



MEDICAL CASE LAW

Manuscript ID: IJHRMLP-1002

Operation without written consent, wrong diagnosis, complications of metal chips: a case of medical negligence [National Consumer Commission (India)]

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CASE HISTORY

The complainant stated that Mst. Saira Bibi (the patient) suffered from stomach pain and visited the clinic of the opposite parties on 23.07.2009, where Dr M. Arif (OP-1) diagnosed gall-bladder stone and verbally assured that he had expertise in subtlest surgery to ferret out stones and his stratagem never failed in the convincing rustic patient. Dr. M. Arif (OP-1) inflated as being Professor & Head Department of Surgery, Katihar Medical College and Hospital to run off at the mouth on what the victim was suffering from showered umpteen advices and instructions upon her and prepared as voluminous prescription indicating an essentiality of surgery in the short run or she should batten down the hatches in the event of delay.

Abu Tahir (OP-2), the medical aid of OP-1 in their local dialect, tried his damndest to convince her of minatory and fatal consequences and thus exerted intense effort to persuade her for surgery, which could best be done in the hands of OP-1 at Katihar on the cheap.

The airs of OP-1 were immediately felt optimal by the patient, her relations and close acquaintances pari passu with the importunate admonition of OP-2 about the extreme urgency of the surgery. Although the victim's family was going through an impecunious situation, the convalescence of the patient was imperative,

without more ado, for the entire company and its relations were devoid of alacrity.

Issue of Operation without written consent:

The patient was operated on 23.07.2009 at Katihar Medical College and Hospital by OP-1 without written consent. No stone was found during the patient's operation. When it came to light that OP-1 had ceased to mind his p's and q's at the time of diagnosis, as well as his operation by himself that resulted in an object fiasco in the field of his specialisation, he began to retort to the queries from the victim's side and that he became so exasperated and also perturbed that he even failed to provide surgery report. Now, both the OPs began to their shameless audacity to file a chord of the rural ignorami increasingly choking up at the sight of the growing feebleness of the victim in one fell swoop and successfully lulled her at last.

OP-1 once again to cure the ailment of the patient through another surgery, which he did again at Katihar Medical College and Hospital on 28.10.2013 without written consent from the patient and her family members, which again met with the same fate, resulting in worsening the mental and physical health of the victim as there could not be found any trace of stone while the aggravation of the trouble loomed large and that the OPs put a lid on the lick and a promise they made and did not take the lid off.

The OPs, firing on all cylinders, managed to win the victim’s heart by assuring her of the success of the surgery they had just performed and persuaded her to stick to the medical care they rendered for another six months, meaning that throughout this period of their target, the OPs partly rampantly used to line their pocket, like milking a milch relentlessly. However, an iota of improvement in the patient’s health could not be marked at all.

Treatment from Another Doctor:

After being completely exhausted and ready to drop the victim’s family on 22.12.2016, switched over to Raza Hospital, Line Bazar, Purnea and placed the victim under treatment of Dr. Md. Shahnawaz Rizwi, which was also marked by aggravation of the patient health condition.

Treatment by Homeopath:

Because of the worsening state of health of the patient, Dr Suvradal Chatterjee, a Homeopath of note, was engaged in a thorough diagnosis and intensive medical care of the victim.

Issue of Medical Negligence and Intention to Eran Money:

Under prudent counsel, a good many tests and scanning were done, and their reports perfectly established medical negligence that occurred at the hands of the OPs during a long-term treatment, not to mention that they treated the patient like a golden goose or a gray train in a space of five years and as such

the village folk naturally credulous utterly failed to wise up the real intention of the OPs to earn money to their heart’s content at the expense of human being.

Court Judgment: Dr. M. Arif vs. Tahasan Ali and 2 Others, FA/893/2022. Date of Judgment: 03.09.2024. NCDRC.

