

(2010) 12 KL CK 0131
In the High Court Of Kerala
Case No : R.F.A No. 242 of 2006

State of Kerala and Another	Vs	APPELLANT
P.G. Kumari Amma and Another		RESPONDENT

Date of Decision : 13-12-2010

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 125
Hindu Adoptions and Maintenance Act, 1956 — Section 20

Citation : (2011) 1 ILR (Ker) 508

Hon'ble Judges : Thottathil B. Radhakrishnan, J;P. Bhavadasan, J

Bench : Division Bench

Advocate : Government Pleader, for the Appellant; Rajeev V. Kurup and Alex M. bcaria, for the Respondent

Final Decision : Dismissed

Judgement

P. Bhavadasan, J.—This is yet another case of failed sterilization resulting in an undesired and uninvited pregnancy. State is the Appellant. The State has been mulcted with liability to pay compensation.

2. The Plaintiffs, a couple, had three children. They wished to have no more. While so, a Family Planning Programme organized by the State conducted a camp, in which the first Plaintiff took part and underwent sterilization operation on 18-3-1988. A few months thereafter, to her dismay, she became pregnant and delivered a male child on 9-12-1990. The couple sued the State for compensation accusing the doctor who conducted the surgery of negligence in performing the sterilization operation and also for expenses for bringing up of the new born child.

3. The State resisted the claim on several grounds. They took the plea of limitation and also that the first Plaintiff had been cautioned that it is not necessary that the sterilization operation should always be successful and there can be cases of failure. Claiming that there was no negligence on the part of the doctor who had performed the operation, they pointed out that the Plaintiffs are

not entitled to any relief.

4. On the above pleadings, necessary issues were raised. The parties went to trial. The Plaintiffs examined P. Ws. 1 to 3 and had Exts. A-1 to A-6 (b) marked. The Defendants had Ext. B-1 marked. The trial court on an appreciation of the evidence in the case came to the conclusion that there was manifest negligence on the part of the doctor who conducted the sterilization operation and the State was liable. Accordingly, the trial court quantified the compensation at an amount of Rs. 75,000 and directed the State to pay the said amount with 6% future interest. The said judgment and decree are assailed in this appeal.

5. Learned Government Pleader, who appeared for the State, assailed the findings of the court below on several grounds. It is pointed out that in the light of the decision reported in *State of Punjab Vs. Shiv Ram and Others*, , the Plaintiffs are not entitled to any relief. It is emphasized that in Ext. B-1 document, which was voluntarily signed by the first Plaintiff, it was made clear that it is not necessary that the sterilization operation should always be successful and there could be cases of failure. Thus, according to the Government Pleader, the Plaintiffs had been put on guard. There is also no evidence, according to the learned Government Pleader, to show that the doctor, who conducted the sterilization operation was in any manner negligent and a claim for compensation on the basis of unwanted child theory is no longer sustainable in law. At any rate, according to learned Counsel, the amount awarded as compensation is excessive.

6. In reply, learned Counsel appearing for the Respondents points out that there is no basis for the above contentions at all. The evidence of P. Ws. 1 and 2 are sufficient to show that there has been gross negligence in the performance of sterilization operation in the camp organized by the State and that had resulted in the undesired pregnancy of the first Plaintiff. It is not an answer to say that the first Plaintiff could have aborted the pregnancy at an early stage and thus could have got rid of the undesired child. According to learned Counsel, even assuming that the damages for undesired child as such may not be maintainable, though he disputes the same, at any rate the Plaintiffs have been successful in proving that there was negligence in performing the sterilization operation and are entitled to compensation. The court below has analysed the evidence in the proper perspective and has come to the right conclusion. According to the learned Counsel, no grounds are made out to interfere with the findings of the court below and the appeal is only to be dismissed.

7. The story of unwanted pregnancy, failed sterilization, consequent compensation etc. is a long one. While of recent development in India, it has been a potential topic of actionable tort in other countries.

8. Negligence usually is omission to do something what a reasonable man would do or doing something which a prudent and reasonable man would not do. Negligence is a tort. Law initially was very reluctant to attribute negligence to

professional man. It was concerned with the reputation, status and the alarming consequences that would result by attributing negligence to professional men. Law did not remain static. It marched forward. It then evolved principles whereby professional men too were attributed with negligence.

