NATIONAL CONSUMER DISPUTES REDRESSAL COMMISSION
NEW DELHI

FIRST APPEAL NO. 1093 OF 2018

(Against the Order dated 16/02/2018 in Complaint No. 26/2012 of the State Commission Rajasthan)

1. FORTIS HEALTH CARE (INDIA) LTD. (PRESENTLY FORTIS HEALTH CARE LTD.) & 3 ORS.
THROUGH ITS CHAIRMA, OKHLA ROAD
NEW DELHI 110025
2. MEDICAL SUPERINTENDENT
FORTIS ESCORT HOSPITAL, J.L.N MARG, MALVIYA NAGAR
JAIPUR 302017
3. DR. H. BHARTIYA
NERO SURGEON, FORTIS ESCORTS HOSPITAL, J.L.N MARG, MALVIYA NAGAR
JAIPUR 302017
4. DR. V. VAID,
NERO SURGEON, FORTIS ESCORTS HOSPITAL, J.L.N MARG, MALVIYA NAGAR
JAIPUR 302017 .....Appellant(s)

Versus

1. BHAGCHAND MEENA
S/O. SHRI NARAIN SAHIA MEENA, R/O. VILLAGE TILWAR, TEHSIL RAJGARH
ALWAR
RAJASTHAN .....Respondent(s)

BEFORE:
HON'BLE MR. SUBHASH CHANDRA,PRESIDING MEMBER

FOR THE APPELLANT :

Dated : 06 November 2024

ORDER

BEFORE:

HON’BLE MR. SUBHASH CHANDRA, PRESIDING MEMBER

For the Appellants Mr Devesh Kumar Bansal, Advocate

For the Respondent Advocate **Mr Madhur Bhushan Singh,**

ORDER

1. This First Appeal under Section 19 of the Consumer Protection Act, 1986 (in short, 'the Act') challenges the order dated 16.02.2018 in complaint no. CC/26 of 2012 of the Rajasthan State Consumer Disputes Redressal Commission, Jaipur (in short, 'the State Commission') allowing the complaint and directing the opposite parties no.1 to 4 jointly and severally to pay Rs.50 lakh to the complainant as compensation for medical negligence for the death of his son with simple interest @ 9% per annum from the date of the complaint (23.04.2012) till the date of payment within 2 months of the order.

2. I have heard the learned counsel for both the parties and perused the material on record carefully.

3. The relevant facts of the case, in brief, are that the respondent/complainant's son was suffering from 'Mobile Atlanto Axial Dislocation' or AAD due to injury in childhood on account of a fall from a height of 20 ft for the past 15 years. As a consequence of this injury the patient was bedridden and on wheelchair. AAD is related to injury to the spinal cord and the cervical area which leads to progressive neurological deterioration including high cervical myelopathy (pressure on the spinal cord) with symptoms of weakness, spasticity (stiffness), wasting (atrophy of muscles) and respiratory compromise. According to the appellant, as per the history of treatment based on medical records, the patient was not provided adequate treatment and therefore suffered neurological deterioration. As per the respondent, his son was reasonably mobile and was able to manage himself. According to the petitioner, the patient was admitted in the Department of Neurosurgery, Government SMS Hospital, Jaipur on 07.09.2011 for investigations relating to a proposed surgery for AAD. However, he left the hospital without the doctor's permission and thereafter consulted Dr Hemant Bhartiya on 13.09.2011. Thereafter he approached the said Dr Bhartiya in November 2011 after two months. The patient also decided to get admitted in Fortis Escort Hospital in Jaipur for surgery. In view of the required investigation having been done in September 2011, further investigations were not done. Prior consent of the relatives were obtained and the surgery was conducted on 24.11.2011 followed by another surgery on 24.11.2011 The patient remained in the hospital till 26.12.2011 and was discharged on request. The patient subsequently expired during hospitalisation at Mittal Hospital, Alwar on 01.05.2012. On 10.05.2012, one Dr S C Mittal of Mittal Hospital, Alwar issued a certificate indicating the cause of death to be "quadriplegia, respiratory failure and sudden cardiac arrest". The said Mittal Hospital had also issued a certificate earlier on 08.04.2012 to state that the patient had been brought on 26.12.2011 in a Critical Care Ambulance on ventilator and that he had

continued to be on the ventilator since then as he could not be weaned off the ventilator since his left lung was collapsed with quadriplegia.

