UTTAR PRADESH STATE CONSUMER DISPUTES REDRESSAL COMMISSION

Before: Sri. Rajendra Singh, Presiding Member and Sri. Vikas Saxena, Member Date of Decision : March 14, 2024.

Complaint Case No.159 of 2014. D/d. 14.03.2024.

Vinay Kumar Mishra – Complainant

VERSUS

Sri. Mankameshwar Nursing Home and others – Opposite Parties

Legislation and Rules:

Section 106 of the Indian Evidence Act, 1872

Section 17A(i) of the Consumer Protection Act, 1986

Subject: The complaint centers around allegations of medical negligence involving a homeopathic doctor practicing allopathic medicine, resulting in the death of the complainant's wife due to complications post-childbirth.

Headnotes:

Consumer Law - Medical Negligence and Misrepresentation – Consumer Protection Act 1986, Section 17A(i) – Case of wrongful practice and medical negligence resulting in patient's death – Held – Opposite party-2, claiming to be a gynecologist while holding only a homeopathic degree, engaged in misrepresentation and medical negligence. Given the absence of proper allopathic treatment capabilities and misleading information provided to the patient, her death due to postpartum hemorrhage (PPH) amounted to a deficiency in service. Complaint substantiated, opposite parties held liable for compensation. [Paras 2-5, 111-115]

Res Ipsa Loquitur Applicability – Doctrine applied given the circumstances of the case where the type of accident that occurred (postpartum hemorrhage leading to death) does not usually happen without negligence. Opposite parties failed to provide necessary medical attention in a timely manner, which directly contributed to the deterioration of the patient's condition and eventual death. [Paras 36, 114]

Duty of Care in Medical Practice – Healthcare providers must adhere to the ethical standards and care expected in their professional domain. Misrepresentation of medical qualifications and failure to adhere to these standards constitutes a breach of duty and results in a deficiency of service. The case underscores the importance of transparency and competence in healthcare delivery. [Paras 25, 111]

Compensation for Medical Negligence – Opposite parties ordered to pay significant compensation for the emotional distress caused to the complainant and the loss of life due to medical negligence. The calculated compensation reflects the severity of the misconduct and the impact on the complainant's life. [Para 115]

Final Order – Opposite parties directed to pay a total of Rs. 30.2 lakhs as compensation and legal costs to the complainant, with additional interest applicable if payment delays occur. This order underscores the accountability mechanisms in place for consumer protection in medical services. [Para 115]

Referred Cases:

- A.S. Mittal v. State of UP, AIR 1989 SC 1570
- Achutrao Haribhau Khodwa v. State of Maharashtra
- Byrne v. Boadle
- Cassidy v. Ministry of Health, [1951] 2 KB 343
- Clarke v. Worboys, (1952) Times, 18 March, CA
- Cox v. May Dept. Store Co., 903 P.2d 1119 (1995)
- Dr. Kunal Saha v. Dr. Sukumar Mukherjee, on 21.10.2011 (NC), original petition number 240 of 1999
- Indian Medical Association v. V.P. Santha, III (1995) CPJ 1 (SC)

- Jacob Mathew v. State of Punjab, AIR 2005 SC 3180
- Laxman Balkrishna Joshi (Dr) v. Dr. Trimbak Bapu Godbole, AIR 1969 SC 128 : 1969 SCR (1) 206 : AIR 1969 SC 128
- Mahon v. Osborne, [1939] 1 All ER 535
- Malay Kumar Ganguli's, AIR 2010 SC 1162
- Ng Chun Pui v. Lee Chuen Tat
- Nizam Institute of Medical Sciences v. Prashant S. Dhananka, 2009 (VI) SCC 1
- Poonam Verma v. Ashwin Patel (1996) 4 SCC 332 (SC), Decided on 10.5.1996
- Prof. P.N. Thakur v. Hans Charitable Hospital
- V. Krishna Rao v. Nikhil Super Speciality Hospital, 2010 (V) SCC 513

Representing Advocates:

Sri. Hemraj Mishra, Advocate for complainant.

Sri. Ashok Kumar Rai, Advocate for opposite parties.

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JUDGMENT

Sri. Rajendra Singh, Presiding Member. -This complaint has been filed by the complainants against the opposite parties under section 17A(i) of The Consumer Protection Act 1986.

2. The brief facts of the complaint case are that, that the complainant's wife Smt. Sangita was pregnant and on 15.01.2014, she was admitted in the nursing home of the opposite party at 9 PM in the night. The opposite party-2 Dr. Meena Pandey told the complainant that she is gynaecologist and specialist in gynaecology. On 16.01.2014, the complainant's wife gave birth a female child at 9:45 AM through normal delivery and thereafter Dr. Meena Pandey told the complainant that his wife and child are fine. After some time the opposite party-2 told the complainant to arrange blood. The complainant arranged the blood and reached hospital, Dr. Meena Pandey told to the

complainant that his wife is no more. The complainant was shocked to hear the death of his wife who has two female children.

3. The complainant was again shocked when he came to know that Dr. Meena Pandey having the degree of Homeopathic Medicine but she was prescribing allopathic medicines and treated his wife through allopathic medicines. Dr. Meena Pandey is a homeopathic doctor and she has no right to prescribe any allopathic medicines. The complainant's wife died due to excess bleeding and Dr. Meena Pandey did not take care properly because she is a Homeopathic doctor and as such she has no knowledge about the allopathic medicines. The aforesaid action of the opposite party-2 comes under deficiency of service and she showed medical negligence. The complainant informed the police about the aforesaid incident and an FIR has been lodged with police station Hasanganj, Lucknow. The complaint also filed a complaint before the Medical Council and the Medical Council constituted a Medical Board and the medical board after enquiry submitted its report in which it has been stated that Dr. Meena Pandey has homeopathy degree but she is practising in allopathic and this action of Dr. Meena Pandey is medical negligence.

4. The complainant suffered mental agony and economical harassment due to negligence of Dr.Meena Pandey. Therefore the complainant has filed this petition with the following reliefs :

a. To award compensation of Rs. 40 lakhs at a rate of 18% interest per annum on account of medical negligence done by the opposite parties.

b. To award compensation of Rs. 5 lakhs towards mental pain and agony.

c. To award compensation of 20,000 towards cost of the complainant.

5. The opposite parties have filed their written statement stating that the complainant has come to the opposite party-1 with his patient along with an ex-employee of the opposite party-1 and presently advocate Sri. Uma Kant Gupta, his friend. It is absolutely wrong that when the complainant brought his wife for admission to opposite party-1, the opposite party-2 told him that she is gynaecologist and specialist in gynaecology. The complainant wife was not fit, infact she was bleeding after delivery, which may be seen in the delivery note of the treatment chart. The complainant was intimated by the opposite party-2 about the birth of a female child and the condition of the patient i.e. postpartum haemorrhage and the emergency situation. It was told him that he may see the patient and child but he did not see the patient and

child because he was not pleased about the birth of a female child. The sample of blood was given to the complainant at 9:55 AM to bring the blood from blood bank but despite the knowledge of the poor condition of the patient and profuse bleeding to his wife, he did not turn up before the death of the patient at 1 PM, though it is evident from the Cross match report of blood bank that the blood was handed over to the complainant at 11:10 AM.

6. After the death of his wife, the complainant called his friends through phone, who started giving threat to the opposite party-2 as well as Dr. Mahesh Prasad Pandey to destroy the property of the opposite party-1 and assaulted physically the staff of the opposite party-1 hospital, opposite party-2 and Dr. Mahesh Prasad Pandey. On suggestion of the opposite party for the post-mortem of the dead body of the wife of the complainant, the complainant denied for post-mortem and directed the opposite party to issue the death certificate. Dr. Mahesh Prasad Pandey issued the death certificate and handed over the dead body of the patient and physically fit live female child to the complainant.

7. It is not denied that the opposite party-2 is BHMS but it is vehemently denied that she prescribed any allopathic medicines to the patient. It is also denied that the opposite party-2 gave treatment to the patient with allopathic medicines. The treatment was given to the wife of the complainant by Dr. Mahesh Prasad Pandey, the husband of the opposite party-2 and co-owner of the opposite party1, who has MBBS and MD degree and is a qualified doctor and authorised to treat the patient by prescribing allopathic medicines. The complainant's wife expired due to excessive bleeding. The opposite party-2 neither committed any medical negligence in the treatment of the wife of the complainant nor showed any deficiency of service. The FIR was lodged after a month mentioning wrong fact and only to harass the opposite parties and to grab money from them. The complainant is guilty of gross misbehaviour having repeatedly used abusive and filthy language and gave threats to the doctor and staff of the opposite party-1.