9. A doctor's liability to patient arises both under tort and in contract. The question arises as to what is the degree of care and caution that is expected of a doctor. Lord Denning in *The Discipline of Law* at page 243 states as follows:

You should only find him guilty of negligence when he falls short of the standard of a reasonably skilful medical man, in short, when he is deserving of censure - for negligence in a medical man is deserving of censure.

10. It is further stated:

But so far as the law is concerned, it does not condemn the doctor when he only does that which may a wise and good doctor so placed would do. It only condemns him when he falls short of the accepted standards of a great profession; in short, when he is deserving of censure.

10. Salmond and Heuston on the Law of Torts Eighteenth Edition at page 215 observes thus:

It is expected of such a professional man that he should show a fair, reasonable and competent degree of skill; it is not required that he should use the highest degree of skill, for there may be persons who have higher education and greater advantages than he has, nor will he be held to have guaranteed a cure. So a barrister is not expected to be right: it is enough that he exercises reasonable care. So a medical practitioner should not be found negligent simply because one of the risks inherent in an operation of the kind occurs, or because in a matter of opinion he made an error of judgment, or because he has failed to warn the patient of every risk involved in a proposed course of treatment. There is no rule that a doctor must tell a patient what is the matter with him.

11. It is true that merely because a woman has become pregnant after undergoing sterilization operation, that ipso facto does not lead to the conclusion that the surgeon who conducted the operation was negligent. But it is not proper to say that if the woman concerned did not desire to have a child, she could have undergone abortion, which would be justified under the Medical Termination of Pregnancy Act, 1971. There might have been reasons for not doing it. Such a defence has never been considered as an answer to a claim for damages in Law.

12. By now, the principles on which the liability of the medical practitioner is to be determined is well-settled. The criteria to be adopted were laid down in *Bolam v. Friern Hospital Management Committee* (1957) 2 All ER 118 (known as Bolam's principle).

13. Every person who enter into a profession undertakes to bring to the exercise of it, a reasonable degree of care and skill. May be a doctor cannot assure a

cure. He may not undertake to use the highest possible degree of skill, as there may be persons of higher education and greater advantages than himself, but a professional is expected to exhibit a fair, reasonable and competent degree of skill. In Bolam's case (supra) it was held as follows:

The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill; it is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular Article In the case of a medical man, negligence means failure to act in accordance with the standards of reasonably competent medical men at the time. There may be one or more perfectly proper standards, and if he conforms with one of these proper standards, then he is not negligent.

14. In *Udale v. Bloomsbury Area Health Authority* 1983(2) All. E.R. 522a similar issue was considered. Mrs. Udale got married in 1963 and by the year 1977 they had four children, all of whom were daughters. They desired to have no more children. Mr. Udale underwent a laparoscopic sterilization. The operation failed to achieve the purpose. In June, 1978 Mrs. Udale was told that she was pregnant. She sued for compensation. In the said decision it was held as follows:

It was contrary to public policy to award damages to a mother whose child had been conceived after the mother had undergone a negligently performed sterilization operation to cover the cost of carrying out necessary extensions to the home and of bringing up the child because (a) it was highly undesirable that the child should learn that a court had declared that his life or birth was a mistake and that he was unwanted or rejected, (b) before making such an award the court would have to deduct an amount for the value of the child's life as perceived by the mother so that an uncaring mother would receive a greater net sum than a loving mother and virtue would go unrewarded, (c) medical practitioners who would otherwise incur liability would be placed under pressure to authorize or carryout abortions and (d) the birth of a healthy, normal baby was a beneficial, not a detrimental, event. However, those principles of public policy did not preclude an award of damages for lost income and also for pain, suffering, inconvenience, anxiety and the disruption to the family's finances caused by the unexpected pregnancy.

