

Dr. (Mrs.) Satya Atri Vs Smt. Shashi Sharma and Others

Court: Jammu & Kashmir High Court

Date of Decision: June 14, 2002

Acts Referred: Jammu and Kashmir Consumer Protection Act, 1987 â€” Section 15, 2

Citation: AIR 2003 J&K 41 : (2010) 4 JKJ 832

Hon'ble Judges: Tajinder Singh Doabia, J; Sudesh Kumar Gupta, J

Bench: Division Bench

Advocate: L.K. Sharma and V.B. Gupta, for the Appellant; Abhinav Sharma, for the Respondent

Final Decision: Dismissed

Judgement

Doabia, J.

The proverbial ""needle of suspicion"" in this case ultimately turned out to be a curved foreign body which stood lodged in the

system of the respondent. She had undergone a caesarean operation on 1st Oct., 1998. Thereafter she complained of pain. She was examined by

the appellant-doctor. It was noticed that respondent was complaining of pain and irritation in the lower abdominal region which was described as

vague. The respondent got herself X-rayed. Ultra sound and CT Scanning was also got done. It was found that a foreign body stood lodged in her

system. This foreign body stands removed. It is for this, the damages were claimed. The damages have been allowed. Appellants in these appeals

seek reversal of the order passed by the State Commission.

2. 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. Whether or not he is a registered medical practitioner, such a person 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, a duty of care in his

administration of that treatment and a duty of care in answering a question put to him by a patient in circumstances in which he knows that the

patient intends to rely on his answer. A breach of any of these duties will -support an action for negligence by the patient.

The aforementioned statement of law has been quoted from Halsbury's Laws of England. Vol. 30 Fourth Edition, page 31 paragraph 34. With

regard to the degree of skill and care required from a medical practitioner, what is said in paragraph 35 can also be quoted with advantage. This is

being quoted :

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, and a person is not liable in negligence because someone else of greater 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 responsible body

of medical men skilled in that particular art, even though a body of adverse opinion also existed among medical men.

3. Deviation from normal practice is not necessarily evidence of negligence. To establish liability on that basis it must be shown (i) that there is a

usual and normal practice; (2) that the defendant has not adopted it; and (3) that the course in fact adopted is one no professional man of ordinary

skill would have taken had he been acting with ordinary care.

4. It is a defence to a practitioner that he acted on the specific instructions of a consultant who had taken over responsibility for the case. Failure to

use due skill in diagnosis with the result that wrong treatment is given is negligence.

5. It is in the light of the aforementioned broad principles, what is projected in these appeals is being noticed.

6. Respondent-complainant was admitted in a hospital namely Bee Enn General Hospital at Jammu. This was on 30th Sept., 1998. She was under

the care of Doctor Satya Atri. The complainant was operated upon. She gave birth to a female child. This operation was performed on 1st Oct.,

1998. The complainant remained in the hospital till 5th Oct., 1998. She was discharged on the same day at 9 p.m. For the service rendered to the

complainant, she paid a sum of Rs. 8819. The further fact which was projected by the complainant and which stands noticed by the Commission

constituted under the Jammu and Kashmir State Consumer Protection Act, before whom the complaint was filed, is that she started having acute

pain in the lower abdominal region. She was examined by the lady doctor referred to above. The doctor applied some Gel but this gave no relief to

the complainant. As the pain persisted and as the complainant submits it aggravated, she got herself X-rayed in Shafa Diagnostic Centre. The

report which was given was to the effect that ""A Radio Opaque F-B (needle is seen in the pelvis overlying Sacrum)."" This naturally disturbed the

complainant. She sought further medical assistance at Acharaya Shri Chandra College of Medical Sciences and Hospital, Sidhra, Jammu. A fresh

X-ray confirmed the earlier report. The fresh report given was to the following effect :--

A curved foreign body is seen in the Pelvic region.

7. This caused mental distress to the complainant. She got another opinion. One Dr. Jagdish Chander Sharma advised the complainant for

undergoing Ultra-sound. The Ultra-sound conducted also confirmed the earlier report. The report which was given is as under :--

A foreign body was seen in the left anterior wall of the uterus and foreign body anterior wall of uterus cholelithiasis.