8. The opposite party-1 is operated by Dr. Mahesh Prasad Pandey, MBBS MD, and the opposite party2 Dr. Meena Pandey, having qualification of BHMS and who has ample experience with Dr. Shashi Gupta, MBBS, DGO (KGMC). She is advised to attend a woman during her confinement, as per the regulations of section 24(1) & (2) of the Central Council of Homeopathy. In Fact Dr. Mahesh Prasad Pandey used to give the treatment to the patient in allopathic method and opposite party-2 used to give the treatment to the

patients in homeopathic method. The opposite party -2 always joins Dr. Mahesh Prasad Pandey in the treatment of every female patients and in normal deliveries and on the instructions of Dr. Mahesh Prasad Pandey, uses to write his prescription only in his presence.

9. The complainant came with his wife with reference of Mr. Uma Kant Gupta, ex-employee of the opposite party-1 on 15.01.2014 at 9 PM for the complaint of pain in the abdomen of his wife. On enquiry it was found that her LMP was 17.04.23 and expected date of delivery was 26.01.2014. The patient was admitted and kept under observation. The pain in the abdomen was exceeding despite of the treatment and ultimately, she delivered a female child at 9:45 AM on 16.01.2014 in normal course under care of Dr. Mahesh Pandey and in the presence of opposite party-2 but the patient had excessive bleeding for which necessary treatment was given by Dr. Mahesh Pandey. At 9:45 AM, the situation was intimated to the complainant and at 9:55 AM, the blood sample was handed over to the complainant to bring the blood from the blood bank. He went away and turned after 1 PM when the patient was no more. The opposite parties did their best to save the life of the patient but failed to do so due to the postpartum haemorrhage. The WHO also worried for the mortality ratio due to PPH. There was neither any negligence in the treatment of the patient nor any deficiency in service committed by the opposite parties.

10. The PPH was created to the patient suddenly, which was not expected earlier and the opposite parties attended the patient with utmost promptness and care and resorted to the best followed medical practice, which are necessary in the circumstances of the case by giving Botropase and Prostodine injections, uterine massage, IV fluid and injection Hemaccel et cetera. Despite all the aggressive measures, the condition of the patient was deteriorating and the complainant after going to arrange the blood at 9:55 AM switched of his mobile phone and came to opposite party-1 after the death of the patient at 1 PM. The entire medical treatments are unanimous on the high mortality rate in PPH. Thus, the death of the patient was not due to any medical negligence, but on the contrary, it is also solely attributable to the high risk of life involved in the PPH.

11. The present case is a tool for pressurising the opposite parties to extract uncalled compensation and as such the instant malicious complaint deserves to be dismissed with cost. The complainant has utterly failed to establish any negligence beyond the general allegations. Further, the

complainant has also failed to explain his default of not reaching to the opposite party-1 with blood which was to be transfused to the patient, as soon as possible and not clearing the bill of the opposite party-1. The medical board appointed on the application of the complainant, nowhere mentioned in the report that the patient was died due to negligence of the opposite parties or the opposite parties committed deficiency in service. The onus on the complainant to prove as to what negligence was committed by the doctor in treatment of the patient and the same may be corroborated by the expert reports and clinical findings, in which the complainant absolutely failed to prove and as such, the complaint is liable to be dismissed with costs.

12. We have heard the learned counsel for the complainant Mr. Hemraj Mishra and the learnedcounsel of the opposite parties Mr. Ashok Kumar Rai. We have perused the pleadings evidences and documents on record.

13. In this case first we have to discuss about the PPH, postpartum haemorrhage. Postpartum hemorrhage (PPH) is severe vaginal bleeding after childbirth. It's a serious condition that can lead to death. Other signs of postpartum hemorrhage are dizziness, feeling faint and blurred vision. PPH can occur after delivery or up to 12 weeks postpartum. Early detection and prompt treatment can lead to a full recovery.

14. Postpartum hemorrhage (also called PPH) is when a woman has heavy bleeding after giving birth. It's a serious but rare condition. It usually happens within 1 day of giving birth, but it can happen up to 12 weeks after having a baby. About 1 to 5 in 100 women who have a baby (1 to 5 percent) have PPH.

15. It's normal to lose some blood after giving birth. Women usually lose about half a quart (500 milliliters) during vaginal birth or about 1 quart (1,000 milliliters) after a cesarean birth (also called c-section). A c-section is surgery in which your baby is born through a cut that your doctor makes in your belly and uterus (womb). With PPH, you can lose much more blood, which is what makes it a dangerous condition. PPH can cause a severe drop in blood pressure. If not treated quickly, this can lead to shock and death. Shock is when your body organs don't get enough blood flow.

When does PPH happen?

16. After your baby is delivered, the uterus normally contracts to push out the placenta. The contractions then help put pressure on bleeding vessels where the placenta was attached in your uterus. The placenta grows in your

uterus and supplies the baby with food and oxygen through the umbilical cord. If the contractions are not strong enough, the vessels bleed more. It can also happen if small pieces of the placenta stay attached.

How do you know if you have PPH?

17. You may have PPH if you have any of these signs or symptoms. If you do, call your health care provider right away:

Heavy bleeding from the vagina that doesn't slow or stop Drop in blood pressure or signs of shock. Signs of low blood pressure and shock include blurry vision; having chills, clammy skin or a really fast heartbeat; feeling confused, dizzy, sleepy or weak; or feeling like you're going to faint.

Nausea (feeling sick to your stomach) or throwing up Pale skin Swelling and pain around the vagina or perineum. The perineum is the area between the vagina and rectum.

Are some women more likely than others to have PPH?

18. Yes. Things that make you more likely than others to have PPH are called risk factors. Having a risk factor doesn't mean for sure that you will have PPH, but it may increase your chances. PPH usually happens without warning. But talk to your health care provider about what you can do to help reduce your risk for having PPH.

19. You're more likely than other women to have PPH if you've had it before. This is called having a history of PPH. Asian and Hispanic women also are more likely than others to have PPH.

20. Several medical conditions are risk factors for PPH. You may be more likely than other women to have PPH if you have any of these conditions:

Conditions that affect the uterus

Uterine atony. This is the most common cause of PPH. It happens when the muscles in your uterus don't contract (tighten) well after birth. Uterine contractions after birth help stop bleeding from the place in the uterus where the placenta breaks away. You may have uterine atony if your uterus is stretched or enlarged (also called distended) from giving birth to twins or a large baby (more than 8 pounds, 13 ounces). It also can happen if you've already had several children, you're in labor for a long time or you have too much amniotic fluid. Amniotic fluid is the fluid that surrounds your baby in the womb.

Uterine inversion. This is a rare condition when the uterus turns inside out after birth.

Uterine rupture. This is when the uterus tears during labor. It happens rarely. It may happen if you have a scar in the uterus from having a c-section in the past or if you've had other kinds of surgery on the uterus.

Conditions that affect the placenta

Placental abruption. This is when the placenta separates early from the wall of the uterus before birth. It can separate partially or completely.

Placenta accreta, placenta increta or placenta percreta. These conditions happen when the placenta grows into the wall of the uterus too deeply and cannot separate.

Placenta previa. This is when the placenta lies very low in the uterus and covers all or part of the cervix. The cervix is the opening to the uterus that sits at the top of the vagina.

Retained placenta. This happens if you don't pass the placenta within 30 to 60 minutes after you give birth. Even if you pass the placenta soon after birth, your provider checks the placenta to make sure it's not missing any tissue. If tissue is missing and is not removed from the uterus right away, it may cause bleeding.

Conditions during labor and birth

Having a c-section

Getting general anesthesia. This is medicine that puts you to sleep so you don't feel pain during surgery. If you have an emergency c-section, you may need general anesthesia.

Taking medicines to induce labor. Providers often use a medicine called Pitocin to induce labor. Pitocin is the man-made form of oxytocin, a hormone your body makes to start contractions.

Taking medicines to stop contractions during preterm labor. If you have preterm labor, your provider may give you medicines called tocolytics to slow or stop contractions.

Tearing (also called lacerations). This may happen if the tissues in your vagina or cervix are cut or torn during birth. The cervix is the opening to the uterus that sits at the top of the vagina. You may have tearing if you give birth to a large baby, your baby is born through the birth canal too quickly or you have an episiotomy that tears. An episiotomy is a cut made at the opening of

the vagina to help let the baby out. Tearing also can happen if your provider uses tools, like forceps or a vacuum, to help move your baby through the birth canal during birth. Forceps look like big tongs. A vacuum is a soft plastic cup that attaches to your baby's head. It uses suction to gently pull your baby as you push during birth.