15. The issue came up for consideration in the decision reported in *Thake v. Maurice* 1984(2)All. E.R. 513, wherein a different view was taken from the decision reported in *Udale's* case (supra). In this decision, the couple had five children. In order to prevent further addition to the family, they consulted a Surgeon to see the possibility of the first Plaintiff undergoing Vasectomy. It appears that they were given the impression that Vasectomy was final and that the first Plaintiff would become permanently sterile. He was asked to sign some papers consenting to the operation. The operation was done in October, 1975. The second Plaintiff conceived and a healthy child was born in April, 1979. An action was brought by the Plaintiffs.

The test applied in Bolam's case was referred to. The question that was posed for consideration was whether there was a risk of the nature might, after a considerable lapse of time, reverse the effect of an operation that was initially perfectly satisfactory. Referring to the public policy enunciated in Udale's case (*supra*) it was observed as follows:

The question whether damages may be awarded in respect of the birth of a healthy child has been the subject of a number of decisions in the United States. These are conveniently collected in a judgment of the Supreme Court of Minnesota sitting in banc in *Sherlock v. Stillwater Clinic*:

Premitting moral and theological considerations, we are not persuaded that public policy considerations can properly be used to deny recovery to parents of an unplanned, healthy child of all damages proximately caused by a negligently performed sterilization operation. Analytically, such an action is indistinguishable from an ordinary medical negligence action where a Plaintiff alleges that a physician has breached a duty of care owed to him with resulting injurious consequences. Where the purpose of the physician's actions is to prevent conception or birth, elementary justice requires that he be held legally responsible for the consequences which have in fact occurred. While other courts have referred to a negligent sterilization case as a "wrongful birth" action, we believe that this type of case is more properly denominated an action for "wrongful conception", for it is at the point of conception that the injury claimed by the parents originates. It should be further emphasized that this cause of action is exclusively that of the parents, since it is they and not the unplanned child who have sustained both physical and financial injury by the physician's negligence, viewed in this manner, the parents of an unplanned child should at least be entitled to recover all damages immediately incident to pregnancy and birth. The allowance of these damages, we believe, is wholly consistent with the elementary principle of compensatory damages which seeks to place injured Plaintiffs in the position that they would have been in had no wrong occurred. See, *Sorenson v. Cargill, Inc.*. Incidental damages include such items as prenatal and postnatal medical expenses, pain and suffering incurred by the child's mother, and loss of consortium to the extent that it can be proved under the guidelines set forth in *Thill v. Modern Erecting Co.* Most troublesome is the matter of allowing recovery for the costs of rearing a normal, healthy child. Ethical and religious considerations aside, it must be recognized that such costs are a direct financial injury to the parents, no different in immediate effect than the medical expenses resulting from the wrongful conception and birth of the child. Although public sentiment may recognize that to the vast majority of parents the long-term and enduring benefits of parenthood outweigh the economic costs of rearing a healthy child, it would seem myopic to declare today that those benefits exceed the costs as a matter of law. The use of various birth control methods by millions of Americans demonstrates an acceptance of the family-planning concept as an integral aspect of the modern marital relationship, so that today it must be acknowledged that the time-honoured command to "be

fruitful and multiply" has not only lost contemporary significance to a growing number of potential parents but is contrary to policies embodied in the statutes encouraging family planning.

It was further observed as follows:

I do not think that if I award damages here it will lead little Samantha to feel rejection. She is surrounded by a happy, albeit somewhat poverty-stricken, family life. It is this that must make her feel wanted and not rejected. She may learn in years to come that her conception was unwanted. But there is nothing exceptional about this. What matters to a child is how it is received when it enters life. It so often happens that parents reconcile themselves to an unwelcome conception and accept the child with joy. If Samantha is as bright as her father thinks, by the time she comes to consider this judgment (if she ever does) she will, I think, welcome it as a means of having made life somewhat easier for her family.

It was also observed as follows:

The method of set-off presents difficulties but, one again, I think it can be solved by looking at the hard cash involved and ignoring the intangibles. Both Plaintiffs suffered great distress on learning of Mrs. Thake's pregnancy. Mrs. Thake underwent pain and discomfort in the course of her labour, although it was not particularly difficult. As a result of these sufferings they had a healthy child. But the fact that she has been such a joy to them is largely of their own making. If they had been reluctant to accept her and grudging in the sacrifices they had to make for her support, then they might have had little joy. As I see it, the birth of a healthy child should be set-off against their disappointment and the labour pains so that they cancel each other out. The joy they have for Samantha is largely of their own making in the way they have met their difficulties. The claim for Samantha's support and for the costs of the birth remain.