8. These reports did confirm the fear of the complainant that a foreign body was there in her lower abdominal system. She approached the hospital

where she was operated upon by Dr. Pankaj Aggarwal who was assisted by Dr. Yashpaul Gupta. This was on 20th Nov., 1998. The foreign

body was removed. The complainant lodged a complaint with the State Commission. She claimed compensation to the extent of Rs. 6 lacs. She

has been allowed compensation to the extent of Rs. One lac. In case of nonpayment of the compensation amount within a period of four weeks

from the date the order was passed by the Commission, interest at the rate of 12% was to be paid. The compensation amount is to be paid equally

by the hospital and the doctor who operated upon the complainant. It is against this order, the doctor i.e. appellant in C.I.M.A. No. 46-A/2001

and the hospital i.e. appellant in C.I.M.A. No. 55/2001 have preferred the aforementioned two separate appeals.

9. The findings which have been recorded by the State Commission are :

i) That the hospital is not a charitable institution. The fact that the complainant was called upon to pay a sum of Rs. 8819 was taken note of;

ii) That a foreign body was left in the lower abdominal region of the complainant;

iii) The argument that this foreign body could be inserted by the complainant herself was brushed aside. It was observed that the X-ray report,

report of Ultra-sound and the CT Scan did prove that a foreign body was left in the anterior wall of the abdomen of the complainant.

10. The statement of Dr. Pankaj Aggarwal who conducted the second operation was taken note of. The fact that this doctor was unable to say as

to whether the foreign body was a needle or not was taken note of. It was observed that Dr. Pankaj Aggarwal had tried to help his colleague in

profession. The State Commission as indicated above, concluded that the foreign body was left in the lower abdominal system of the complainant

when the first operation was performed by the lady doctor namely Mrs. Satya Atri and for this she and also the hospital authorities were held

liable. In this appeal, preferred by the lady doctor who conducted the first operation, it is admitted that a caesarian operation was performed by

the appellant on respondent No. 1 with the help of a team of anaesthetist, Assistant Surgeon and thereafter by the staff provided by the respondent

No. 2 in the appeal preferred by the lady doctor i.e. Bee Enn General Hospital. This assertion has been made in paragraph 5 of the appeal. It is

also admitted that the complainant was discharged on 5th Oct., 1998. It is further admitted that the complainant did visit her again and the

appellant found that she (complainant) was complaining about some irritation and pain. This has been described by the doctor as a vague irritation

and pain in the area of the operation scar. It is stated that the appellant on examination found that it was so trivial that it required no further probe.

The appellant assured the complainant that the pain and irritation would disappear. The fact that doctor Pankaj Aggarwal, a specialist Surgeon did

remove an object is not being denied. This was done on 20th November, 1998. All that is sought to be projected is that this was done by giving a

small incision slightly away from and to the left of the scar of the earlier operation. What is sought to be urged is that the operation was a minor and

the whole event should be forgotten notwithstanding the fact that a foreign body was removed. It is sought to be projected that this is not a case

depicting any negligence. The arguments thus put across on behalf of the lady doctor are :

i) That the first X-ray report of the complainant indicated presence of a needle like object and the fact is that this needle like substance was not

removed but some metallic object was removed after the minor incision by the Doctor namely Pankaj Aggarwal; therefore, the case as projected

by the complainant deserves outright rejection;

ii) That Dr. Inder Singh who had performed the CT Scan did not find any needle like object;

iii) That the fact that Dr. Pankaj Aggarwal who removed the object did not find a needle like object and that whatever metallic substance was there

was removed after a minor surgery and, therefore, the question of negligence on part of appellant did not arise at all, and as such she should not

have been burdened with the cost of compensation.