Having quick labor or being in labor a long time. Labor is different for every woman. If you're giving birth for the first time, labor usually takes about 14 hours. If you've given birth before, it usually takes about 6 hours. Augmented labor may also increase risk of PPH. Augmentation of labor means medications or other means are used to make more contractions of the uterus during labor.

Other conditions

Blood conditions, like von Willebrand disease or disseminated intravascular coagulation (also called DIC). These conditions can increase your risk of forming a hematoma. A hematoma happens when a blood vessel breaks causing a blood clot to form in tissue, an organ or another part of the body. After giving birth, some women develop a hematoma in the vaginal area or the vulva (the female genitalia outside of the body). Von Willebrand's disease is a bleeding disorder that makes it hard for a person to stop bleeding. DIC causes blood clots to form in small blood vessels and can lead to serious bleeding. Certain pregnancy and childbirth complications (like placenta accreta), surgery, sepsis (blood infection) and cancer can cause DIC.

Infection, like chorioamnionitis. This is an infection of the placenta and amniotic fluid.

Intrahepatic cholestasis of pregnancy (also called ICP). This is the most common liver condition that happens during pregnancy.

Obesity. Being obese means you have an excess amount of body fat. If you're obese, your body mass index (also called BMI) is 30 or higher. BMI is a measure of body fat based on your height and weight.

Preeclampsia or gestational hypertension. These are types of high blood pressure that only pregnant women can get. Preeclampsia is a condition that can happen after the 20th week of pregnancy or right after pregnancy. It's when a pregnant woman has high blood pressure and signs that some of her organs, like her kidneys and liver, may not be working properly. Signs of preeclampsia include having protein in the urine, changes in vision and severe headache. Gestational hypertension is high blood pressure that starts

after 20 weeks of pregnancy and goes away after you give birth. Some women with gestational hypertension have preeclampsia later in pregnancy.

How is PPH tested for and treated?

21. Your provider may use these tests to see if you have PPH or try to find the cause for PPH:

Blood tests called clotting factors tests or factor assays Hematocrit. This is a blood test that checks the percent of your blood (called whole blood) that's made up of red blood cells. Bleeding can cause a low hematocrit.

Blood loss measurement. To see how much blood you've lost, your provider may weigh or count the number of pads and sponges used to soak up the blood.

Pelvic exam. Your provider checks your vagina, uterus and cervix.

Physical exam. Your provider checks your pulse and blood pressure.

Ultrasound. Your provider can use ultrasound to check for problems with the placenta or uterus. Ultrasound is a test that uses sound waves and a computer screen to make a picture of your baby inside the womb or your pelvic organs.

22. Treatment depends on what's causing your bleeding. It may include:

Getting fluids, medicine (like Pitocin) or having a blood transfusion (having new blood put into your body). You get these treatments through a needle into your vein (also called intravenous or IV), or you may get some directly in the uterus.

Having surgery, like a hysterectomy or a laparotomy. A hysterectomy is when your provider removes your uterus. You usually only need a hysterectomy if other treatments don't work. A laparotomy is when your provider opens your belly to check for the source of bleeding and stops the bleeding.

Massaging the uterus by hand. Your provider can massage the uterus to help it contract, lessen bleeding and help the body pass blood clots. Your provider may also give you medications like oxytocin to make the uterus contract and lessen bleeding. Getting oxygen by wearing an oxygen mask

Removing any remaining pieces of the placenta from the uterus, packing the uterus with gauze, a special balloon or sponges, or using medical tools or stitches to help stop bleeding from blood vessels.

Embolization of the blood vessels that supply the uterus. In this procedure, a provider uses special tests to find the bleeding blood vessel and injects material into the vessel to stop the bleeding. It's used in special cases and may prevent you from needing a hysterectomy.

Taking extra iron supplements along with a prenatal vitamin may also help. Your provider may recommend this depending on how much blood was lost.

23. Now we come to the facts of the present case. The opposite party-2 has herself designated as Gynaecologist. The enquiry committee has submitted in its report that herself declaring as gynaecologist by Dr. Meena Pandey is not legal. It is also held that in the hospital Dr. Meena Pandey's name was included in the registration application. The enquiry committee recommended to issue notice to the hospital and the doctor for taking necessary action against them. It is also held that the said hospital is being run without any renewed registration in spite of the fact that the stay on the renewal registration has been dismissed so notice be issued to the concerned hospital for taking necessary action. This enquiry report is not up to the mark in some respect. It has not been stated about the authorisation of Dr. Meena Pandey to do the allopathic practice. No citation of the judgement of the Hon'ble Supreme Court and Hon'ble NCDRC has been mentioned, in which it has been specifically held that a homeopathy doctor is competent to treat in allopathy.

24. First we come to see the oath taken by a doctor when he or she entered into the noble medical profession. We have to see the different pronouncements of the Supreme Court and Hon'ble NCDRC and also the principle of res ipsa loquitur.

25. As per guidelines of MCI, Every member should get it framed in his or her office it should never be violated in its letter and spirit.

"I solemnly pledge myself to consecrate my life to service of humanity.

Even under threat, I will not use my medical knowledge contrary to the laws of Humanity.

I will maintain the utmost respect for human life from the time of conception.

I will not permit considerations of religion, nationality, race, party politics or social standing to intervene between my duty and my patient.

I will practice my profession with conscience and dignity.

The health of my patient will be my first consideration.

I will respect the secrets which are confined in me.

I will give to my teachers the respect and gratitude which is their due.

I will maintain by all means in my power, the honour and noble traditions of medical profession.

I will treat my colleagues with all respect and dignity.

I shall abide by the code of medical ethics as enunciated in the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations 2002.

I make these promises solemnly, freely and upon my honour."

26. Now let us see the different case laws and the broader scope of res ipsa loquitur to prove the negligence of the doctor in a given circumstances and in the given disease.

27. The complexity of the human body and the uncertainty involved in the medical procedure are of such great magnitude that it is impossible for a Doctor to guarantee a successful result; and the only assurance that he can give, or can be understood to have given by implication is that he is possessed of requisite skill in that branch of profession which he is practising and while undertaking the performance of the task entrusted to him, he would be exercising his skills with reasonable competence. An ordinary physician or surgeon is not expected to be either a clodhopper or feckless practitioner of profession, as much as, he is not expected to be a paragon, combining qualities of polymath or prophet as in the realm of diagnosis and treatment, there is ample scope for genuine difference of opinion; and a Doctor cannot be treated as negligent merely because his conclusion differs from that of other persons in the profession, or because he has displayed less skill or knowledge than others would have shown. The true test for establishing negligence in diagnosis or treatment on the part of a doctor is whether he has been proved to be guilty of such failure as no doctor of ordinary skill would be guilty of, if acting with ordinary care. Furthermore, a golden principle of law has been laid down by the Hon'ble Apex Court in ***Jacob Mathew v. State of Punjab, AIR 2005 SC 3180*** that no sensible professional would intentionally commit an act or omission which would result in loss or injury to the patient as the professional reputation of the person is at stake. A single failure may cost him dear in his career. Even in civil jurisdiction, the rule of res ipsa loquitor is not an universal application and has to be applied with extreme care and caution to the cases of professional negligence and in particular that of the doctors, else it would be counter productive. Simply because a patient

has not favourably responded to a treatment given by a physician or a surgery has failed, the doctor cannot be held liable per-se by applying the doctrine of res ipsa loquitor. Yet, another golden principle of law has been laid down by the Hon'ble Apex Court in ***Indian Medical Association v. V.P. Santha's III (1995) CPJ 1 (SC)*** at para 37 that "it is no doubt true that sometimes complicated questions requiring recording of evidence of experts may arise in a complaint about deficiency in service based on the ground of negligence in rendering medical services by a medical practitioner; but this would not be so in all complaints about deficiency rendering services by a medical practitioner. There may be cases which do not raise such complicated questions and the deficiency in service may be due to obvious faults which can be easily established such as removal of the wrong limb or the performance of an operation on the wrong patient or giving injection of a drug to which the patient is allergic without looking into the out patient card containing the warning or use of wrong gas during the course of an anaesthetic or leaving inside the patient swabs or other items of operating equipment after surgery. Furthermore, it has been observed in ***Malay Kumar Ganguli's case AIR 2010 SC 1162*** that" charge of professional negligence on a medical person is a serious one as it affects his professional status and reputation and as such, the burden of proof would be more onerous. A doctor cannot be held negligent only because something has gone wrong. He also cannot be held liable for mischance or misadventure or for an error in judgment in making a choice when two options are available. The mistake in diagnosis is not necessarily a negligent diagnosis." In the instant matter, thus a simple test, in the light of aforesaid observations, needs to be conducted in order to ascertain whether the Doctor is guilty of any tortious act of negligence/battery amounting to deficiency in conducting a surgery in the delivery of child and not properly attending the patient, the complainant and consequently, liable to pay damages for leaving cotton mass in the abdomen / stomach due to failure in surgery and deteriorating condition of the patient.