If the principle of public policy applies, it should apply throughout and there should be no award in respect of the birth. The injustice of this course was apparent to Jupp, J. who said:

"It seems to me that it is legitimate, without detracting from the above principles of public policy, to have some regard to the disturbance to the family finances which the unexpected pregnancy causes. One may look at the cost of the layette and the sudden necessity of having to find more ample accommodation in assessing the damages for the unwanted pregnancy, without regarding the child as unwanted. One has to bear in mind here that the child has, up until the age of 4 years 2 months, in fact lived in that house without the extension. It has not of course been built. Accordingly, in my view, it is proper to increase the award of damages with this in mind when awarding general damages for the pain, suffering, inconvenience, anxiety and the like, mentioned at the beginning of this judgment."

After finding that the Plaintiffs are entitled to compensation, the amount was quantified for the distress, pain and suffering undergone by the Plaintiffs, for the birth and upkeep of the child.

16. In the decision reported in *Emeh v. Kensington and Chelsea and Westminster Area Health Authority* 1984(3) All. E.R. 1044 conflict between a public policy and common law was considered and it was held as follows:

(1) Since the avoidance of a further pregnancy and birth was the object of the sterilization operation undergone by the Plaintiff, the compensatable loss suffered by the Plaintiff as a result of the negligence in performing that operation extended to any reasonably foreseeable financial loss directly caused by her unexpected pregnancy. The Plaintiff's decision not to have an abortion was not a *novus actus interveniens* or a failure to mitigate damage, because the health authority, by the negligence for which it was itself responsible, had confronted the Plaintiff with the very dilemma of whether to have the child or an abortion which she had sought to avoid by having herself sterilised. The health authority had no right to expect that, if its doctors did not perform the operation properly, the Plaintiff would undergo an abortion with its attendant risks, pain and discomfort. Instead, it was reasonably foreseeable that if, as a consequence of the negligent performance of the sterilisation operation, the Plaintiff found herself pregnant she might decide to keep the child, and the fact that she exercised that particular option did not mean that it was an option she wished to have.

(2) Furthermore, there was no rule of public policy which prevented the Plaintiff from recovering in full the financial damage sustained by her as the result of the negligent failure to perform the sterilisation operation properly, regardless of whether the child was healthy or abnormal.

(3) Accordingly the Plaintiff was entitled to damages for loss of future earnings, maintenance of the child up to trial, maintenance of the child in the future, the Plaintiff's pain and suffering up to the time of the trial and future loss of amenity and pain and suffering, including the extra care that the child would require.

17. In the decision reported in *Gold v. Haringey Health Authority* 1988 Queen's Bench 481 it was observed as follows:

...that for the purposes of ascertaining the test as to the duty of care owed by a doctor to a patient there was no distinction to be made between advice given in a therapeutic context and advice given in a non-therapeutic context; that, accordingly, the judge erred in holding that advice given in a contraceptive context was not to be judged by the contemporary standards of a responsible body of medical opinion; and that, on the evidence, there was a substantial body of responsible doctors who would not in 1979 have warned the Plaintiff of the failure rate of female sterilization operations.

The claim in the said case was dismissed.

18. In the decision reported in *Thake v. Maurice* 1986 (1) All. E.R. 497 the question whether the liability arises under contract or tort was considered. In the said decision, it was held as follows:

(1) Having regard to the fact that medicine was not an exact science and that the results of operations were to some extent unpredictable, a doctor or surgeon could not objectively be regarded as guaranteeing the success of any operation or treatment unless he expressly said as much in clear and unequivocal terms. The Defendant's contract with the Plaintiffs was to perform a vasectomy operation on the first Plaintiff with reasonable skill and care rather than to sterilize him and although the Plaintiffs were entitled to expect the operation to be performed with skill and care they were not entitled to expect the Defendant to guarantee the 100% success of the operation. The Defendant was not therefore in breach of a contract to render the first Plaintiff absolutely sterile.