11. So far as the medical evidence which has come on the record is concerned, it is clear and categorical.

12. Shafa Diagnostic Centre, where the X-ray was performed, gave its report that a Radio Opaque F-B (Needle is seen in the pelvis over-lying

sacrum). The report by the hospital namely Acharaya Shri Chander College of Medical Sciences and Hospital, Sidhra, Jammu is to the effect that

a curved foreign body is seen in the pelvic region." The Ultra-sound examination conducted by Dr. Jagdish Chander Sharma is also to the effect

that "a foreign body was seen in the left anterior wall of the Uterus and foreign body anterior wall of Uterus Cholelithiasis." The complainant was

operated second time in the very hospital where the first operation was performed. Dr. Pankaj Aggarwal who removed the foreign body from the

lower abdominal system of the complainant did give an opinion that this is not a needle like object. In this regard, it would be apt to mention that

Dr. Jagdish Chander Sharma who had advised the complainant to undergo an Ultra-sound did opine a day earlier to the second operation that

F.B. Stitching needle, Abdomin after C. Seaharon 1-10-1998"" is diagnosed. From the evidence which has come on the record, it cannot be said

that the findings recorded by the State Commission holding that a foreign body was left in the lower abdominal system of the complainant requires

reversal. The fact that first operation was performed and the fact that soon thereafter the complainant complained of pain and irritation and she

visited the doctor who had operated her i.e. the appellant and the fact that she was later on operated upon by Dr. Pankaj Agarwal are all factors

which are relevant and they lead to only one conclusion that a foreign body was, infact, left in the system of the complainant. This necessitated a

second operation. The complainant did suffer mental torture.

13. The learned counsel for the appellant has placed reliance on the decisions given by different Commissions constituted under the Consumer

Protection Act of 1986. The first decision on which reliance is being placed is the one given by the Rajasthan State Consumer Disputes Redressal

Commission at Jaipur. This is reported as Chanchal Oswal v. Santokba Durlabhji Memorial Hospital (1995) 1 CPJ 42. In the above case, the

complainant came before the Commission on the plea that some surgical guaze was left inside the chest when she was operated upon.

Compensation was not allowed as a firm finding was recorded that the version of the complainant that a surgical guaze was left inside the chest

while performing the operation had not been established. Thus, the claim was declined after recording, a finding that the foreign material which the

complainant was stating was left inside was, as a matter of fact, not left. What would have been the situation had the foreign body been left in the

system of Chanchal Oswal in the above case is a matter which cannot be adverted to. All that is being said is that the aforementioned decision

would be of no assistance as the finding recorded in the above case was that no such material was left.

14. The other decision is of the Karnataka State Consumer Disputes Redressal Commission at Bangalore. This is reported as Smt. Rina Prakash

v. Dr. Dechi Ganapathy 3 (1994) CPJ 358. The complainant went to the Commission with a plea that some foreign body ""Sponage M.O.I."" was

left in her system. The plea of the complainant was rejected as a finding of fact was recorded that no such foreign body was left in the system of

complainant. Yet another decision on which reliance has been placed is of Madhya Pradesh State Consumer Disputes Redressal Commission,

Bhopal. This is reported as Syed Zahid Ali v. Dr. Jaiprakash Paliwal 1 (2000) CPJ 129. In the above case, again there was no evidence that a

second operation was performed with a view to remove the gauge which was alleged to have been left in the system of the complainant. A finding

of fact was recorded to the above effect. The complainant in these circumstances was held not entitled to any damages. The decision given by

West Bengal Consumer Disputes Redressal Commission, Calcutta, reported as 3 (1997) CPJ 469. Anup Kumar Ghose v. Dr. T.K. Biswas has

also been relied upon. This was again a case of insufficient evidence. There was failure to prove that there was deficiency in service. Therefore, the

authorities on which reliance has been placed by the appellant would be of no assistance to her. This is, in fact, a case where a foreign body was

left in the system of complainant. A firm finding of fact has been recorded in this regard by the State Commission. The complainant got the opinion

of different doctors. X-ray was performed, Ultra-sound and CT Scanning was also got done. It was after getting these opinions, the complainant

approached the very hospital where she was operated upon. In these circumstances, we are of the opinion that the finding of fact recorded by the