28. Now, it is required to be seen whether an expert report is necessary in each and every case relating to medical negligence or not ? It has been observed by the Hon'ble Apex Court in ***Indian Medical Association v. V.P. Santha III (1995) CPJ 1 (SC)*** at para 37 that "it is no doubt true that sometimes complicated questions requiring recording of evidence of experts may arise in a complaint about deficiency in service based on the ground of negligence in rendering medical services by a medical practitioner; but this would not be so in all complaints about deficiency rendering services by a

medical practitioner. There may be cases which do not raise such complicated questions and the deficiency in service may be due to obvious faults which can be easily established such as removal of the wrong limb or the performance of an operation on the wrong patient or giving injection of a drug to which the patient is allergic without looking into the out patient card containing the warning or use of wrong gas during the course of an anaesthetic or leaving inside the patient swabs or other items of operating equipment after surgery. Furthermore, in ***V. Krishna Rao v. Nikhil Super Speciality Hospital 2010 (V) SCC 513*** at para 40 the Hon'ble Apex Court was pleased to hold that it is not necessary to have opinion of the expert in each and every case of medical negligence. The Hon'ble Apex Court was pleased to further hold in ***Nizam Institute of Medical Sciences v. Prashant S. Dhananka and others 2009 (VI) SCC 1*** that "in a case of medical negligence, once initial burden has been discharged by the complainant by making of a case of negligence on the part of the hospital or the doctor concerned, the owner then shifts on the hospital or to the attending doctors and it is for the hospital to satisfy the court that there was no lack of care or diligence".

29. A doctrine or rule of evidence in tort law that permits an inference or presumption that a defendant was negligent in an accident injuring the plaintiff on the basis of circumstantial evidence if the accident was of a kind that does not ordinarily occur in the absence of negligence a plaintiff who establishes the elements of res ipsa loquitur can withstand a motion for summary judgment and reach the jury without direct proof of negligence- ***Cox v. May Dept. Store Co., 903 P.2d 1119 (1995)***.

30. In ***Byrne v. Boadle***, this maxim was used for the first time where the complainant was injured by a barrel that dropped from the window of the defendant. In the abovementioned case, Pollock, C. B., said "here are many incidents from which no presumption of negligence can arise, but this is not true in every case. It is the duty of persons who keep barrels in a warehouse to take care that they do not roll out and I think that such a case will, beyond all doubt, afford prima facie proof of negligence."

31. This doctrine intends to help direct the court proceedings to a conclusion, especially if it is established through the implication of this doctrine's rule that the injury caused to the claimant would not have occurred or taken place if the defendant wasn't negligent. This also gives enough cause and evidence to hold the defendant liable for his negligent actions.

1. Doctrine of Res Ipsa Loquitar

32. The thing speaks for itself is the gist of the maxim Res Ipsa Loquitur Maxim. What are the essentials of this maxim.

1. The injury caused to the plaintiff shall be a result of an act of negligence.
2. There is a lack of evidence, or the evidence presented before the court is insufficient to establish the possibilities of the fault of the plaintiff or third party.
3. The defendant owes a duty of care towards the plaintiff, which he has breached.
4. There is a significant degree of injury caused to the plaintiff.

Applicability of Doctrine of Res Ipsa Loquitur.

3 3 . The maxim of res ipsa loquitur came into force to benefit the plaintiff as he can use circumstantial evidence to establish negligence.

34. Consequently, it shifts the burden of proof on the defendant, logic being, where there is an event of unexplained cause, usually, the one that does not occur without the defendant's negligence in controlling the action which has caused the injury to the claimant or destroyed his goods.

35. In this scenario, the court shall presume negligence on the part of the defendant in such a case unless it includes an appropriate explanation compatible with his taking reasonable care.

36. In ***Achutrao Haribhau Khodwa and Others v. State of Maharashtra and Others***, it was considered that the maxim should not be applied in the case of general incidences of neglect and shall only be reflected when there is a significant degree of injury caused.

section 106 of the Indian Evidence Act

37. Section 106 of the Act provides that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

38. Res ipsa loquitur is a Latin phrase that means "the thing speaks for itself." In personal injury law, the concept of res ipsa loquitur (or just "res ipsa" for short) operates as an evidentiary rule that allows plaintiffs to establish a rebuttable presumption of negligence on the part of the defendant through the use of circumstantial evidence.

39. This means that while plaintiffs typically have to prove that the defendant acted with a negligent state of mind, through res ipsa loquitur, if

the plaintiff puts forth certain circumstantial facts, it becomes the defendant's burden to prove he or she was not negligent.

Res Ipsa Loquitur and Evidence Law

40. Accidents happen all the time, and the mere fact that an accident has occurred doesn't necessarily mean that someone's negligence caused it. In order to prove negligence in a personal injury lawsuit, a plaintiff must present evidence to demonstrate that the defendant's negligence resulted in the plaintiff's injury. Sometimes, direct evidence of the defendant's negligence doesn't exist, but plaintiffs can still use circumstantial evidence in order to establish negligence.

41. Circumstantial evidence consists of facts that point to negligence as a logical conclusion rather than demonstrating it outright. This allows judges and juries to infer negligence based on the totality of the circumstances and the shared knowledge that arises out of human experience. Res ipsa is one type of circumstantial evidence that allows a reasonable fact finder to determine that the defendant's negligence caused an unusual event that subsequently caused injury to the plaintiff.

42. This doctrine arose out of a case where the plaintiff suffered injuries from a falling barrel offlour while walking by a warehouse. At the trial, the plaintiff's attorney argued that the facts spoke for themselves and demonstrated the warehouse's negligence since no other explanation could account for the cause of the plaintiff's injuries.

43. As it has developed since then, res ipsa allows judges and juries to apply common sense to a situation in order to determine whether or not the defendant acted negligently.

44. Since the laws of personal injury and evidence are determined at the state level, the law regarding res ipsa loquitur varies slightly between states. That said, a general consensus has emerged, and most states follow one basic formulation of res ipsa.

45. Under this model for res ipsa, there are three requirements that the plaintiff must meet before a jury can infer that the defendant's negligence caused the harm in question:

The event doesn't normally occur unless someone has acted negligently;

The evidence rules out the possibility that the actions of the plaintiff or a third party caused the injury; and The type of negligence in question falls with the scope of the defendant's duty to the plaintiff.

46. As mentioned above, not all accidents occur because of someone else's negligence. Some accidents, on the other hand, almost never occur unless someone has acted negligently.

47. Going back to the old case of the falling flour-barrel, it's a piece of shared human knowledge that things don't generally fall out of warehouse windows unless someone hasn't taken care to block the window or hasn't ensured that items on the warehouse floor are properly stored. When something does fall out of a warehouse window, the law will assume that it happened because someone was negligent. The second component of a res ipsa case hinges on whether the defendant carries sole responsibility for the injury. If the plaintiff can't prove by a preponderance of the evidence that the defendant's negligence cause the injury, then they will not be able to recover under res ipsa.

48. States sometimes examine whether the defendant had exclusive control over the specific instrumentality that caused the accident in order to determine if the defendant's negligence caused the injury. For example, if a surgeon leaves a sponge inside the body of a patient, a jury can infer that the surgeon's negligence caused the injury since he had exclusive control over the sponges during the operation.

49. In addition to the first two elements, the defendant must also owe a duty of care to protect the plaintiff from the type of injury at issue in the suit. If the defendant does not have such a duty, or if the type of injury doesn't fall within the scope of that duty, then there is no liability.

50. For example, in many states, landowners don't owe trespassers any duty to protect them against certain types of dangers on their property. Thus, even if a trespasser suffers an injury that was caused by the defendant's action or inaction and that wouldn't normally occur in the absence of negligence, res ipsa loquitur won't establish negligence since the landowner never had any responsibility to prevent injury to the trespasser in the first place.

51. Res ipsa only allows plaintiffs to establish the inference of the defendant's negligence, not to prove the negligence completely. Defendants

can still rebut the presumption of negligence that res ipsa creates by refuting one of the elements listed above.

52. For example, the defendant could prove by a preponderance of the evidence that the injury could occur even if reasonable care took place to prevent it. An earthquake could shake an item loose and it could fall out of the warehouse window, for instance.

53. A defendant could also demonstrate that the plaintiff's own negligence contributed to the injury. To go back to the flour-barrel example, if the defendant shows that the plaintiff was standing in an area marked as dangerous it could rebut the presumption of negligence created by res ipsa.