(2) However, the failure by the Defendant to give his usual warning that there was a slight risk that the first Plaintiff might become fertile again amounted to a breach of the duty of care which he owed to the Plaintiffs, because the warning was necessary to alert the second Plaintiff to the risk that she might again become pregnant and so enable her to seek an abortion at an early stage. Moreover, the risk of the second Plaintiff failing to appreciate promptly that she had become pregnant ought to have been in the reasonable contemplation of the Defendant. The Defendant's appeal would therefore be dismissed.

(3) The Plaintiffs were entitled to damages for distress, pain and suffering, since the parental distress of both Plaintiffs and the pain and suffering of the birth was a separate head of claim which was not cancelled out by the relief and joy felt after the birth of a healthy baby and there was no reason in principle why damages could not be recovered for the discomfort and pain of a normal pregnancy and delivery. The Plaintiffs' cross-appeal on damages would therefore be allowed.

19. The issue came up for consideration in the decision reported in *Allen v. Bloomsbury Health Authority* 1993 (1) All. E.R. 651, wherein after referring to the previous decisions as regards the question of law, it was held as follows:

So much for the facts, I turn now to the law. Although a claim of this type has not yet been considered by the House of Lords, the principles on which damages are to be awarded have been considered a number of times by the Court of Appeal, and I was referred to all the leading cases which have been decided in the last seven years. I derive from these cases the following principles which should guide me when I consider Mrs. Allen's claim:

(1) If a doctor fails to act towards his patient with the standard of care reasonably to be expected of him, and as a foreseeable result of the doctor's breach of duty a child is born whose potential for life would have been lawfully terminated but for the doctor's negligence, the law entitles the mother to recover damages for the foreseeable loss and damage she suffers in

consequence of the doctor's negligence.

(2) A Plaintiff mother is entitled to recover general damages (and any associated financial special damage) for the discomfort and pain associated with the continuation of her pregnancy and the delivery of her child, although she must set-off against this claim a sum in respect of the benefit of avoiding the pain and suffering and associated financial loss which would have resulted from the termination of her pregnancy under general anaesthetic, since in the events which have happened she has not had to undergo that operation.

(3) She is also entitled to damages for economic loss quite unassociated with her own physical injury which falls into two main categories: (i) the financial loss she suffers because when the unwanted baby is born she has a growing child to feed, clothe, house, educate and care for until the child becomes an adult; (ii) the financial loss she suffers because she has lost or may lose earnings or incur other expense because of her obligations towards her child which she would have sought to avoid.

(4) Although the law recognizes that it is foreseeable that if an unwanted child is born following a doctor's negligence a mother may suffer wear and tear and tiredness in bringing up a healthy child, the claim for general damages she might otherwise have had on this account is generally set-off against and extinguished by the benefit of bringing a healthy child into the world and seeing one's child grow up to maturity.

(5) However, the law is willing to recognize a claim for general damages in respect of the foreseeable additional anxiety, stress and burden involved in bringing up a handicapped child, which is not treated as being extinguished by any countervailing benefit, although this head of damages is different in kind from the typical claim for anxiety and stress associated with the flowing from an injured Plaintiff's own personal injuries.

In the above case, the court awarded damages for loss of earning, child-minding cost, cost of maintenance, pain and suffering and loss of amenity. In the above decision, it was also held that if a doctor fails to act towards his patient with the standard of care reasonably expected of him, and the consequent being the birth of a child, the law entitles the mother to recover damages for the foreseeable loss and damage she suffers in consequence of the doctor's negligence. [See the decision in *Emeh's case* (supra)]. In the said case the decision reported in *Udale's case* was also referred to. It was held that the law recognizes a claim for damages in respect of foreseeable additional anxiety etc., apart being entitled to the damages for economic loss, physical injury also.