4. The appellants argued that the disease from which the patient, Raj Rishi was suffering since 1995-96 was due to injury to the neck region due to a fall which was progressively deteriorating, and he had become dependent on others. It was submitted that the patient had consulted other doctors at the SMS Hospital, Jaipur where he was admitted for neurosurgery and investigations like CT, MRI, X Ray and other tests were performed. Based on consultations on 13.09.2011 and 14.09.2011, Dr Hemant Bhartiya reached a presumptive diagnosis of cranio vertebral junction (CVJ) advised dynamic (flexion, extension, neutral) X Ray of the CVJ. On 14.09.2011 the earlier test reports of the Department of Neurosurgery SMS Medical College were reviewed. A line of treatment for the disease, including need for surgery and attendant risks were informed and immediate surgery advised. On 23.11.2011 the patient was admitted to Fortis Escorts Hospital, Jaipur where two surgeries were done on 23/24.11.2011 and 27/28.11.2011. On 26.12.2012 the patient was discharged on request against medical advice and shifted to Alwar in a critical condition while on ventilator in view of high cost of medicare in the appellant hospital where he remained on ventilator. On 01.05.2012 the patient expired.

5. According to the appellants, Mobile Atlanto Axial Dislocation or AAD was a serious disease caused due to fracture of the odontoid process of the C2 vertebral body due to fall from height of about 20 feet. Any sudden movement of the neck forward would result in quadriplegia or weakness in all four limbs and pentaplagia (weakness in all four limbs as well as compromised respiration). According to the appellant, the patient had not been provided adequate treatment for nearly 15 years and therefore suffered neurological deterioration. It was submitted that informed consent for the surgery had been obtained from the patient and attendants and was done in the supervision of appellants 3 and 4 and a team of doctors as per prescribed medical techniques and procedures. The treating surgeons Dr Hemant Bhartiya and Dr Vivek Vaid were stated to be qualified neurosurgeons holding advanced degrees and having considerable experience. It was argued that the complainant had not specifically proven which procedure or treatment was done incorrectly and that the alleged weakness and condition post-surgery was a natural situation in such a complicated surgery and could not be attributed to any incorrect surgery or failure, especially when the patient survived for months after the surgery. It was argued that proper neurological post-surgery care was not provided which was very important.

6. Reliance was placed on various medical literature to indicate that the protocol for the management of AAD was well established and to argue that the same was followed. It was contended that the material facts of treatment at Mittal Hospital had been suppressed and no expert's report had been filed. Reliance was placed on the judgement of the Hon'ble Supreme Court in ***Kusum Sharma & Ors. Vs. Batra Hospital and Medical Research Centre & Ors.,*** AIR 2010 SC 1050 to argue that medical procedures by medical professionals often involve a higher element of risk but cannot be concluded to be negligence so long as the doctor performs his duties with reasonable skill and competence. It was contended that merely because a doctor chooses one course of action in preference to the other available, he would not be liable for medical negligence. Reliance was also placed on the judgement of the Hon'ble Supreme Court in ***Jacob Mathew Vs. State of Punjab & Anr.,*** III 205 CPJ 9 (SC) and ***Martin F D'Souza vs Mohammad Ishfaq,*** II (2009) SLT 20. It was argued on the basis

of ***Achutrao Haribhau Khodwa vs State of Maharashtra,*** I (1996) CLT 532 SC that medical negligence cannot be attributed if a doctor performs his duties to the best of his ability with due care and caution even though the skill of medical practitioners differ from doctor to doctor. Reliance was also placed on ***Malay Kumar Ganguly vs Dr Sukumar Mukerji,*** AIR 2010 SC 1162 with regard to individual liability of the doctors when a medical practitioner exercises reasonable degree of care and skill and only failure to use due skill in diagnosis resulting in wrong treatment would amount to negligence. Reliance was also placed on the judgement of the Hon'ble Supreme Court in ***Bombay Hospital and Medical Research Centre vs Asha Jaiswal & Ors.,*** Civil Appeal no. 1658 of 2010 where in it had been held that no doctor can assure life to his patient and that if a patient in a critical condition could not survive even after surgery, the blame could not be passed on to the hospital and the doctor who provided all possible treatment within their means and capacity.

