

**(1999) 11 KL CK 0071**  
**In the High Court Of Kerala**  
**Case No : A.S. No. 439 of 1988**

Adoration Convent

APPELLANT

Vs

Cicily

RESPONDENT

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**Date of Decision :** 16-11-1999

**Acts Referred:**

**Citation :** (2000) 1 ACC 232 : (2001) ACJ 1605

**Hon'ble Judges :** P.K. Balasubramanian, J;K.A. Mohammed Shafi, J

**Bench :** Division Bench

**Advocate :** George Varghese Kannanthanam, Felix Mary Das and Xavier George, for the Appellant; P.G.P. Panicker, P. Gopal and N. Manoj Kumar, for the Respondent

**Final Decision :** Dismissed

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## Judgement

K.A. Mohammed Shafi, J.—This appeal is directed against the judgment passed by the Sub-Court, Thodupuzha dated 27.6.88 in O.S. No. 108 of 1986. Defendant Nos. 2 and 3 are the appellants. The suit was filed by the plaintiff-respondent herein claiming damages of Rs. 3,50,000 from the defendants. The lower court after trial decreed the suit against defendant Nos. 2 and 3 for Rs. 1,00,000 with interest thereon at the rate of 6 per cent per annum from the date of decree, by the impugned decree and judgment. Hence defendant Nos. 2 and 3 have preferred this appeal.

2. The plaintiff claimed damages on the following allegations. On 18.10.1984 at about 4 p.m. while carrying a bucket of water the plaintiff stumbled and fell down and experienced sprain on her right foot, which developed into severe pain with inflammation. On 18.10.84 itself she went to the Mercy Hospital, owned and run by the defendant No. 1 where the defendant No. 3 had been working as a doctor. The defendant No. 3 examined her and gave medicines. Though she consumed medicines as prescribed by the defendant No. 3, the pain did not subside. On 23.10.1984 at about 7 a.m. she went to the hospital and met the defendant No. 3. She was admitted in the hospital and got X-rayed her right foot.

The defendant No. 3 told her that there is fracture and on 24.10.1984 plaster cast was applied below the right knee excluding the toes. On 25.10.1984 the toes showed discolouration and there was swelling below the knee. The defendant No. 3 was called and he gave an injection. Blisters were developed at the root of the middle two toes of the right foot and the defendant No. 3 performed surgery on the blisters. But the pain continued and the defendant No. 3 removed the plaster on 29.10.84. Then it was found that the entire foot became septic and ulcers formed on both sides. All toes had become black in colour. Though the plaintiff sought for discharge, the defendant No. 3 told her that there is no need for any anxiety and her condition was improving. On 2.11.84 the defendant No. 3 brought a surgeon from the Medical College Hospital, Alleppey who examined the plaintiff and said that the tissues were damaged incurably and the toes should be amputated. She was removed to the Medical College Hospital, Kottayam on 2.11.84 and found that amputation of part of her foot was necessary. On 7.11.84 half of her foot was amputated. Skin-grafting was also conducted. There was absolutely no need to put her leg in plaster cast. Due to the plaster the nerves were pressed and damaged. It was due to negligent handling by defendant No. 3 her foot had to be amputated. The plaintiff was aged only 24 years and unmarried at that time. The prospect for her marriage has become dim and she also lost her brilliant academic career. She had to suffer unbearable mental pain and agony apart from permanent disability and disfiguration. She had to spend large amount towards expenses for her treatment. All this loss and suffering was caused to her due to negligence of the defendant No. 3. Therefore, she is entitled to damages of Rs. 3,50,000.

3. The defendants contested the suit by filing separate written statements. The defendant No. 1 contended that he had nothing to do with the hospital, its ownership or management or control and as such not liable for the claim made by the plaintiff.

4. The defendant No. 2 has contended that the plaintiff was admitted in the hospital with suspected gangrene and the defendant No. 3 started treating her for the same disease. It is also contended that the defendant No. 3 has given proper treatment to the plaintiff and there was absolutely no negligence on the part of the defendant No. 3 and as such the defendant No. 2 is not liable to pay any damages to the plaintiff.

5. The defendant No. 3 filed a detailed written statement contesting the suit. He contended that when the plaintiff alleged that the pain has not subsided after the administration of medicines prescribed by him on 18.10.84, she was admitted in the hospital. X-ray was taken on 23.10.1984 and found that there was no fracture of the foot. According to him, the right foot of the plaintiff was put on plaster cast for one day to immobilise that foot in order to relieve her from pain and it was removed the next day and she continued to be in-patient in the hospital. According to him, the portion of the limb was protected and proper medicines were given to her. But when signs of discolouration of the skin were

noticed, an expert doctor, a retired surgeon from the Alleppey Medical College was called on 2.11.1984 and consulted for second opinion. As he pointed that three toes will have to be amputated, the plaintiff was immediately removed to the Medical College Hospital, Kottayam. According to him, he has given the best medical treatment and attention to the plaintiff and there was absolutely no negligence on his part and as such the plaintiff is not entitled to any relief in the suit.