20. In the decision reported in *McFarlane v. Tayside Health Board* 1999(4) All. E.R. 961 the issue cropped up again. There, the couple had four children. In order to limit the size of their family, the husband agreed to have vasectomy. Six months after the operation, the consultant surgeon advised the husband that sperm counts were negative and he could indulge in free intercourse. The

husband and wife relied on the said advice. But he wife became pregnant and gave birth to a healthy daughter. Proceedings for negligence were brought by the couple. They sought damages for rearing the child and for the pain and stress suffered by the parent carrying and giving birth to the child. After reviewing the authorities and considering all aspects it was held as follows:

Where medical negligence resulted in an unwanted pregnancy and the birth of a healthy child, the parents were not entitled to recover damages for the costs of rearing that child, but the mother was entitled to recover damages for the pain and stress suffered during the pregnancy and in giving birth, and for financial loss associated with the pregnancy. Such an unwanted pregnancy was a plainly foreseeable consequence of a vasectomy failing but the father nevertheless being told that contraceptive measures were unnecessary. The object of the vasectomy was to prevent such a pregnancy, and accordingly the mother was entitled to claim damages in respect of the physical effects of the pregnancy and the birth. However, damages for the costs of bringing up a healthy child were irrecoverable since it was not fair, just or reasonable to impose liability for such economic losses on a doctor and his employer. Furthermore, it was morally unacceptable to allow such a claim having regard to the principle of distributive justice which focused on the just distribution of burdens and losses among members of a society.

21. In the decision reported in *Parkinson v. St. James and Seacroft University Hospital NHS Trust* 2001 (3) All. E.R. 97 the issue was considered once again. The Surgeon employed by a health authority performed the sterilization operation on the mother of four children. It seems that the operation was performed negligently and the lady conceived again. The new born baby had behavioural problems, possibly caused by an Autistic Spectrum Disorder. It was held that in such cases, damages were recoverable for the costs of providing the special needs and care attributable to the child's disability, but not the ordinary of costs of his upbringing.

22. The apex court has considered this issue. It is unnecessary to refer to all the decisions except two decisions, namely *State of Haryana v. Santra* AIR 2000 S.C. 1888 and *State of Punjab Vs. Shiv Ram and Others*, . In the decision reported in *State of Haryana's case* (supra) one Santra opted sterilization operation to avoid pregnancy. Unfortunately, she conceived and ultimately gave birth to a female child. She attributed the birth to a negligent sterilization operation conducted by the surgeon. After referring to various decisions on the issue, and after finding that there was gross negligence, it was held as follows:

Respondent had undergone a sterilization operation at the General Hospital, as she already had seven children and wanted to take advantage of the scheme of sterilization launched by the State Govt. She underwent the Sterilization Operation and she was issued a certificate that her operation was successful. She was assured that she would not conceive a child in future. But, as the luck would have it, she conceived and ultimately gave birth to a female child. Respondent

was a poor lady who already had seven children, she was already under considerable monetary burden. The unwanted child (girl) born to her has created additional burden for her on account of the negligence of the doctor who performed sterilisation operation upon her and, therefore, she is clearly entitled to claim full damages from the State Govt, as well as doctor to enable her to bring up the child at least till she attains puberty. Damages for the birth of an unwanted child may not be of any value for those who are already living in affluent conditions but those who live below the poverty line or who belong to the labour class who earn their livelihood on daily basis by taking up the job of an ordinary labour, cannot be denied the claim for damages on account of medical negligence.

It is true that parents are under an obligation to maintain their minor children. This is a moral, apart from a statutory, liability in view of the provisions contained in Section 125 of the Code of Criminal Procedure. It is also a statutory liability on account of Section 20 of the Hindu Adoptions and Maintenance Act. "Maintenance" would obviously include provision for food, clothing, residence, education of the children and medical attendance of treatment. The obligation to maintain besides being statutory in nature is also personal in the sense that it arises from the very existence of the relationship between parent and the child. The obligation is absolute in terms and does not depend on the means of the father or the mother. Similarly, under the Mohammedan law, a father is bound to maintain his sons until they have attained the age of puberty. He is also bound to maintain his daughters until they are married. But the statutory liability to maintain the children would not operate as a bar in claiming damages on account of tort of medical negligence in not carrying out the sterilization operation with due care and responsibility. The two situations are based on two different principles. The statutory as well as personal liability of the parents to maintain their children arises on account of the principles that if a person has begotten a child, he is bound to maintain that child. Claim for damages, on the contrary, is based on the principle that if a person has committed civil wrong, he must pay compensation by way of damages to the persons wronged.

