filed an affidavit detailing her case as well as offered for cross- examination, that she had to go to Appolo Hospital is not challenged in the cross- examination. None of the opposite parties has tendered any evidence either oral or documentary except producing the case file. It is true that the complainant moved I.A. 779/2000 for the issue of a commission for examining Dr. Gopalakrishnan, the said application was allowed, but the complainant filed another application later saying that for the reasons averred in the affidavit the order appointing the Commissioner has to be re-called. THE reason averred in the affidavit is when the doctor was requested to give evidence he said due to certain subsequent events he is not in a position to give evidence in a case against a doctor. Of course the averment by the petitioner by itself need not render the examination impossible as in such circumstance he could have taken steps for the issue of summons to the doctor for his examination before this Commission as a witness. THE question is whether the failure to examine the said doctor, in the facts and circumstance of this case, would adversely affect the case of the complainant has to be judged in the context of the nature of the case pleaded by the opposite party, the affidavit and evidence of P.W. 1 along with the materials already produced. As has already been noted, the condition of the complainant when she consulted the 2nd opposite party, she was healthy without any complaint, her position after the surgery at discharge from first opposite party hospital along with the said evidence would show the burden is shifted to the opposite parties to substantiate their case that the lifting of the left limb was due to a complication which developed later. At least the second opposite party could have filed an affidavit and offered for cross-examination. No reason whatever is assigned as to why anyone of them did not file affidavit. In such circumstance with due regard to the nature of the case pleaded by the second opposite party, and the evidence tendered by the complainant, unless the opposite parties substantiates, that deformity is the result of the condition, pleaded by them, the case of the complainant in this regard has to be accepted. In this connection it has to be noted, though it was contended that when the second opposite party wanted to stop the process at a particular stage the complainant insisted to continue the process for getting the desired height. This is not even put to P.W. 1 when she was examined. THEse are matters that could have been proved by filing affidavit and offering for cross-examination, that is not done. Since the exhibits are proved by affidavit and there being no challenge as regards the same the complainant is entitled to rely on them, Exbt. P1 series discharge summaries, P2 series, P4 series, P5 series bills and Exbt. P6 series prescriptions along with Exbt. P3 series. Case records of the complainant 1st opposite party hospital support and corroborate the evidence of P.W. 1 and her affidavit as to her treatment and details

of 1st opposite party hospital. Exbt. P9 discharge summary along with P10 series, P11 series, P12 series, P13 series and P16 series bills of the Appolo Hospital prove that she had to undergo surgery and treatment there, then such is the situation it has to be found that the case pleaded by the opposite party that because of "Adolosoent idiopathic scoliosis of the dorso lumbar spine" the present deformity developed is not substantiated. THEN the case of the complainant that there is negligence and deficiency of service should be accepted. This point, therefore, found in favour of the complainant. Point Nos. 2 and 3 :

6. THE complainant has produced Exbts. P2 series, P4 series- and P5 series bills evidencing payment to the first opposite party hospital. THEse bills take in an amount of Rs. 1,94,122/-. This is bare expenses in the first opposite party hospital towards medicine, etc. THE claim in the complaint is towards medical expenses Rs. 2,43,000/- and for future treatment, mental agony, etc. the further claim is Rs. 15 lakhs. Thus the total claim is Rs. 17,43,000/-. THE bills and medical expense and the other charges of the hospital alone cannot be the expenditure, there could be other incidental expenses also. In measuring the compensation the actual expenses which she had to meet at the first opposite party hospital and also the further expenditure she had to meet, the subsequent charges at the Appolo Hospital have to be kept in view. Apart from the same, naturally she should have undergone physical pain as well as agony; a young girl becoming afflicted with such deformity will certainly be agonising and desperate. THE expenditure at the Appolo Hospital is sought to be established by Exbt. P10 series, P11 series, P12 series, P13 series and P16 series bills which come to more than Rs. 2,00,000/- (Rs. two lakhs). Apart from the same she had to meet other expenditure also as seen from Exbt. P6 series, P14 series, P17 series, etc. Having regard to the aforesaid expenditure towards the hospital expenses, we consider that towards mental agony and medical expenses the complainant is eligible for a total compensation of Rs. 5,00,000/- (Rs. five lakhs).

Now the liability to pay the said amount has also to be gone into particularly in the context of the submission by the learned Counsel for the first opposite party that, if at all, there is any liability that should be only for the second opposite party, doctor. This is a tortious liability; admittedly, at the relevant period the second opposite party, doctor was employed in the first opposite party hospital. Therefore, the first opposite party is vicariously liable for the tortious acts of his employee during the course of his employment. But one important aspect to be noted is, the second opposite party in para 2 of the version stated that has taken a professional indemnity policy for doctors and medical practitioner during the relevant period from the New India Assurance Company Limited and that the said party has to be

impleaded. Accordingly the complainant moved a petition for impleading the said party "New India Assurance Company Limited" and was impleaded as the 3rd opposite party as per order on LA. 983/99. The 3rd opposite party though was served remained absent and was set ex- parte. Therefore, so far as the liability of the second opposite party doctor is concerned the 3rd opposite party has to indemnify to the extent of the insured amount. The second opposite party does not state for what amount he took the policy on the extent of the insurance cover. The 3rd opposite party is ex-parte. The 3rd opposite party cannot be absolved from the liability to the extent of the policy amount, the 3rd opposite party will be liable to indemnify the second opposite party to the extent of the amount covered by the policy. In the circumstance the complainant shall be entitled to her costs which we fix at Rs. 2,000/-. Points found accordingly.

In the result opposite parties 1 and 2 are directed to pay Rs. 5,00,000/- (Rs five lakhs) to the complainant; the 3rd opposite party is liable to indemnify the second opposite party to the extent of the amount covered by the policy. The said amount shall be paid as above within three months of the receipt of the copy of this order failing which the said amount will bear interest at 14% from the date of the expiry of the said three months till payment or recovery. The complainant shall be entitled to her costs Rs. 2,000/-. Complaint allowed with costs.