

(2009) 07 DEL CK 0188

In the Delhi High Court

Case No : Writ Petition (C) 22857 of 2005

Mahinder Kumar Gupta

APPELLANT

Vs

Dr. Rajendra Prasad Centre for Ophthalmic Sciences and
Others

RESPONDENT

Date of Decision : 15-07-2009

Acts Referred:

Citation : (2010) 7 RCR(Civil) 2654

Hon'ble Judges : Sanjiv Khanna, J

Bench : Single Bench

Advocate : Sunil Goyal and Party-in-Person, for the Appellant; Mukul Gupta, for respondent No. 1-AIIMS, for the Respondent

Final Decision : Dismissed

Judgement

Sanjiv Khanna, J.—The petitioner has filed the present writ petition claiming damages on the ground of medical negligence. The allegation is that he was administered Amikacin injection in his right eye while under treatment at the Gurunanak Eye Centre in the year 1997, which has resulted in damage and loss of vision in his right eye.

2. The petitioner had earlier filed a complaint before the Consumer Forum, which was withdrawn. Thereafter, he approached this Court by way of W.P. (C) No. 3980/2000, which was disposed of vide order dated 31st August, 2004 with the following order:

Learned Counsel for the respondent agrees to the proposal in terms of the last order whereby the petitioner will be satisfied if a Medical Board is constituted of AIIMS Doctors to look into the reports of the petitioner as well as the medical treatment given to him and to decide whether the treatment given to the petitioner was inadequate and not in accordance with the protocol and procedure.

In view of the aforesaid, it is directed that the Chief of the Eye Centre, AIIMS, shall constitute the Medical Board within a period of 15 days on the receipt of the

copy of this order and a decision of the Board shall be communicated to the petitioner and the respondents.

The writ petition is disposed of with the aforesaid directions.

3. In terms of the said order, a medical board was constituted by Dr. Rajendra Prasad Centre for Ophthalmic Sciences, All India Institute of Medical Sciences consisting of 1) Dr. S.P. Garg, Professor Ophthalmology, 2) Dr. R.P. Centre., 3) Dr. Raj Pal, Additional Professor of Ophthalmology, 4) Dr. R.P. Centre and 5) Dr. Pradeep Venkatesh, Asstt. Professor of Ophthalmology, 6) Dr. R.P. Centre. After examining the records, the said Board gave the following opinion:

We have carefully gone through the entire records provided of Shri Mahender Kumar Gupta, Son of Late Shri Ganpat Lal Gupta.

The treatment given to the patient (i.e. Intravitreal Injection) has been according to one of the accepted international regimens. The risk of macular infarction is an established adverse effect of the drug Amikacin, even in the recommended dose.

4. Thereupon, the petitioner filed the present writ petition challenging the opinion given by the medical board with a claim for damages.

5. During the pendency of the present writ petition, vide order dated 4th February, 2008 direction was given to constitute another medical board to examine the grievance of the petitioner. This order was given in view of the contention by the petitioner that he was not given an opportunity to place records available with him before the earlier Board. The new Board constituted by All India Institute of Medical Sciences consisting of Prof. S.P. Garg, Dr. Tanuj Dada and Dr. Pradeep Venkatesh has submitted their opinion dated 27th March, 2008. Operative portion of the said opinion reads as under:

On examination, his best corrected visual acuity was right eye (RE) finger counting (FC) at 1 ft looking in up gaze with +0.75 Ds with -2.00 D Cyl at 10, and left eye (LE) no vision (no PL) with prosthetic shell in place. His Intra Ocular pressure on NCT was 17mm Hg RE. Direct pupil reaction RE was quite brisk. Cornea was clear (within normal limits). IOL was discentered inferiorly. Posterior Segment evaluation was done and revealed Optic disc pallor with Inferotemporal Vascular Sclerosis and Macular thinning. Visual Evoked Response (VER-flash) was 4uv/91 ms RE (amplitude being subnormal).

Conclusion: Vision loss may be either due to Endophthalmitis or drug injection or both.