7. According to the appellant, the deceased patient had been discharged by the appellant on 26.12.2011 on the request of the complainant in a conscious state who was following verbal commands and thereafter the patient did not consult the Fortis Escorts Hospital, Jaipur. The contention that there was medical negligence on the part of the appellant was denied and it was contended that the subsequent treatment at the said Mittal Hospital, Alwar had not been disclosed nor medical records brought on record to establish conclusively that the death was on account of negligence of the appellant. It was also contended that Mittal Hospital, Alwar had not been arrayed as a party to the complaint. It was further contended that no medical evidence to establish negligence of the appellant or any expert medical opinion has been brought on record.

8. A complaint was filed by the respondent before the State Commission praying for the following relief:

> Damage of Rs.94,19,103/- for the injury, pain and suffering and deficiency in service to the petitioner, loss of income and medical and hospital charges and any other further order/orders as this Hon'ble Commission may deem fit and proper in the facts and circumstances of the case.

The State Commission, vide its order dated 16.02.2018 disposed the complaint filed by the respondent and held, on the basis of the judgment of the Hon'ble Supreme Court in the case of ***Sheela vs Apollo Hospital Ltd.,*** 1 (2017) CPJ 1 (SC) as under:

> 9. It is clear from the documents produced in documentary evidence of the complainant that CT cervical spine and other radiological investigations of the patient were done at the SMS Hospital Jaipur on 13.09.2011, according to these, patient was living his normal life and was performing all physical activities, only there was weakness in the limbs and at SMS Hospital some Neuro surgeon had given consultation for the spinal injury. On this, Complainant consulted opposite parties nos. 3 & 4 on 14.09.2011, on this they were expert in operation of spinal injury and their hospital had all the facilities for this operation. Complainant admitted his son in the hospital of opposite parties on 23.11.2011, believing them, where blood test, ECG, X-Ray chest of the patient was done and on 24.11.2011 operation was done. Condition of the patient was deteriorated after the operation and weakness was caused in the limbs of the patients and he was kept in ICU. On 27.11.2011, operation of Tracheotomy of

trachea was done and due to this his right lung was damaged and physiotherapy of chest and limbs was started but as patient got no relief, he was discharged on 26.12.2011 on the request of the complainant. From there he was taken to Mittal Hospital, where he died on 01.05.2012.

10. In this way, it is clear from the material and consolidated evidence available on the file that due to negligence of the opposite doctors and due to irregularity caused during operation, health of the patient deteriorated day by day and finally patient died on 01.05.2012. Complainant has submitted bills related to the treatment of his son in the hospital and has disclosed that diseased was earning 2-3 lacks per year from the agriculture and has filed affidavits of witnesses in support of this. Defence taken by opposite parties is not proved by any cogent evidence.

Opposite party Hospital is a five star Hospital where heavy charges are levied for the treatment of the patient. Rs.6,14,025/- were charged for the treatment of diseased from 23.11.2011 to 26.12.2011 for a period of one month and 4 days. Diseased was of age of 24 years and his income is said to be about Rs.3,00,000/-. In the judgment rendered by Hon'ble Supreme Court, age of the diseased was 60 years and his income was Rs. 5 lacks, in this situation age of diseased is less than half of the age in the case of Supreme Court. Income of the diseased would be more that's why got treated with hospital of opposite party, if treatment was taken by taking loan than situation would be more serious.

11. As per above mention discussion, complaint filed by the complainant is admitted and it seems reasonable to award compensation of Rs. Fifty lacks.

As per above mentioned discussion, complaint filed by the complainant is admitted and it seems reasonable to award compensation of Rs.50 lakh.

This order of the State Commission is impugned before us.

9. It is the case of the appellant that as per the settled principles of law, in the case of medical negligence, it was necessary for the complainant/respondent to establish his case with cogent evidence. Reliance was placed on ***Jacob Mathew*** (supra) wherein it was held that:

There is a marked tendency to look for a human actor to blame for an untoward event, a tendency that is closely linked with a desire to punish. Things have gone wrong and therefore somebody must be found to answer it. An empirical study reveals that background to a mishap is frequently far more complex than may generally be assumed ……. The human body and its working is nothing less than a highly complex machine. Coupled with the complexities of medical science, the scope for misimpressions, misgivings and misplaced allegations against the operator, i.e., the doctor, cannot be ruled out.