State Commission cannot be dislodged. We are conscious of the fact that a charge of professional negligence against a medical man is serious. It

stands on a different footing as compared with other cases of negligence. The consequence of this are far more serious; it affects the professional

status and reputation of the doctor concerned. We are also conscious of what Lord Denning said in Kucks v. Colo (1968) 118 New ER 469. The

observations made in the above case are being reproduced below :--

..... .The burden of proof was correspondingly greatened. As the charge was so grave, so should the proof be clear. With the best will in the

world, things sometimes went amiss in surgical operations or medical treatment. A Doctor is not to be held negligent simply because something

went wrong. He was not liable for mischance or misadventure; or for in 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 fields

so much so that his conduct might be deserving of censure of inexecutable.

15. We also take notice of what has been said by the Supreme Court in the case of Dr. Laxman Balkrishna Joshi Vs. Dr. Trimbak Bapu Godbole

and Another, . What was said is being quoted (para 11):

The duties which a doctor owes to his patient are clear. A person who holds himself out ready to give medical advice and treatment impliedly

undertakes that he is possessed of skill and knowledge for the purpose. Such a person when consulted by a patient owes him certain duties, viz., a

duty of care in deciding whether to undertake the case, a duty of care in deciding what treatment to give or a duty of care in the administration of

that treatment. A breach of any of those duties gives a right of action for negligence to the patient. The practitioner must bring to his task a

reasonable degree of skill and knowledge and must exercise a reasonable degree of care. Neither the very highest nor a very low degree of care

and competence judged in the light of the particular circumstances of each case in what the law requires (cf. Halsbury's Laws of England. 3rd ed.

Vol. 26, p. 17). The doctor no doubt has a discretion in choosing treatment which he proposes to give to the patient and such discretion is

relatively ampler in cases of emergency.

16. In this regard, reference be made to the decision given by the Supreme Court in the case of State of Haryana and Others Vs. Smt. Santra, .

What is said in paragraphs 10 to 13 of the judgment is relevant and is being reproduced below (paras 9 to 12 of AIR) :

Negligence is a "tort." Every doctor who enters into the medical profession has a duty to act with a reasonable degree of care and skill. This is

what is known as "implied undertaking" by a member of the medical profession that he would use a fair, reasonable and competent degree of skill.

In Bolam v. Friern Hospital Management Committee (1957) 2 All ER 118, McNair, J. summed up the law as under :

The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert

skill at the risk of being found negligent. It is well-established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man

exercising that particular art. in the case of a medical man, negligence means failure to act in accordance with the standards of reasonably

competent medical men at the time. there may be one or more perfectly proper standards; and if a medical man conforms with one of those

proper standards then he is not negligent.

11. This decision has since been approved by the House of Lords in Whitehouse v. McGregor (1981) 1 All ER 267 : (1981) 1 WLR 246 (HL),

Maynard v. West Midlands Regional Health Authority. (1985) 1 All ER 635 : (1984) 1 WLR 634 (HL) and Sidway v. Bethlem Royal Hospital

(1985) 1 All ER 643 : 1985 AC 871 : (1985) 2 WLR 480 (HL).

12. In two decisions rendered by this Court, namely, Dr. Laxman Balkrishna Joshi Vs. Dr. Trimbak Bapu Godbole and Another, and A.S. Mittal

and Another Vs. State of U.P. and Others, , it was laid down that when a doctor is consulted by a patient, the former namely, the doctor owes to

his patient certain duties which are (a) a duty of care in deciding whether to undertake the case; (b) a duty of care in deciding what treatment to

give; and (c) a duty of care in the administration of that treatment. A breach of any of the above duties may give a cause of action for negligence

and the patient may on that basis recover damages from his doctor. In a recent decision in Poonam Verma Vs. Ashwin Patel and others, where the

question of medical negligence was considered; in the context of treatment of a patient, it was observed as under (SCC p. 348, para 42) : (at p.