6. The said report is inconclusive and does not conclusively state that respondent No. 2 or the injection given has resulted in the present condition of the petitioner. Damages cannot be awarded without proof of negligence and establishing medical negligence and without the Court being satisfied that action or inaction on the part of the doctor concerned has causal connection with the

injury suffered or disability caused. Both negligence and the causal connection have to be established. As per the first report, the treatment or the injection given to the petitioner was as per agreed and accepted international regimen. The second sentence of the said report further states that adverse affect of drug Amikacin is accepted even when administered in recommended dozes. The second expert report dated 27th March, 2008 refers to the present physical eye condition of the petitioner. It does not dispute or contradict the first report that the treatment given to the petitioner in form of Intravitreal Injection is an accepted medical practice adopted by reasonably competent doctors/eye specialists. It also does not contradict the first opinion that adverse effect of drug Amikacin is medically accepted even in recommended dozes. Thus, it cannot be said that the doctors at respondent No. 2 hospital had acted contrary to the established medical practice and were negligent. The causal connection between the present condition of the petitioner and the treatment given is also not established. As per the second report, the vision loss in the eye of the petitioner could be due to Endophthalmitis or drug injection or both. Endophthalmitis is not attributed to the respondent No. 2 and the treatment administered. Thus, it cannot be said with certainty what has caused the present vision loss.

7. The Court sympathises with the petitioner but this sympathy alone cannot and does not justify award of damages without proof of medical negligence and causal connection. In the case of *Martin F. D'Souza Vs. Mohd. Ishfaq*, , the Supreme Court of India has observed as follows:

34. A medical practitioner is not liable to be held negligent simply because things went wrong from mischance or misadventure or through an error of judgment in choosing one reasonable course of treatment in preference to another. He would be liable only where his conduct fell below that of the standards of a reasonably competent practitioner in his field. For instance, he would be liable if he leaves a surgical gauze inside the patient after an operation vide *Achutrao Haribhau Khodwa and Others Vs. State of Maharashtra and Others*, or operates on the wrong part of the body, and he would be also criminally liable if he operates on someone for removing an organ for illegitimate trade.

35. There is a tendency to confuse a reasonable person with an error free person. An error of judgment may or may not be negligent. It depends on the nature of the error.

36. It is not enough to show that there is a body of competent professional opinion which considers that the decision of the accused professional was a wrong decision, provided there also exists a body of professional opinion, equally competent, which supports the decision as reasonable in the circumstances. As Lord Clyde stated in *Hunter v. Hanley* 1955 SLT 213:

In the realm of diagnosis and treatment there is ample scope for genuine difference of opinion and one man clearly is not negligent merely because his conclusion differs from that of other professional men.... 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....

37. The standard of care has to be judged in the light of knowledge available at the time of the incident and not at the date of the trial. Also, where the charge of negligence is of failure to use some particular equipment, the charge would fail if the equipment was not generally available at that point of time.

38. The higher the acuteness in an emergency and the higher the complication, the more are the chances of error of judgment. At times, the professional is confronted with making a choice between the devil and the deep sea and has to choose the lesser evil. The doctor is often called upon to adopt a procedure which involves higher element of risk, but which he honestly believes as providing greater chances of success for the patient rather than a procedure involving lesser risk but higher chances of failure. Which course is more appropriate to follow, would depend on the facts and circumstances of a given case but a doctor cannot be penalized if he adopts the former procedure, even if it results in a failure. The usual practice prevalent nowadays is to obtain the consent of the patient or of the person in-charge of the patient if the patient is not in a position to give consent before adopting a given procedure.

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42. When a patient dies or suffers some mishap, there is a tendency to blame the doctor for this. Things have gone wrong and, therefore, somebody must be punished for it. However, it is well known that even the best professionals, what to say of the average professional, sometimes have failures. A lawyer cannot win every case in his professional career but surely he cannot be penalized for losing a case provided he appeared in it and made his submissions.

8. The writ petition is dismissed. The petitioner is granted liberty to file a civil suit, if so advised. The observations made in this order will not be binding in the civil proceedings.