Reliance was also placed on the judgment of the Hon'ble Supreme Court in ***Martin F D'Souza*** (supra) which held that:

> Simply because a patient has not favourably responded to a treatment given by a doctor or a surgery has failed, the doctor cannot be held straightaway liable for medical negligence by applying the doctrine of *res ipsa loquitor*. No sensible professional would intentionally commit an act or omission which would result in harm or injury to the patient since the professional reputation of the professional would be at stake. A single failure may cost him dear in his lapse.

Appellant also relied upon ***Bombay Hospital and Medical Research Centre*** (supra) wherein the Hon'ble Supreme Court had observed that *"The patient was in a critical condition and if he could not survive even after surgery, the blame cannot be passed on to the hospital and the doctor who provided all possible treatment within their means and capacity…….. it cannot be said that there is a negligence on the part of the hospital.* Reliance was also placed on the judgment in ***Dr Chanda Rani Akhuri vs Dr M A Methusethupati and Ors.,*** Civil Appeal No.6507 of 2009 wherein it was held that:

> The doctors are expected to take reasonable care, but no professional can assure that the patient will come back home after recovering the crisis. At the same time, no evidence has come on record at the behest of the appellants which, in any manner, could demonstrate that it was a case of post-operative medical negligence or follow up care on the part of treating doctors.

Appellant also contended, on the basis of the Hon'ble Supreme Court's judgment in ***Kusum Sharma and Ors.*** (supra) that:

> Negligence cannot be attributed to a doctor so long as he performs his duties with reasonable skill and competence. Merely because the doctor chooses one course of action in preference to the other one available, he would not be liable if the course of action chosen by him was acceptable to the medical profession.

Finally, reliance was also placed on ***Achutrao Haribhau Khodwa vs State of Maharashtra***, I (1996) CLT 532 (SC) wherein the Hon'ble Supreme Court held that:

> Medical opinion may differ with regard to the course of action to be taken by a doctor treating a patient, but as long as a doctor acts in manner which is acceptable to the medical profession on and the court finds that he has attended on the patient with due care skill and diligence and if the patient still does not survive or suffers a permanent ailment, it would be difficult to hold the doctor to be guilty of negligence.

10. It was essentially argued that no guarantee is given by any doctor or surgeon that the patient would be cured and that every death in the institutionalised environment of the hospital does not necessarily amount to medical negligence on a hypothetical assumption of lack of due medical care. It was contended that the patient was suffering from a serious ailment of AAD for over a decade. It was stated that an operation was advised, the risks explained and it was only conducted after the informed consent of the patient's guardian and attendants. It was contended that the patient had left the hospital against medical advice and

thereafter took the treatment in Mittal Hospital, Alwar where he passed away. Therefore, the allegation of medical negligence on the appellant was incorrect, since it had not been established as to how and in what manner there was negligence on the part of the appellant hospital. It was argued that in the absence of any allegation based on evidence, allegation of medical negligence against the hospital was not justified. The appellant has relied upon several medical literature to justify the treatment of AAD, including surgical procedure that was undertaken. According to the appellant, the standard of care that was provided was as required and that there had not been negligence on the part of either the hospital or its doctor in the conduct of the surgical operation and care of the patient so long as he was admitted in the hospital.

11. *Per contra*, the respondent's case is that when the patient was admitted to the hospital of the appellant on 23.11.2011 he had weakness in his limbs for two months including numbness in the upper limbs hands but was conscious and following verbal commands. The power in all his four limbs was of 4/5 grip and his chest was clear as per the discharge note dated 26.11.2011. Therefore, his condition was normal and he was breathing normally. According to the respondent, there was no case of urgency to operate the patient. However, in the night of the day of admission itself the appellant doctors hurriedly performed a surgery of the upper spine in undue haste without proper pre-operative essential investigations because of greed of money. Respondent submits that on the day of admission the chest X ray indicated a clear lungs. However, apart from some lab investigations of the blood, no fresh MRI, CT scan or X ray of cervical spine or other investigations such as myelogram to visualize the state of the spinal cord or any malformation or syringomyelia. CT guided needle aspiration biopsy or pre-operative respiratory tissue culture was done. The appellants acted negligently on the presumptive diagnosis that the patient was suffering from mobile AAD on the basis of old MRI and CT scan reports of SMS Hospital dated 13.09.2011.