6. After trial the lower court found that the respondent No. 3 was negligent in this case and, therefore, decreed the suit against defendant Nos. 2 and 3 for damages of Rs. 1,00,000.

(Paras 7 to 19 omitted being appreciation of facts)

20. In the book Bailey and Love's Short Practice of Surgery the learned authors have observed at page 353 that sprains of the lateral ligaments should be treated by compression bandaging, early mobilisation within the limits of pain and swelling and coordination exercises. Therefore, it is clear from the medical evidence from the textbook as well as experts available in this case that complete immobilisation in plaster was not essential in this case and depending upon the injury elastic bandage was sufficient.

21. It is submitted by the counsel for the respondent that this is a fit case wherein the principle of *res ipsa loquitur* applies. According to him, since the professional skill of the appellant is under consideration, it is up to him to explain how the accident could have been happened without negligence on his part. In support of this contention the counsel for the respondent relies upon the observations made by the learned authors Salmond and Heuston on the Law of Torts 19th Edn. at p. 270, wherein the learned authors have observed as follows:

If the accident is proved to have happened in such a way that *prima facie* it could not have happened without negligence on the part of the defendants, then it is for the defendants to explain how the accident could have happened without negligence.

22. The argument advanced by the counsel for the appellant that the principle of *res ipsa loquitur* will apply only in cases where the court is not able to decide the reason for the injury in the accident, is not sustainable. In this case the appellant No. 2 has no contention that gangrene has set in due to any unforeseen reasons. But his definite case is that gangrene has set in due to the sprain due to the fall of the respondent. Though he noticed symptoms of gangrene on 23.10.1984 itself as there was reduction in blood supply to the limb and subsequently confirmed by him on 27.10.84 on the removal of the plaster cast, he has not taken any remedial measures to improve the blood supply and prevent gangrene. He put plaster cast even after noticing reduction in blood supply to the limb of the respondent. Therefore, in this case there is negligence on the part of the appellant No. 2 due to commission as well as omission. Hence the principle of *res ipsa loquitur* as stated above is applicable in this case since the professional skill

in the treatment of the respondent is a matter for consideration.

23. The counsel for the appellant vehemently submitted that the evidence to be adduced and the standard of proof in an action for medical negligence against a doctor is very high and the patient should prove the negligence. According to him, the medical practitioner should act in accordance with the prevailing medical practice and it is up to the respondent to prove that the doctor has acted negligently with cogent and acceptable evidence. He relies upon the decision of a Division Bench of the Bombay High Court in *Phillips India Ltd. v. Kunju Punnu* 1975 ACJ 311 wherein it is held that the standard of care and skill to satisfy the duty in tort is that of the ordinary competent medical practitioner exercising the ordinary degree of professional skill. In that judgment the Division Bench has observed as follows:

(23) It is, therefore, clear that in an action for negligence against a doctor, as in any other action for negligence, the plaintiff has to prove: (1) that the defendant was under a duty to take a reasonable care towards the plaintiff to avoid the damage complained of or not to cause damage to the plaintiff by failure to use reasonable care; (2) that there was a breach of duty on the part of the defendant; and (3) that the breach of duty was the real cause of the damage complained of and such damage, was reasonably foreseeable.

24. But in the decision in *Laxman Bal-krishna Joshi v. Trimhak Rapu Godbole* 1968 ACJ 183 the Supreme Court has observed as follows:

(10) The duties which a doctor owes to his patient are clear. A person who holds himself out ready to give medical advice and treatment impliedly undertakes that he is possessed of skill and knowledge for the purpose. Such a person when consulted by a patient owes him certain duties, viz., a duty of care in deciding whether to undertake the case, a duty of care in deciding what treatment to give or a duty of care in the administration of that treatment. A breach of any of those duties gives a right of action for negligence to the patient. The practitioner must bring to his task a reasonable degree of skill and knowledge and must exercise a reasonable degree of care. Neither the very highest nor a very low degree of care and competence judged in the light of the particular circumstances of each case is what the law requires.

Hence the above dictum laid by the Apex Court has to be followed by this court.