54. Finally, the defendant could establish that he did not owe the plaintiff a duty of care under the law, or that the injury did not fall within the scope of the duty owed. For example, if the law only imposes a limited duty on the defendant not to behave recklessly, then res ipsa will not help the plaintiff by creating an inference of negligence since a negligent action would not violate the duty owed to the plaintiff.

55. According to the Blacks Law Dictionary the maxim is defined as the doctrine providing that, insome circumstances, the mere fact of accidents occurrence raises an inference of negligence so as to establish a prima facie (at first sight) case. It is a symbol for that rule that the fact of the occurrence of an injury taken with the surrounding circumstances may permit an inference or recipes omission of negligence, or make out a plaintiff's prima facie case and present a question of fact for defendant to meet with and explanation. It is merely a short way of saying that the circumstances attendant on the accident are of such a nature to justify a jury in light of common sense and past experience in inferring that the accident was probably the result of the defendant's negligence, in the absence of explanation or other evidence which the jury believes.

56. Its use in clinical negligence gained some traction before Bolam and Bolitho. ***Mahon v. Osborne [1939] 1 All ER 535***, is an early example of the application of res ipsa loquitur in a case where a surgical swab had been left inside a patient's body.

57. In ***Clarke v. Worboys (1952) Times, 18 March, CA***, a patient noticed burns on her buttock shortly after surgical excision of a breast tumour. The surgery involved cauterisation. The Court of Appeal held that this was a case where res ipsa loquitur applied. The outcome was not one that would

ordinarily occur in the absence of negligence, and the surgical team were unable to explain how the injury was caused.

58. In ***Cassidy v. Ministry of Health [1951] 2 KB 343***, Denning LJ succinctly summarised the maxim's application to clinical negligence cases: "I went into hospital to be cured of two stiff fingers. I have come out with four stiff fingers and my hand is useless. That should not happen if due care had been used. Explain it if you can."

59. ***Ng Chun Pui v. Lee Chuen Tat***, the first defendant was driving a coach owned by the second defendant westwards in the outer lane of dual carriageway in Hong Kong. Suddenly the course across the central reservation and collided with a public bus travelling in the inner lane of the other carriageway, killing one passenger in the bus and injuring the driver and three others on the bus. The plaintiff could not prove that the defendants were negligent and had caused the accident. They however proceeded on the basis of Res Ipsa Loquitur and shifted the onus on the defendants to prove that they were not negligent. However, they failed to do so. And the judicial committee of the Privy Council held the defendants liable for the plaintiffs injuries. {MarkLuney and Ken Opliphant, Tort Law Text And Materials (Oxford University Press, New York, 2000) pp 173-175 }

60. In ***A.S. Mittal & Anr. v. State of UP & Ors., AIR 1989 SC 1570***, the defendants had organised an eye camp at Khurja along with the Lions Club. 88 low risk cataract operations were undertaken during the period of the camp. It was however, disastrous as many of those who had been operated upon lost their eyesight due to post medical treatment. Proceedings against the government initiated for negligence of the doctors. Damages worth Rs. 12,500/- were paid as interim belief to each of the aggrieved. The decision was on the basis of Res Ipsa Loquitur as the injury would not ave occurred had the doctors not been negligent in not having followed up with post-operation treatment. Res Ipsa Loquitur can be applied in matters where are the procedures have not been followed and is not just limited to the commission of an act.

61. We can define 'Medical negligence' as the improper or unskilled treatment of a patient by a medical practitioner. This includes negligence in taking care from a nurse, physician, surgeon, pharmacist, or any other medical practitioner. Medical negligence leads to 'Medical malpractices' where the victims suffer some sort of injury from the treatment given by a doctor or any other medical practitioner or health care professional.

62. Medical negligence can occur in different ways. Generally, it occurs when a medical professional deviates from the standard of care that is required.

63. So, we can say that any kind of deviation from the accepted standards of medication and care is considered to be medical negligence and if it causes injury to a patient then the doctor who operated on him, other staff and/or hospital may be held liable for this. 64. Some of the common categories of medical negligence are as follows:

Wrong diagnosis - When someone goes to a hospital, clinic or medical room, etc. the first step after admittance is the diagnosis. Diagnosing symptoms correctly is critical and important to provide medical care to any patient. However, if a patient is not treated properly due to any mistake in diagnosis, the doctor can be made liable for any further injury or damages caused as a result of the wrong diagnosis.

Delay in diagnosis - A delayed diagnosis is treated as medical negligence if another doctor would have reasonably diagnosed the same condition in a timely fashion. A delay in diagnosis can cause undue injury to the patient if the illness or injury is left to worsen with time rather than being treated. Obviously, any delay in the identification and treatment of an injury can reduce the chance of recovery for the patient.

Error in surgery - Surgical operations require an enormous level of skill and it should be done with due care and caution because even the slightest mistakes can have profound effects on the patient. The wrong-site surgery, lacerations of any internal organ, severe blood loss, or a foreign object being left in the body of the patients, all this comes under Surgical error. **Unnecessary surgery** - Unnecessary surgery is usually associated with the misdiagnosis of patient symptoms or a medical decision without proper consideration of other options or risks. Alternatively, sometimes surgery is chosen over conventional treatments for their expediency and ease compared to other alternatives.

Errors in the administration of anesthesia - Anesthesia is a risky part of any major medical operation and requires a specialist (anesthesiologist) to administer and monitor its effect on the patient. Prior to any medical procedure requiring anesthesia, the anesthesiologist has to review the patient's condition, history, medications, etc. to determine the most suitable

of all the medicine to use. Anesthesia malpractice can happen even during the pre-operation medical review or during the procedure itself.

Childbirth and labor malpractice - Childbirth is a difficult event for a woman and it becomes worse if not handled properly by the doctors and nurses. There are many instances of medical negligence during childbirth including the mishandling of a difficult birth, complications with induced labor, misdiagnosis of a newborn medical condition, etc.

Long-Term negligent treatment - Medical negligence can also occur in subtle ways over the course of a long treatment period. Usually, the negligence can take the shape of a failure to follow up with treatment, or a doctor's failure to monitor the effects of the treatment properly.

65. A standard of care specifies the appropriate treatment and medication procedure as per the requirements that should be taken into account by a doctor while providing the treatment to his patients. The care should not be of the highest degree nor the lowest. Here, the degree means the level of care an ordinary health care professional, with the same training and experience, would render in similar circumstances in the same community. This is the critical question in medical malpractice cases and if the answer is "no," and you suffered injury as a result of the poor treatment, you may file a suit for medical malpractice.

66. In the case of ***Dr. Laxman Balkrishna Joshi v. Dr. Trimbak Bapu Godbole and Anr. [1969 AIR 128]***, the Supreme Court held that a doctor has certain aforesaid duties and a breach of any of those duties can make him liable for medical negligence. A doctor is required to exercise a reasonable degree of care that is set for this profession.

67. ***Dr. Kunal Saha v. Dr. Sukumar Mukherjee on 21 October, 2011 (NC) original petition number 240 of 1999*** is one of the most important case regarding medical negligence. The brief facts of the case are-

68. Toxic Epidermal Necrolysis (TEN) is a rare and deadly disease. It is an extoliative dermatological disorder of unknown cause. A patient with TEN loses epidermis in sheet-like fashion leaving extensive areas or denuded dermis that must be treated like a larze, superficial, partial-thickness burn wound. The incidence of TEN has been reported at 1 to 1.3 per million per year. The female male ratio is 3:2. TEN accounts for nearly 1% of drug reactions that require hospitalization. TEN has a mortality rate of 25 to 70%.

69. Smt. Anuradha Saha (in short Anuradha), aged about 36 years wife of Dr. Kunal Saha (complainant) became the unfortunate victim of TEN when she alongwith the complainant was in India for a holiday during April-May 1998. She and the complainant although of Indian original were settled in the United States of America. The complainant is a doctor by profession and was engaged in research on HIV / AIDS for the past fifteen years. Anuradha after acquiring her Graduation and Masters Degree was pursuing a Ph.D. programme in a university of U.S.A. She was a Child Psychologist by profession. Anuradha showed certain symptoms of rashes over her body and received treatment at the hands of Opposite Parties and some other doctors as outdoor patient uptil 10.05.1998 and she was admitted in Advanced Medicare and Research Institute Limited, Calcutta (for short, AMRI), on 11.05.1998, where she was treated by the above-named Opposite Parties and other doctors uptil 16.05.1998. As there was no improvement in her condition, she was shifted to Breach Candy Hospital, Mumbai, on 17.05.1998 by an air ambulance. She was treated in Breach Candy Hospital from 17.05.1998 evening till she breathed her last on 28.05.1998.