12. It was argued that the Hon'ble Supreme Court in ***Malay Kumar GAnguly*** (supra) had held that "*in our opinion if hospitals knowingly fail to provide some amenities that are fundamental for the patient it would certainly amount to malpractice and failure to diagnose the disease properly would amount to negligence."* Therefore, it is argued that appellants should have first undertaken full investigations to decide upon the need for an operation. Breach of such duty in deciding whether to undertake surgery or not amounts to medical negligence as held by the Hon'ble Supreme Court in ***Kusum Sharma*** (supra). It is contended by the respondent that when the appellant hospital's report of the X ray of the cervical spine (flexion/extension) shows no evidence of collapse or erosion, the diagnosis that the patient was suffering from mobile oblique reducible AAD, particularly when the MRI report was suggestive only of AAD and did not specifically indicate whether AAD was mobile/reducible, the same should have been asserted before any surgical intervention.

13. It was argued that as per the discharge summary and the CT scan report dated 30.11.2011 following the trans oral decompression surgery bony pieces (osteophytes) at C3-C4 level were noted in the MRI of cervical spine dated 05.12.2011 which confirms the presence of bony components in the spinal canal. The bony pieces left in the canal were compressing the cord since spinal cord had thinned at that level. This was a post operation development due to negligence of the appellants according to the respondent since they had not been seen in earlier reports of the CT scan and MRI done at SMS Hospital. The respondent asserts that appellant had not denied these reports.

14. Respondent also contended that the lungs and respiratory failure was an admitted fact. Before the operation, a lung X ray dated 23.11.2011 had shown both lung fields to be clear. Following the operation on 22/23.11. 2011, the lungs had collapsed and the patient was put on ventilator. Ultimately tracheostomy was done on 27.11.2011. The collapse of the left lung is admitted in the Discharge Note. The left lung continued to be in a collapsed condition till the death of the patient on 01.05.2012. Respondent argued that the appellants had admitted the use of high doses of steroids after the first surgery in their reply for which no consent was taken nor any justification provided for the use of such high doses of steroids.

15. According to the respondent, the patient was treated for 32 days from 23.11.2011 to 26.12.2011 at the appellant hospital and had to be shifted to Mittal Hospital, Alwar on account of the high costs of treatment at the appellant hospital. It is stated that the patient died while on ventilator during hospitalization at Mittal Hospital, Alwar on 01.05.2012. The cause of death according to the hospital at Alwar was due to quadriplegia, respiratory failure and sudden cardiac arrest.

16. Reliance was placed on the judgement of the Hon'ble Supreme Court in ***Dr Balaram Prasad vs Dr Kunal and others,*** (2014) 1 SCC 384 which held that a death certificate regarding the cause of death issued by a junior doctor was legally sustainable even in the absence of an autopsy. Respondent contends that as held by the Supreme Court in ***Magesh vs Dr Mehta*** AIR 2011 SC 249, the opinion of an expert is not needed in respect of civil liability cases in which a mere preponderance of probability is sufficient. It was submitted that a civil liability case is governed by the principle of *res ipsa loquitur*. Therefore, once the initial burden had been discharged by making out a case of negligence the onus was on the hospital and doctors to establish that there was no lack of care or diligence. As per hospital records and admitted facts, the respondent contended that medical negligence on the part of the appellants stood established.

17. The respondent has contended that it was an admitted fact that when the patient was admitted in the hospital on 23.11.2011 he was conscious and was following verbal commands. As per the Discharge Note dated 26.12.2011 the patient's condition was normal, and he was breathing normally. It was contended that after admission the appellant doctor performed surgery of the upper spine in undue haste without proper pre-operative investigations that were essential which constitutes medical negligence. It is also contended that while x-ray of chest was done on the day of admission along with certain other routine blood tests such as CBC, PTINR, Blood Sugar, S Creatinine, BUN, S Electrolytes, HBsAG, HIV/ BCG, no other investigations such as, MRI CT Scan or X-ray of cervical spine were undertaken. It is the case of the respondent that such examinations are essential before any major surgery. It is contended that the appellant acted negligently on the basis of presumptive diagnosis that the patient was suffering from mobile AAD on the basis of old MRI and CT Scan report of SMS Hospital dated 13.09.2011 even though, cervical spine X-ray of the same date i.e., 13.09.2011 states that *"vertebral bodies appear to be normal with no evidence of collapse, sub-luxation or erosion, intervertebral disc spaces appear normal, bony cervical canal and interspinal lines appear normal. Prevertebral soft tissue thickness appear normal."*