25. In the decision in *Achutrao Haribhau Khodwa and Others Vs. State of Maharashtra and Others*, the Apex Court has observed as follows:

(14) The skill of medical practitioners differs from doctor to doctor. The very nature of the profession is such that there may be more than one course of treatment which may be advisable for treating a patient. Courts would indeed be slow in attributing negligence on the part of a doctor if he has performed his duties to the best of his ability and with due care and caution. 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 a manner which is acceptable to the medical profession 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.

(15) In cases where the doctors act carelessly and in a manner which is not expected of a medical practitioner, then in such a case an action in torts would be maintainable. As held in Laxman's case 1968 ACJ 183 by this court, a medical practitioner has various duties towards his patient and he must act with a reasonable degree of skill and knowledge and must exercise a reasonable degree of care. This is the least which a patient expects from a doctor.

26. Applying the principles laid down in the above decisions of the Apex Court to the facts and circumstances of this case, it is clear that the appellant No. 2 has not exercised the due skill, care and caution expected of him while treating the respondent. The appellant No. 2 after knowing that there was no fracture of the bone or the ligament, after taking X-ray put the right limb of the respondent in full plaster cast fully realising the hazards of a tight plaster cast even after noticing that there was reduction in blood supply to the limb. He did not take any steps to treat the respondent either to augment the blood supply or to prevent the setting in or advancement of gangrene in spite of the fact that even according to him, he had suspected the setting in of gangrene on 23.10.84 itself and found that gangrene has set in at least on 27.10.1984. He did not take any effective steps for treatment for gangrene thereafter and he in fact sought the second opinion only on 2.11.84. Under the circumstances it is clear that the appellant in this case did not exercise reasonable skill, knowledge and care in the treatment of the respondent. Therefore, he is liable to pay damages for negligence in the treatment of the respondent.

27. The counsel for the appellant argued that the reliefs sought for by respondent-plaintiff cannot be based outside the pleadings and the case pleaded should also be proved by the respondent. He argued that the negligence pleaded by the respondent that he has put plaster cast for six days even though there was no fracture of her leg is disproved in evidence since the plaster cast was removed the next day. So, according to him, the respondent is not entitled to a decree in the suit. In support of the contention that the case pleaded should be proved, counsel for the appellant relies upon the decision in Trojan and Co. Ltd. Vs. Rm. N.N. Nagappa Chettiar, . The dictum that the case pleaded should be proved admits of no doubt, but it is not helpful to the appellant in this case.

28. In this case, there is sufficient and satisfactory evidence on record to establish that the setting in and advancement of gangrene resulting in amputation of a portion of the foot of the respondent was due to negligence of the appellant. It is also clear from the evidence on record that gangrene has set in due to the tight plaster cast put by the appellant on the right foot of the respondent. Though the respondent had pleaded that her leg was put in plaster

cast from 24.10.1984 to 29.10.84 and that too done by the appellant informing her that there is fracture of her leg, that contention with regard to the fracture of the leg and the duration of the plaster cast is found to be incorrect by the lower court. But the fact remains that gangrene has set in due to the tight plaster cast put by the appellant without exercising proper care and professional skill in the matter. Moreover, in the written statement the defendant No. 2 - appellant No. 1 has admitted that the respondent was admitted in the hospital with suspected gangrene and the defendant No. 3 started treating for the same disease. Therefore, the core of the contention of the respondent that due to negligence on the part of the appellant in putting her limb in tight plaster cast, a portion of her foot happened to be amputated, is established. Therefore, it cannot be said that the case pleaded by the respondent is not proved in this case, though the details with regard to the allegations of negligence made by the respondent are found to be incorrect. It has to be noted that in a case of this nature regarding negligence of an expert in the field of science, the allegations with regard to the details of negligence alleged by the plaintiff who is a layman, absolutely inexperienced about the professional skill, care and intricacies in the field, cannot be magnified and blown out of proportion to contend that the case pleaded by the plaintiff is not proved. Therefore, we find that the case pleaded by the respondent regarding negligence of the appellant No. 2 is proved in this case.

29. Though the respondent had claimed Rs. 3,50,000 being damages from the appellant, the lower court after considering the entire facts and circumstances awarded Rs. 1,00,000 being damages to the respondent. We find considering the fact that the respondent was a young unmarried lady, had to undergo amputation of a portion of her right foot and she had to suffer unbearable mental and physical pain apart from incurring large amounts for her treatment, the award of damages of Rs. 1,00,000 by the lower court is only moderate and reasonable in this case. We find absolutely no ground to interfere with the quantum of damages awarded by the lower court in this case.

30. In view of what is stated above, we find that the appeal is devoid of any merits and the judgment and decree passed by the lower court are liable to be confirmed. Hence this appeal is dismissed confirming the judgment and decree passed by the lower court. Under the circumstances of the case we direct the parties to bear their respective costs.