70. Our Complainant as husband of Anuradha felt that the doctors who treated Anuradha and the hospitals where she was treated were grossly negligent in her treatment and her death was occasioned due to gross negligence of the treating doctors and hospitals. Complainant, accordingly, got issued a legal notice to as many as 26 persons i.e. various doctors who treated Anuradha between end of April to the date of her death alleging negligence and deficiency in service on their part and claiming a total compensation exceeding Rs. 55 crores from them. Complainant, thereafter filed the present complaint on 09.03.1999 before this Commission claiming a total compensation of Rs. Rs. 77,07,45,000/- (Seventy Seven Crores Seven Lakhs Fourty Five Thousand only). Later he also filed another complaint no. 179 of 2000 in this Commission against Breach Candy Hospital, its doctors and functionaries claiming a further compensation of Rs. 25.30 crore (though the said complaint was later on withdrawn), thereby making claim of compensation exceeding Rs. 102 crores, perhaps the highest ever claimed by any complainant for medical negligence before any consumer fora established under the provisions of Consumer Protection Act, 1986 (in short, the Act). These are some of the facts which make the present case extra ordinary.

71. The present complaint was filed by the complainant against the above-named opposite parties, namely, Dr. Sukumar Mukherjee, Dr. B. Haldar (Baidyanath Halder), Advanced Medicare and Research Institute Limited (in short the AMRI Hospital) and Dr. Balram Prasad and Dr. Abani Roy Chowdhury (physician) and Dr. Kaushik Nandy (plastic surgeon), the Directors of the AMRI Hospital and others claiming a total compensation of Rs. Rs. 77,07,45,000/- under different heads alleging various acts of commission and omission on the part of the doctors and hospital amounting to negligence and deficiency in service. Complainant through his brother-in-law Malay Kumar Ganguly also filed criminal complaint against some of the doctors and the hospital under section 304A IPC.

72. The complaint was resisted by the doctors and the hospital on a variety of grounds thereby denying any medical negligence or deficiency in service on their part. Parties led voluminous documentary and oral evidence and testimonies of some of the witness were even recorded through video conferencing through a Local Commissioner. After a protracted trial and hearing and on consideration of the evidence and material so produced on record and taking note of the legal position governing the question of medical negligence, this Commission (by a three Member Bench presided over by the then President) dismissed the complaint by an order dated 01.06.2006 holding as under:

In the result, we reiterate that Doctors or Surgeons do not undertake that they will positively cure a patient. There may be occasions beyond the control of the medical practitioner to cure the patients. From the record, it would be difficult to arrive at the conclusion that the injection Depo-Medrol prescribed by Dr. Mukherjee was of such excessive dose that it would amount to deficiency in service by him which was his clinical assessment.

73. Thereafter, with regard to the alleged deficiency in the treatment given to Mrs. Anuradha by Opposite Party Doctors 2, 3, 5 and 6, there is no substance. The contention against the hospital that it was not having Burns-Ward, and therefore, the deceased suffered is also without substance. Hence, this complaint is dismissed. There shall be no order as to costs.

74. Aggrieved by the dismissal of his complaint, the complainant filed Civil Appeal (No.1727 of 2007) in the Hon'ble Supreme Court. It would appear that even before the said appeal was filed before the Hon'ble Supreme Court, the Supreme Court was seized of the matter in Criminal Appeal Nos.1191-94 of 2005 filed by Malay Kumar Ganguly, the complainant in the criminal

complaint, against the Orders passed by the Calcutta High Court. Since the Criminal Appeals and the Civil Appeal filed by the complainant in the present complaint raised the same questions of fact and law, the Hon'ble Supreme Court heard all the appeals together and decided the same by means of a detailed judgment dated 07.8.2009. By the said order, the Apex Court dismissed the Criminal Appeals filed by Shri. Malay Kumar Ganguly but allowed the Civil Appeal No. 1727 of 2007 filed by the complainant and set aside the order dated 01.6.2006 passed by this Commission dismissing the complaint and remanded the matter to this Commission for the limited purpose of determining the adequate compensation, which the complainant is entitled to receive from the subsisting opposite parties by observing as under:

So far as the judgment of the Commission is concerned, it was clearly wrong in opining that there was no negligence on the part of the Hospital or the doctors. We, are, however, of the opinion, keeping in view the fact that Dr. Kaushik Nandy has done whatever was possible to be done and his line of treatment meets with the treatment protocol of one of the experts viz.. Prof. Jean Claude Roujeau although there may be otherwise difference of opinion, that he cannot be held to be guilty of negligence.

75. We remit the case back to the Commission only for the purpose of determination of the quantumof compensation. We, keeping in view the stand taken and conduct of AMRI and Dr. Mukherjee, direct that costs of Rs. 5,00,000 and Rs. 1,00,000 would be payable by AMRI and Dr. Mukherjee respectively.

76. We further direct that if any foreign experts are to be examined it shall be done only throughvideo conferencing and at the cost of the respondents.

Summary In view of the foregoing discussion, we conclude as under:

77. The facts of this case viz., residence of the complainant and Anuradha (deceased) in USA andthey working for gain in that country; Anuradha having been a victim of a rare and deadly disease Toxic Epidermal Necrolysis (TEN) when she was in India during April-May 1998 and could not be cured of the said disease despite her treatment at two superspeciality medical centres of Kolkata and Mumbai and the huge claim of compensation exceeding Rs. 77 crores made by the complainant for the medical negligence in the treatment of Anuradha makes the present case somewhat extraordinary.

78. The findings given and observations made by the Supreme Court in its judgment dated 07.08.2009 are absolutely binding on this Commission not only as ratio decidendi but also as obiter dicta also, the judgment having been rendered by the Supreme Court in appeal against the earlier order passed by a three Member Bench of this Commission and, therefore, no attempt can be allowed to read down / dilute the findings and observations made by the Supreme Court because the Supreme Court has remitted the complaint to this Commission only for the purpose of determination of the quantum of compensation after recording the finding of medical negligence against the opposite parties and others.

79. The task entrusted to the Commission may appear to be simple but the facts of the present case and the voluminous evidence led on behalf of the complainant has made it somewhat arduous. Still difficult was the task of apportionment of the liability to pay the awarded amount by the different opposite parties and perhaps it was for this reason that the Supreme Court has remitted the matter to this Commission.

80. Multiplier method provided under the Motor Vehicles Act for calculating the compensation is the only proper and scientific method for determination of compensation even in the cases where death of the patient has been occasioned due to medical negligence / deficiency in service in the treatment of the patient, as there is no difference in legal theory between a patient dying through medical negligence and the victim dying in industrial or motor accident. The award of lumpsum compensation in cases of medical negligence has a great element of arbitrariness and subjectivity. 81. The foreign residence of the complainant or the patient and the income of the deceased patient in a foreign country are relevant factors but the compensation awarded by Indian Fora cannot be at par which are ordinarily granted by foreign courts in such cases. Socio economic conditions prevalent in this country and that of the opposite parties / defendants are relevant and must be taken into consideration so as to modulate the relief. A complainant cannot be allowed to get undue enrichment by making a fortune out of a misfortune. The theoretical opinion / assessment made by a Foreign Expert as to the future income of a person and situation prevalent in that country cannot form a sound basis for determination of future income of such person and the Commission has to work out the income of the deceased having regard to her last income and future prospects in terms of the criteria laid down by the Supreme Court.

82. There exists no straight jacket formula for apportionment of the awarded compensation amongst various doctors and hospitals when there are so many actors who are responsible for negligence and the apportionment has to be made by evolving a criteria / formula which is just going by the nature and extent of medical negligence and deficiency in service established on the part of different doctors and hospitals.

83. On a consideration of the entirety of the facts and circumstances, evidence and material brought on record, we hold that overall compensation on account of pecuniary and non pecuniary damages works out to Rs. 1,72,87,500/- in the present case, out of which we must deduct 10% amount on account of the contributory negligence / interference of the complainant in the treatment of Anuradha. That will make the net payable amount of compensation to Rs. 1,55,58,750/(rounded of to Rs. 1,55,60,000/-). From this amount, we must further deduct a sum of Rs. 25,93,000/which was payable by Dr. Abani Roy Chowdhury (deceased) or his Legal Representative as the complainant has forgone the claim against them.

84. In view of the peculiar facts and circumstances of the case and as a special case, we have awarded a sum of Rs. 5,00,000/- as cost of litigation in the present proceedings.