18. It was contended by the respondent that there were two operations conducted in the appellant's hospital: (i) internal fixation of posterior arches of atlas and axis with MRI

compatible wiring fixation for AAD in the night of 23/24.11.2011 and (ii) Trans Oral Decompression on 28/29.11.2011. A tracheostomy was also done on 27.11.201 The respondent contended that no consent was obtained for the tracheostomy and transoral decompression operation which was contrary to the law laid down by the Hon'ble Supreme Court in ***Nizam Institute of Medical Science vs Prasanth***, AIR 209 (Supp.) 1503 requiring the obtaining of separate consent for different procedures/surgeries. It was also argued that as per the hospital's Discharge Summary, the deceased was being treated for AAD with OS for which posterior stabilisation was done with the neck in neutral position whereas in the present case the posterior C1-C2 fusion was done for mobile reducible AAD. It was contended that posterior fusion was performed on a patient with Mobile AAD by achieving reduction with the neck in extension position. It was averred that as was evident from the appellant's documents at (A4, page 244), the appellant's doctor negligently adopted a wrong surgical management procedure as a result of which, even after the first operation to remove the compression, MRI done by the appellant hospital on 28.11.2011 shows that there was still severe compression upon the cord C1-C2 level and that posteriorly displaced fracture of odontoid process of axis was still seen without significant changes in intensity.

19. It is, therefore, the case of the respondent that the appellant hospital and its doctors were negligent in the treatment of his son in presumptive diagnosis for surgeries that were not preceded by the mandatory necessary pre-operative tests, conduct of operations without obtaining prior consent and in incorrectly operating upon his son for AAD since post-operative MRI revealed the severe compression on the spinal cord and posteriorly displaced fracture of odontoid process of axis was still seen without any significant changes.

20. In matters where an allegation of medical negligence is made against a doctor or hospital (or both), it is the settled proposition of law that the definition of 'service' under Section 2(1)(d) of the Act has to be understood on broad parameters and it cannot exclude service rendered by a medical practitioner. It has also been well laid down that the jurisprudential concept of negligence differs in civil and criminal law. The law relating to what constitutes medical negligence has been laid down in the Hon'ble Supreme Court's judgment in ***Jacob Mathew*** (supra) which has been relied upon by the State Commission. It is based on the ***Bolam Test*** (1957) 2 A11 ER 118. The test for medical negligence is based on the deviation from normal medical practice and it has been held that establishment of negligence would involve consideration of issues regarding:

(1) *state of knowledge* by which standard of care is to be determined,

(2) *standard of care* in case of a charge of failure to (a) use some particular equipment, or (b) to take some precaution,

(3) *enquiry to be made* when alleged negligence is (a) due to an accident, or (b) due to an error of judgment in choice of a procedure or its execution. For negligence to be actionable it has been held that the professional either (1) professed to have the requisite skill which he did not possess, or (2) did not exercise, with reasonable competence, the skill which he did possess, the standard for this being the skill of an ordinary competent person exercising ordinary skill in the profession.

21. It was further held that in a claim of medical negligence, it was essential to establish that the standard of care and skill was not that of the ordinary competent medical practitioner exercising an ordinary degree of professional skill. For negligence to be actionable, it was held that it has to be attributable and the three essential components of "duty", "breach" and "resulting damage" need to be met, i.e. (i) the existence of a duty to take care, which is owed by the defendant to the complainant; (ii) the failure to attain that standard of care, prescribed by the law, thereby committing a breach of such duty; and (iii) damage, which is both causally connected with such breach and recognized by the law, has been suffered by the complainant. Negligence is the breach of a duty caused by omission to do something which a reasonable man guided by those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do. Negligence becomes actionable on account of injury resulting from the act or omission amounting to negligence attributable to the person sued. The essential components of negligence, as recognized, are three: existence of a duty to take care, which is owed by the defendant to the complainant; failure to attain that standard of care, thereby committing a breach of such duty; and "resulting damage", which is both casually connected with such breach and has been suffered by the complainant. If these three ingredients are made out on the basis of evidence, the defendant should be held liable in negligence.