Case Law relied on: 1. Samira Kohli vs. Dr. Prabha Manchanda, (2008) 2 SCC 1. 2.V. Kishan Rao vs. Nikhil Super Speciality Hospital, (2010) 5 SCC 513. 3. V.N. Shrikhande (Dr) vs Anita Sena Fernandes, (2011) 1 SCC 53. 4. Hyundai Motors India Limited vs. Shailendra Bhatnagar, 2022 SCC OnLine SC 483.

Alleging medical negligence on the part of the OPs, the complainant filed the complaint before WBSRC on 31.01.2018, directing the appellant and respondent-2 to pay (i) Rs.9210500/- as compensation and (ii) any other relief, which is deemed fit and proper in the facts and circumstances of the case.

West Bengal State Consumer Disputes Redressal Commission, Circuit Bench Sliguri dated 25.07.2022 passed in RBR CC/23/2018, partly allowing the complaint and directing the appellant (OP-1) to pay Rs.8/- lacs to Mst. Saira Bibi as compensation and Rs.20000/- as litigation cost within two months, failing which, the interest would be payable @8% per annum on it.

The following essential issues emerged for discussion in this case:

Issue of Operation without written consent	<i>Duty of experts in giving expert evidence opinion</i>
Doctrine of Limitation Impleadment of Indemnity Insurance Company as a necessary party Cause of Action and Territorial Jurisdiction	

Expert comments:

Questions for consideration:

Question 1: Whether the acts or omissions of the medical practitioners or the hospital constitute negligence?

Question 2: Whether a medical practitioner or the hospital is negligent or not?

In the present case, in the Video Upper G.I. Endoscopy report dated 01.01.2017, “one moderate (5mm x 4 mm) deep ulcerated zone on the lateral wall of duodenal bulb” was diagnosed for the first time.

According to the complainant, this ulcer occurred due to infection, as during her second surgery, metal chips were left in her stomach by OP-1. Thus, negligence surfaced for the first time on 01.01.2017, and the complaint was filed on 31.01.2018, i.e. within two years from the date when the negligence of OP-1 was noticed. Therefore, it cannot be said that this complaint is time-barred. [Para 9]

Stand of Doctor:

The appellant admits that he did Common Bile Duct exploration choledocholithotomy-cholecho-duodesostomy on 04.11.2013 of the patient. In his Reply Affidavit sworn on 29.03.2022, the appellant stated that choledoch-duodesostomy is a process in which a passage is made between the common bile duct and duodenum.

Metal chips used to remove GB remain in the patient’s abdomen for the rest of life. Staples, clips, and other implanted devices are inserted in deficient active properties that lack a usual or anticipated chemical or biological section. As such, using metal chips during the second surgery is admitted.

Observations of SCDR:

State Commission found that an ‘ulcer’ in the stomach was caused by metal chips left in her stomach during surgery by OP-1. State Commission further found that when the patient was not cured after the second surgery, she was handed over to a physician, namely Dr.

Mohd. S. Rizwi, but her condition deteriorated day by day. [Para 10]

Issue of Informed Consent and the SC Case Law

The complainant alleged that ‘informed consent’ was not obtained by OP-1 before conducting both the surgery. Although the appellant has denied this allegation, he does not produce copies of ‘informed consent’. Supreme Court in **Samira Kohli vs. Dr. Prabha Manchanda, (2008) 2 SCC 1**, summarised principles relating to consent as follows:

- “(i) A doctor has to seek and secure the consent of the patient before commencing a “treatment” (the term “treatment” includes surgery also). The consent so obtained should be real and valid, which means that the patient should have the capacity and competence to consent; his consent should be voluntary; and his consent should be based on adequate information concerning the nature of the treatment procedure so that he knows what he is consenting to.
- (ii) The “adequate information” to be furnished by the doctor (or a member of his team) who treats the patient should enable the patient to make a balanced judgment as to whether he should submit himself to the particular treatment or not. This means that the doctor should disclose (a) the nature and procedure of the treatment and its purpose, benefits and effect; (b) alternatives, if any, available; (c) an outline of the substantial risks; and (d) adverse consequences of refusing treatment. However, there is no need to explain the remote or theoretical risks involved, which may frighten or confuse a patient and result in the refusal of consent for the necessary treatment. Similarly, there is no need to explain the remote or theoretical risks of refusing treatment, which may persuade a patient to undergo a fanciful or unnecessary treatment. A balance should be achieved between disclosing

necessary and adequate information and, simultaneously, avoiding the possibility of the patient being deterred from agreeing to a necessary treatment or offering unnecessary treatment.

- (iii) Consent given only for a diagnostic procedure cannot be considered consent for treatment. Consent given for a specific treatment procedure will not be valid for conducting another treatment procedure. The fact that the unauthorised additional surgery is beneficial to the patient, would save considerable time and expense or would relieve the patient from pain and suffering in future are not grounds for defence in action in tort for negligence or assault and battery. The only exception to this rule is where the additional procedure, though unauthorised, is necessary to save the life or preserve the patient's health. It would be unreasonable to delay such an unauthorised procedure until the patient regains consciousness and decides.
- (iv) There can be common consent for diagnostic and operative procedures where they are contemplated. There can also be a common consent for a particular surgical procedure and an additional or further procedure that may become necessary during surgery.
- (v) The nature and extent of information to be furnished by the doctor to the patient to secure the consent need not be of the stringent and high degree mentioned in *Canterbury* [464 F 2d 772: 150 US App DC 263 (1972)] but should be of the extent which is accepted as normal and proper by a body of medical men skilled and experienced in the particular field. It will depend upon the physical and mental condition of the patient, the nature of the treatment, and the risks and consequences attached to the treatment. [Para 11]

The SC Case Law on Expert Evidence: Duty of Expert

So far as the arguments that the complainant has produced no expert evidence is concerned, the Supreme Court in **V. Kishan Rao vs Nikhil Super Speciality Hospital, (2010) 5 SCC 513**, held that this Court, however, makes it clear that before the Consumer Fora if any of the parties wants to adduce expert evidence, the members of the Fora by applying their mind to the facts and circumstances of the case and the materials on record can allow the parties to adduce such evidence if it is appropriate to do so in the facts of the case. The discretion in this matter is left to the members of the Fora, especially when retired Judges of the Supreme Court and the High Courts are appointed to head the National Commission and the State Commissions, respectively. Therefore, these questions are to be judged based on the facts of each case, and there cannot be a mechanical or straightjacket approach, so every case must be referred to experts for evidence. When the Fora finds that expert evidence is required, the Fora must remember that an expert witness in a given case normally discharges two functions. The first duty of the expert is to explain the technical issues as clearly as possible so that the common person can understand them. The other function is to assist the Fora in deciding **whether the medical practitioners' or hospital's acts or omissions constitute negligence**. In doing so, the expert can throw considerable light on the current state of medical science knowledge when the patient is treated. In most cases, whether a medical practitioner or the hospital is negligent is a mixed question of fact and law and the Fora is not bound in every case to accept the expert witness's opinion. In many cases, the expert witness's opinion may assist Fora in deciding on a controversy.

Note: NCDRC concluded that the earlier discussion proved that the appellant had not obtained 'informed consent' before conducting surgeries on 10.08.2009 and 04.11.2013. The findings of the State Commission that the appellant has committed negligence in leaving metal chips in the stomach of the patient during surgery, which caused an 'ulcer' to the patient, does not suffer from any illegality. The appeal has no merit and is liable to be dismissed.

Cite this article: *Yadav M. Operation without written consent, wrong diagnosis, complications of metal chips: a case of medical negligence [National Consumer Commission (India)]. 2024.Jul-Dec;10(2):11-15. Doi: 10.31741/ijhrmlp.v10.i2.2024.2*

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