85. The above amount shall be paid by opposite parties no.1 to 4 to the complainant in the following manner:

(i) Dr. Sukumar Mukherjee-opposite party no.1 shall pay a sum of Rs. 40,40,000/- (Rupees Forty Lakh Forty Thousand only) i.e. [Rs. 38,90,000/- towards compensation and Rs. 1,50,000/- as cost of litigation].

(ii) Dr. B. Haldar (Baidyanth Halder)-opposite party no.2 shall pay a sum of Rs. 26,93,000/(Rupees Twenty Six Lakh Ninety Three Thousand only) i.e. [Rs. 25,93,000/- towards compensation and Rs. 1,00,000/- as cost of litigation]

(iii) AMRI hospital-opposite party no.3 shall pay a sum of Rs. 40,40,000/- (Rupees Forty Lakh Forty Thousand only) i.e. [Rs. 38,90,000/- towards compensation and Rs. 1,50,000/- as cost of litigation .

(iv) Dr. Balram Prasad-opposite party no.4 shall pay a sum of Rs. 26,93,000/- (Rupees Twenty Six Lakh Ninety Three Thousand only) i.e. [Rs. 25,93,000/- towards compensation and Rs. 1,00,000/as cost of litigation] The opposite parties are directed to pay the aforesaid amounts to the complainant

within a period of eight weeks from the date of this order, failing which the amount shall carry interest @ 12% p.a. w.e.f. the date of default."

86. Now we see the present case. We have seen the death certificate issued by the opposite party in which below the name of Dr. Meena Pandey, it is written "Stree rog visheshyagya" (GYNAECOLOGIST). It is misleading and it develop a false assurance in the minds of the patient that she is gynaecologist but actually she is not a gynaecologist. She depicted herself as a gynaecologist which is violation of the noble principle of medical profession. It is scanned hereinbelow.

IMAGE OMITTED

87. Now we have to see the judgment of the Hon'ble Supreme Court in this regard.

88. ***Poonam Verma v. Ashwin Patel and Others, 1996 SC Case Decided on: May 10, 1996 (SC)*** **Facts of The Case**

89. In ***Poonam Verma v. Ashwin Patel and others***, Mr. Pramod Verma appellant's husband complained of fever on 4th of July 1992 and was examined by Dr. Ashwin Patel (Respondent 1, a homeopath physician who had a Diploma in Homoeopathic Medicine and Surgery from Gujarat and was a registered medical practitioner in 1983 under the Bombay Homoeopathic Practitioners' Act [BHPA], 1959 and in the state of Gujarat) at appellant's residence initially for viral fever till 6th of July 1992 and subsequently for typhoid which according to Respondent 1 these two diseases were prevalent in that locality and kept him on allopathic medicines. He gave him a broad-spectrum of medicines and intramuscular injections to relieve him of pain, without ascertaining the cause of the pain, these medicines did not improve his condition and the condition of the patient was worsened, thereafter he was admitted to Sanjeevani Maternity and General Nursing Home under Dr. Rajeev Warty (Respondent 2, is an allopathic practitioner running a nursing home in Bombay) on the advice of Respondent 1 on 12th of July 1992. Pramod Verma received treatment by Respondent 2 till the evening of the 14th of July 1992 then in an unconscious state, he was shifted to Hinduja Hospital on the evening of the 14th of July 1992 where, after about four and a half-hour of admission he died at the age of 35 years. At the time of his death, he was a Sales Manager in M/s Encore Marketing P. Ltd. in Bombay where he was said to be earning Rs. 5700 per month and was supporting his family comprising of his wife, two children, and his parents.

90. The wife of Mr. Pramod Verma i.e. Mrs. Poonam Verma (later appellant) filed a petition before the National Consumer Disputes Redressal Commission, at New Delhi on 14th of August 1992 praying for compensation and damages for the negligence and carelessness of Respondent 1 and Respondent 2 in treating her husband but the petition was dismissed by the Commission by its judgment on 8th of November 1994 as no expert was produced by the appellant before the commission, this was further challenged in the apex court.

Arguments of Both The Sides And Issues

91. It was set out in the claim lodged by the appellant before the Commission that Respondent 1 was not even a registered practitioner in the Allopathic System of Medicine and despite his lack of expertise in the allopathic system of medicine, he prescribed strong allopathic drugs and also intramuscular injections to Mr. Pramod Verma for the treatment of viral fever and subsequently, for typhoid even without ascertaining the cause of the diagnosis by blood or urine test.

92. It was then claimed by Respondent 1 that Mr. Pramod Verma and his family members had been taking allopathic treatment from him since they moved into the same colony and he did advise Mr. Verma to get pathological investigations done i.e. blood and urine test but said was not followed by him and viral fever was prevalent in that locality so Respondent 1 prescribed drugs as per usual practice in the management of fever and kept reiterating for the tests and on finding he had not got his tests done Respondent 1 advised the appellant to get her husband admitted under a physician and get the tests done, so there was no negligence, carelessness or deficiency of services on his part.

93. Appellant claimed that when transferred to Respondent 2 Mr. Pramod Verma was immediately put on intravenous Glucose drip without knowing the level of blood sugar by a simple blood test, which was primarily responsible for the constant and steady deterioration of appellant's husband but Respondent 2 kept assuring Poonam Verma (appellant) that her husband will recover soon and there was no need to shift him to a better-equipped hospital.

94. The issue before the court was whether there was a breach of duty and deficiency in services by the above acts of both the respondent in the treatment of Mr. Pramod Verma and whether the act amounted to negligence or not?

95. It was also claimed by Respondent 1 that he had done an integrated course of study in both the Homeopathic and Allopathic System of Medicine and was awarded DHMS (Diploma in Homeopathic Medicine and Surgery) after passing the final examination at the end of a four years' course conducted by the Homoeopathic Medical College, Anand, Gujarat.4 Respondent 1 claimed that he had experience and knowledge in allopathy when he worked as a chief medical officer in Bombay and took a reasonable degree of care while administering drugs to the appellant's husband.

96. Another issue before the court was whether Respondent 1 can practice Allopathy under BHPA,1959 as he was registered as a medical practitioner in homeopathy under the act? **Judgement of The Supreme Court**

97. The Supreme Court held based on the report given by the board of doctors/specialists in medicine and related branches concerning Respondent 2 that the appellant's husband health was already made worse to an undeterminable extent by Respondent 1 even before he was admitted to the Nursing Home of Respondent 2, so it was not proper to proceed against Respondent 2 as Mr. Verma died before the diagnosis could be ascertained.

98. The court further held concerning issue two that Respondent 1 was not authorized to practice allopathy under Bombay Homeopathic Practitioners' Act,1959, and sub-section (12)(a) of section 20 of the act required him to practice Homeopathy Only not allopathy based on mere experience until and unless the medical practitioner has obtained requisite qualification from a recognized medical college and was registered or certified for the same under the said act.

99. It was observed by the court concerning issue one that it was the decision of Respondent 1 to give allopathic medicines to the appellant's husband despite not having any requisite qualification in Allopathy System of Medicine and had Diploma in DHMS and was registered medical practitioner in Homeopathy, this amounted to actionable negligence and there was a breach of duty and deficiency in services on the part of Respondent 1.

100. Negligence is the breach of duty caused by the omission to do something that a reasonable manwould do or something that a prudent and reasonable man would not do. The definition involves 3 constituents:

1. A legal duty to exercise due care

2. Breach of duty

3. Consequential damages

101. The court gave the rationale that even though Respondent 1 had gained experience in allopathy while he was working as a medical officer in a private nursing home where he prescribed allopathic drugs and claimed to have studied allopathy in the second year of his four years' diploma he did not have requisite qualification for the Allopathy System of Medicine and the Bombay Homeopathic Practitioners' Act required him to practice homeopathy only, having studied about the drugs of one system of medicine a person cannot claim to have complete and deep knowledge about the drugs of another system of medicine, the court held that it is a statutory duty of medical practitioners not to enter another system of medicine without requisite qualification. The court also observed that Respondent 1 advised Mr. Verma to have his tests done orally but in the usual code of conduct doctor advice the patients in writing on prescription to get required pathological tests done and the act of Respondent 1 was contrary to the usual practice of doctors.

102. He violated the act of medical practitioner set by the Indian Medical Council Act, 1956 (IMCA) or under the State Act namely Maharashtra Medical Council Act, 1965 (MMCA) as the definition of "medical practitioner" in the said act did not include "homeopathic practitioners" therefore he was not registered under the central and state acts and the BHPA,1959 though included "homeopathic practitioners" under medical practitioner but it required the Respondent 1 to practice homeopathy only, therefore the court held him liable for negligence per se in consonance with the maxim sic utere tuo alienum non loedas (a person is held liable at law for the consequences of his negligence).