22. However, the Hon'ble Supreme Court has also held, in ***V. Kishan Rao Vs. Nikhil Super Speciality Hospital & Anr.,*** (2010) 5 SCC 513 decided on 08.03.2010, that the principle of *res ipsa loquitur* would also apply to cases of medical negligence. It has held the principle of *res ipsa loquitur,* which is essentially an evidential principle, is intended to assist a claimant who, for no fault of his own, is unable to adduce evidence as to how the accident occurred. The Apex Court has held that *"In a case where negligence is evident, the principle of res ipsa loquitur operates and the complainant does not have to prove anything as the thing (res) proves itself. In such a case it is for the respondent to prove that he has taken care and done his duty to repel the charge of negligence."* It was also held that as regards adducing of expert evidence, it would have to be judged on the facts of each case and there cannot be a mechanical or strait jacket approach since each case must stand on its own legs. Courts have consistently held that the onus would shift to the defendant once *res ipsa loquitur* is established.

23. In ***Indian Medical Association vs V.P. Shantha & Ors.,*** 1995 SCC (6) 651 decided on 13.11.1995, the Hon'ble Supreme Court held that in cases before consumer *fora* both simple and complicated cases may come and that only in complicated cases the recording of evidence of an expert may be required for which the complainant may be asked to approach a civil court for appropriate relief. It was also held by the Hon'ble Supreme Court in ***Dr. J.J. Merchant & Ors vs Shrinath Chaturvedi, 2002,*** (6) SCC 635 decided on 12.08.2002 that it has to be left to the discretion of the Commission whether or not to examine experts in appropriate matters.

24. The doctrine of *res ipsa loquitur* ("the thing speaks for itself") is based on an inference of negligence based on the nature of injury or damage even if there is no direct evidence of the defendant's actions. In medical negligence, the doctrine shifts the burden of proof to the medical professional to explain how the damage occurred. In ***V. Kishan Rao*** (supra), the Hon'ble Supreme Court had held that the doctrine of *res ipsa loquitur* could apply to cases of medical negligence also. It was held that negligence could be inferred from the facts when

the defendant medical professional and hospital had exclusive control over the situation in which the patient was and the nature of the damage suffered suggests that it would not have occurred without negligence.

25. In the instant case, the son of the complainant/respondent was under the care of appellants in the appellant hospital and was operated upon. The moot issue is whether a by doctors in the said hospital. A duty of care was owed by the appellants as medical professionals. The patient was, despite suffering from AAD was breathing normally. However, post surgery he suffered left lung collapse, was put on ventilator and ultimately expired due to quadriplegia with respiratory failure and sudden cardiac arrest. It is not in dispute that the patient had to be taken from the appellant hospital in a Critical Care Ambulance to Alwar in view of the high costs of hospitalisation for nearly a month. The duty of care was breached when the operations were conducted without pre-operative tests and thereafter conduct of medical procedures without prior consent resulting in harm to the patient as a result of which he ultimately expired. It is a fact not disputed by the appellants that the patient was shifted from the appellant hospital on 26.12.2011 while on ventilator in a Critical Care Ambulance. It can, therefore be inferred that the patient's health deteriorated post-surgical procedures for which he was admitted. The State Commission cannot be faulted for reaching a finding of medical negligence.

26. From the record it is apparent that the appellant hospital and the appellant doctors had not prescribed or conducted pre-surgery investigations as alleged by the respondent. Surgical procedures were embarked upon essentially on the basis of tests done at SMS, Hospital, Jaipur without evaluation of the patient through tests at the appellant hospital except some pre-surgery test conducted on admission of the patient in the appellant hospital. No evidence has been brought on record by the appellants to counter the allegations in this regard by the respondent. It is also manifest from the material on the record that prior consent was only obtained for the surgical procedure relating to internal fixation of posterior arches on 23/24.11.2011 (night). No documents to indicate prior consent for any other procedure has been presented by the appellants. The appellants were mandated to obtain prior informed consent for the second operation for Trans Oral Decompression on 28/29.11.2011. No documentary evidence is available for the same. Thus, as per the principles laid down in ***Jacob Matthew*** (supra), it is evident that the appellant hospital and the appellant doctors who owed the respondent's son a duty of care in respect of the medical procedures/ operations for AAD breached that standard of care. The post operative MRI reports also indicate that there was no material change in the patient's condition.