2119 para 40 of AIR) :

42. Negligence has many manifestations--It may be active negligence, collateral negligence, comparative negligence, concurrent negligence,

continued negligence, criminal negligence, gross negligence, hazardous negligence, active and passive negligence, wilful or reckless negligence or

negligence per se which is defined in Black's Law Dictionary as under :

Negligence per se.--Conduct, whether of action or omission, which may be declared and treated as negligence without any argument or proof as

to the particular surrounding circumstances, either because it is in violation of a statute or valid municipal ordinance, or because it is so palpably

opposed to the dictates of common prudence that it can be said without hesitation or doubt that no careful person would have been guilty of it. As

a general rule, the violation of a public duty, enjoined by law for the protection of person or property, so constitutes.

13. It was also observed that where a person is guilty of negligence per se, no further proof is needed.

17. In para 16 of the Judgment in the above case, reference was made to the decision given in Whitehouse v. Jordan (1957) 2 All ER 118. What

was said in this para is being reproduced below :--

In this judgment, reliance was placed on the decision of the House of Lords in Whitehouse v. Jordan. Lord Fraser, while reversing the judgment

of Lord Denning (sitting in the Court of appeal), observed as under :--

'The true position is that an error of judgment may, or may not, be negligent; it depends on the nature of the error. If it is one that would not have

been made by a reasonably competent professional man professing to have the standard and type of skill that the defendant held himself out as

having, and acting with ordinary care, then it is negligent. If, on the other hand, it is an error that (such) a man, acting with ordinary care, might have

made, then it is not negligence.

18. The aforementioned decisions clearly bring out that where there is negligence on the part of a doctor, then, it would not only attract statutory

liability but it would also amount to deficiency in service and the issue can be examined under the Consumer Protection Laws.

19. At this stage, the argument on behalf of the Hospital that this is a charitable institution, and therefore, is not amenable to the provisions of

Consumer Protection Laws be also examined.

20. It be seen that no evidence was led that the Institution is, infact, a charitable institution. The complainant paid a sum of Rs. 8819 to the hospital.

Therefore, where the services are rendered by the Doctors and hospitals for which charges are required to be paid by everyone availing that

services, this would be covered by the term ""special service"" as defined in the Act. Such is the opinion expressed by the Supreme Court in the case

of Indian Medical Association Vs. V.P. Shantha and Others, . As a matter of fact, in Poonam Verma Vs. Ashwin Patel and others, , it has been

observed that the Consumer Protection Act is applicable to a person engaged in medical profession as private practitioners. It was held in the

above case that where a person is guilty of negligence per se, no further proof is needed.

21. In Smt. Vinitha Ashok Vs. Lakshmi Hospital and Others, . the view expressed is that a doctor would be liable for negligence in respect of

diagnosis and treatment in spite of a body of professional opinion approving his conduct where it is not established to the Court satisfaction that

such an opinion relied upon is reasonable or responsible. It was observed that if it can be demonstrated that professional opinion is not capable of

withstanding the logical analysis, the Court would be entitled to hold that the body of opinion is not reasonable of responsible. However, on facts, it

was observed that the procedure which was adopted by the medical experts was a procedure which was valid and in common use in the State of

Kerala and it was observed that on facts, a case of negligence was not made out,

22. Thus, on the basis of evidence which has come on the record and in view of the legal position vis-a-vis liability of medical profession; we are of

the opinion;

i) That this is a case where a foreign body was left inside the system of the complainant;

ii) The fact that a foreign body was left in the lower abdominal region of the complainant stands established from the report of the X-ray, CT Scan

and also from the report of Ultra-sound, which investigations were got done by the complainant from different diagnostic centres;

iii) That after the different reports of X-ray. Ultra-sound and CT Scan were collected by the complainant, she approached the very doctor who

had conducted the first operation and complained of the pain;

iv) That the foreign object was removed in the very hospital where first operation was performed by the appellant-Dr. Satya Atri:

v) That this is a case which does demonstrate that Dr. Satya Atri had a duty to act with a reasonable degree, care and skill. This is a part of

implied undertaking given by a person in medical profession, which element is missing in this case.

23. In view of the above, it is held that no case is made out for interfering with the view expressed by the State Commission. This appeal along

with the connected appeal preferred by the hospital i.e. C.I.M.A. No. 55/2001 shall stand dismissed.