103. Negligence per se comes under negligence which means an act that is presumed to be negligent without any proof because the act is in violation of a framed statute or law designed for the protection of the public or property or because the very act goes against the common practice and no careful person would have done that.

104. ***Laxman Balkrishna Joshi (Dr) v. Dr. Trimbak Bapu Godbole (1969 AIR 128, 1969 SCR (1) 206, AIR 1969 SC 128)*** laid down certain duties that a doctor needs to follow while examining a patient which was: a duty of care in deciding whether to undertake the case, what treatment to give and in the administration of that treatment, the following said rules were not followed by

Respondent 1 as he did undertake the treatment of the appellant's husband without ascertaining the cause of the pain and kept him on allopathic of which he had no requisite qualification, therefore, the court held that there was a deficiency in services on part of him hence was liable under specified sections of medical service of Consumer Protection Act, 1986 and a copy of the judgment was sent to Medical Council of India constituted under the IMCA, 1956 as also the State Medical Council under the MMCA, 1965 to take appropriate action against Respondent 1 for violation of specified acts of a medical practitioner.

105. Court held that due to the negligent act of Respondent 1 appellant lost her husband and has tobe compensated because the family of Mr. Verma was deprived of monetary benefit. The court directed Respondent 1 to pay 3 lakhs as compensation to the appellant, and Rs. 30,000 was quantified as appellant cost.

National Consumer Disputes Redressal Commission *Prof. P.N. Thakur & Anr. v. Hans Charitable Hospital & Ors.* on 16 August, 2007

106. This is an original complaint filed by Mr. P.N. Thakur, Complainant No.1 and Smt. Durga Devi,Complainant No.2, who are the father and mother respectively of the deceased Jai Dev Kumar. Opposite party No. 1 is a Charitable Hospital, managed by through its Chairman of the Board of Trustees Shri. K.L. Hans, opposite party No.2 is the Junior R.M.O. of opposite party No.1 Dr. Rehan, opposite party No.3 is Dr. Kapil Sood, a Physician and opposite party No.4 is Dr. H.K. Singh, an ENT Specialist who are employed/ engaged by opposite party No.1 and working for opposite party No.1.

107. Prof. P.N. Thakur and his family living in District Munger, Bihar, their son Shri. Jai Dev Kumar,youngster aged 23 was staying in Delhi alongwith his brother Shri. Jai Kishan Kumar. The said Jai Dev Kumar did his M.A. from Delhi University and also his B.Ed. from Lal Bahadhur Shastri University and the Complainants averred that he was preparing for competitive examinations conducted by the Service Commission. On 19.10.1996, the said Jai Dev Kumar was taken by his brother Jai Kishan Kumar to the OPD of Hans Charitable Hospital as he was suffering from fever. He was treated in the OPD by O.P.No.2, Dr. Rehan, who ordered the test for malarial parasite. The test was negative for malarial parasite and he was given some medicines by Dr. Rehan.

108. After two days, i.e. on 21.10.1996 at about 10.00 a.m., the said Jai Dev Kumar was again takento the opposite party No.1 Hospital and was admitted at 10.45 a.m. for Epistaxis (bleeding from the nose). A blood test was ordered, results of which were available at the same day at 2.30 p.m. The report showed that the blood platelets count was 1.61ac/cu.mm. At about 3.00 p.m. the patient had Epistaxis followed by vomiting and at 4.00 p.m. he again had fresh Epistaxis. The patient however, expired at 9.00 p.m. on the same day.

109. When a patient is admitted in a hospital, it is done with the belief that the treatment given in the hospital is being given by qualified doctors under the Indian Medical Council Act, 1956. It is not within the knowledge of the relatives of the patient that the patient is being treated by a Unani Specialist. We hold that it is clear deficiency in service and negligence by the hospital for leaving the patient in the hands of Unani doctor.

110. Supreme Court came down heavily in cases where Homeopathic Doctors treated the patients with allopathic medicines. In ***Poonam Verma v. Ashwin Patel and Others (1996) 4 SCC 332*** where a doctor holding Diploma in Homeopathic Medicine and Surgery (DHMS) and registered under Bombay Homeopathic Practitioners Act, caused the death of a patient due to administration of Allopathic medicine, the Supreme Court held him being not qualified to practice Allopathy, was a quake or pretender to the medical knowledge and skill as a charlatan and hence guilty of negligence per se. The facts being similar in this case, we hold that there is total negligence in treating the deceased patient.

111. Now it is clear that there is total lack of medical protocol in the treatment of the patient and the opposite party knowingly deputed herself as a gynaecologist and she advised allopathic medicines. If the complainant would have known that she is not registered Gynaecologist she would not have come to her nursing home for delivery. So it is a clear case of medical negligence and deficiency in service. What was the need of male Dr in the delivery of a patient? It is all manipulated by the opposite parties to attract the patient by misrepresenting the actual facts and degree of the opposite party.

112. Now we see some clinical notes prepared by the opposite party during the treatment of the patient which is scanned hereinbelow for ready reference. There is note of normal delivery of baby child and placenta and membrane delivered completely. At 9:50 AM the patient's attendant was

informed about the Past Partem Hemorrhage and emergency condition of the patient. At 9:55 AM the blood sample was taken for arrangement of blood. PR and BP not recordable. Profuse bleeding was there and patient was in shock. It clearly means that the condition of the patient has become very critical and in spite of it she was not shifted to ICU.

IMAGE OMITTED

113. At 1 PM on 16.01.2014 the patient was declared dead. It shows that there was total lack of post delivery treatment in which the opposite parties totally failed to discharge their duties. They were negligent in not providing the supportive medical care as per medical protocol to the patient. There is no ultrasound report on the record which can show the internal condition of the uterus and placenta. In the above-mentioned article it has been deliberately discussed about the postpartum haemorrhage. No investigation was done regarding this aspect. One can know this condition if there is heavy bleeding from the vagina that does not slow or stop, drop in blood pressure or signs of shock. Signs of low blood pressure and shock include blurry vision; having they said, clammy skin or really fast heartbeat; feeling confused, DC, sleepy or weak; or feeling like you are going to faint. Nausea, pale skin and swelling and pain around the vagina or perineum. The perineum is the area between the vagina and rectum. There are so many other conditions by which one can know about PPH. There is provision for testing of PPH and also for the treatment of PPH. In this case the opposite party did not bother to confirm the PPH at the very beginning because they did not take any sonography picture of the patient.

114. So from all the facts and circumstances clear that the opposite party misrepresented the patient by showing herself as gynaecologist and thereafter they failed to take proper medical care of the patient. They completely failed to provide medical facilities after the delivery. They failed to recognise PPH at the relevant time by which this incident happened. The blood should have been arranged in the very beginning and not at the 11th hour. It was duty of the opposite parties to inform the patient's attendant in time about the need of any blood or any other medicines which may be necessary in the treatment of the patient but they have taken it very lightly. So there is medical negligence and the maxim res ipsa loquitur applies in this case. So after going through all the circumstances and enquiry report and the judgement of the Hon'ble Supreme Court and Hon'ble NCDRC we are of the opinion that the opposite party is entitled for the following reliefs :

(i) The complainant is entitled to get Rs. 25 lakhs from the opposite parties with interest.

(ii) The complaint is entitled to get Rs. 5 lakhs for mental pain and agony.

(iii) The complainant is entitled to get Rs. 20,000 towards cost of the case.

115. So the present complaint case is decided accordingly.

ORDER

1- The opposite parties are directed jointly and severally to pay Rs. 25 lakhs to the complainant in relation to medical negligence and deficiency in service, with interest at a rate of 12% from 16.01.2014 (the date of death of the patient) if paid within 30 days from the judgment of this complaint case otherwise the rate of interest shall be 15% from 16.01.2014 till the date of actual payment.

2- The opposite parties are directed jointly and severally to pay Rs. 5 lakhs to the complainant with interest at a rate of 12% from 16.01.2014 (the date of death of the patient) if paid within 30 days from the judgment of this complaint case otherwise the rate of interest shall be 15% from 16.01.2014 till the date of actual payment.

3- The opposite parties are directed jointly and severally to pay Rs. 20,000 towards cost of thecase with no interest if paid within 30 days from the date of judgment of this complaint case otherwise the rate of interest shall be 12% after 30 days from the date of judgment of this complaint case till the date of actual payment.

116. If the above order has not been complied with within 30 days from the date of judgment of this complaint case, the complainant may file execution case against the opposite parties at their cost. 117. The stenographer is requested to upload this order on the Website of this Commission today itself.

118. Certified copy of this judgment be provided to the parties as per rules.

119. Judgment dated/typed signed by us and pronounced in the open court.

120. Consign to the Record-room.

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