27. It is not material, as the appellants have contended, that the deceased patient subsequently obtained treatment from Mittal Hospital in Alwar or whether the cause of death was recorded differently in the certificate issued by the said hospital and the local authorities. The certificate of the doctor at the said hospital as regards the cause of death is legally acceptable in the absence of an autopsy. The contention of the appellants that details of treatment at the said hospital were not brought on record cannot be considered as it has not brought any material on record to establish that there was deficiency in treatment while admitted there. In any case, it has also not countered the averment of the respondent that the patient was shifted while on ventilator and remained to be on ventilator till his death as he could not be weaned off it and that the shift to this hospital was on account of high medical/hospitalization costs in appellant no. 1 hospital. The onus of proof lies on the

appellants in a case of *res ipsa loquitur.* However, the same has not been discharged. On the contrary, the respondent has brought on record certificates from Mittal Hospital, Alwar that the patient, who was brought on 26.12.2011 on ventilator, could not be weaned off it till he expired in the hospital due to respiratory and cardiac issues. The cause of death has been clearly recorded by a doctor at the said hospital. The said hospital has certified that the patient was brought to it in a Critical Care Ambulance in a critical condition and that the patient was suffering from a collapsed left lung and was therefore on ventilator from which he could not be weaned off. The ventilator had been necessitated at the appellant hospital when a tracheostomy was done on 28/29.11.2011. As held by the Hon'ble Supreme Court in ***V. Kishan Rao*** (supra), the breach of duty attracting the doctrine of *res ipsa loquitur* is evident in this case. The case is squarely covered under the doctrine since the patient, though a case of AAD, had reasonable health and even as per discharge summary of the appellant hospital at the time of admission on 24.11.2011 when he was capable of comprehending verbal commands. However, the position changed after the surgeries.

28. It is evident from the above that the appellant doctors failed to establish why the surgeries were performed without the requisite pre-operation investigations and instead relied upon investigations conducted elsewhere earlier and why tracheostomy was undertaken without prior consent. Medical negligence on part of the appellant doctors (Appellants 2 and 3) is therefore clearly established in this case although the State Commission, on the basis of the doctrine of *res ipsa ,* held the appellants to be jointly and severally held liable to pay compensation to the respondent. As regards the quantum of compensation awarded, a lump sum award in the case of death appears reasonable as it covers both the costs and compensation.

29. The Hon'ble Supreme Court has held in ***Nizam's Institute of Medical Sciences*** (supra) that the award of relief and compensation in matters of medical negligence should strike a balance between inflated and unreasonable demands of the victim and equally untenable denial of the opposite party to arrive at an "adequate compensation". In ***Malay Kumar Ganguly*** (supra), the Hon'ble Supreme Court held that not following medical treatment or protocols laid down by experts and where patient's death was caused due to cumulative effects of giving treatment contrary to established medical treatment protocols would amount to medical negligence. It was also held that professional competence of highest order is not expected from every doctor and that he must use reasonable degree or skill of his profession in diagnosis and treatment. Failure to use due skill in diagnosis, resulting in wrong treatment, amounts to negligence. In the instant case, the liability of the appellant hospital has not been established by the respondent and therefore the impugned order fastening liability on the hospital does not stand established in as much as there was any failure or negligence in the providing of medical facilities or services is concerned. The case of the respondent is that the doctors rushed the deceased patient into surgery without adhering to the established protocol of pre-operative surgeries and thereafter conducted surgical interventions without following the standard operating procedure of prior informed consent being obtained. There is no specific allegation of negligence on part of the hospital (appellant no. 1) to establish even vicarious liability or on appellant no. 2 for any failure to provide medical services.

30. In view of the discussion above, the impugned order is not found to suffer from any legal infirmity in so far as the establishment of liability for medical negligence on appellant nos. 3 and 4 is concerned. The State Commission's order with respect to appellant nos.3 and

4 is well reasoned and liable to be upheld and does not warrant interference. However, as regards the allegation of medical negligence with regard to the hospital (appellant no.1) and appellant no.2, the State Commission's order has not been able to establish any specific negligence which led to the demise of the respondent's son. For the aforesaid reasons, while I do not find any reason to disturb the findings of the State Commission with regard to negligence in service in respect of appellant nos. 3 and 4, the impugned order holding appellant nos. 1 and 2 is found to not be sustainable. Accordingly, the order of the State Commission upheld in part and the appeal of appellant nos. 1 and 2 allowed. The appeal of appellant nos. 3 and 4 is disallowed. They are held jointly and severally liable for deficiency in service *qua* the deceased son of the respondent. They are directed to comply with the order of the State Commission as directed.

31. Pending IAs also stand disposed with this order.

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SUBHASH CHANDRA
PRESIDING MEMBER