23. In the decision reported in State of Punjab's case (supra) a slightly different view was taken. It was held that merely because a woman had undergone sterilization and had become pregnant and delivered a child, the surgeon or his employer cannot be called upon to pay compensation. The apex court held that Bolam's test as referred to in the decision reported in Jacob Mathew Vs. State of Punjab and Another, had to be satisfied. It is possible that the sterilization operation may fail due to natural causes. It was also observed that after coming to know that the wife had conceived and couple decided to carry on and ultimately a child is born, the said child ceases to be an unwanted child. The claim for compensation for maintenance and upbringing of such a child cannot be countenanced. However, it was held that the claim on the basis of tort stands on a different footing. The apex court upheld the principle laid down in Santra's case (supra) to the extent that if negligence is proved, then the aggrieved person

is entitled to compensation.

24. The liability of a professional in tort is based on negligence. Unless negligence is established, primary liability cannot be fastened on the medical professional and if primary liability is not established, necessarily vicarious liability cannot follow. If the employee of a State is proved to be negligent, it was held that the State is vicariously liable.

25. The history of tort of this nature shows that even though initially the theory of unwanted child had more relevance, that was later given up and the liability was confined to the proof of negligence on the part of the surgeon or the medical practitioner as concerned. By now, it is well-settled that no compensation can be awarded for the upkeep and upbringing of the child born out of an undesired pregnancy. However, the various decisions referred to accept that there are heads under which claim for damages could still be sustained. If it is proved that the surgeon or the medical practitioner concerned was negligent in performance of his duty, then obviously the claim for compensation or damages is sustainable.

26. One may now refer to the evidence in the case. First Plaintiff examined herself as P. W. 1. She speaks in terms with the plaint. She would assert that she was given the assurance that once she underwent laparoscopic sterilization, she would not conceive again. She admitted having signed in Ext B-1 printed form, but claimed that she was not aware of its contents. According to her, she conceived again after the sterilization operation solely due to the negligence in performing the operation by the medical practitioner concerned. She speaks about the various heads of damages claimed by her. In cross-examination she asserted that the contents of Ext. B-1 was not read over to her, nor was she made aware of the same. Had she been made aware of the contents of Ext. B-1, her stand is that she probably would not have opted for the operation. She says that she was not informed about the possible failure of the operation.

27. P. W. 2 is a medical practitioner, who had attended to P. W. 1. She had worked as Professor of Gyneacology Department at Medical College Hospital, Kottayam and had retired. She says that there are several methods of sterilization. One of the methods is to enlope ring on the Fallopian tube. According to her, failure of sterilization could be due to many reasons. She would say that a ring is to apply to both the tubes, i.e., Fallopian tube at the left and right, the operation is over and the sterilization is complete. She also gives a reason for the failure in the case of ring application. In the case on hand, as per her evidence the ring was found on the right side of Megosalaphenx, that is a membrane covering the Fallopian tube extending down towards the uterus. That indicates that Fallopian tube was free. According to her, that could have been the reason for pregnancy, even though the sterilization operation as conducted.

28. Sri J.V.N. Jaiswal, in his book on Legal Aspects of Pregnancy, Delivery and Abortion refers to different techniques of female sterilization. He mentioned about (i) Radiotherapy, (ii) Removal of the ovaries, (iii) Removal of the Uterus

and (iv) Resection of fallopian tubes.

29. According to him, one of the most simple operations on the Fallopian tubes, the best, is the Pomeroy procedure in which a loop of tube is excised and the cut ends secured with a ligature. He also speaks about the advantages and disadvantages of following such a procedure. He also explains the various techniques adopted for female sterilization. He also mentions about the possible reasons as to how a female, who has undergone sterilization operation, could later conceive. No sterilization operation, according to him, can guarantee 100% success. It may be due to re-canalisation and may be due to re-conception etc.

30. Mc Gregor in his Book on Damages traces the history of this aspect of the medical profession. The author refers to the various decisions on the point and also noticed conflict in the decisions. But, according to the learned author, if negligence is proved, compensation can be awarded.

31. It could be said that the following principles can be arrived at from the decisions and literature referred to above:

(i) If a doctor fails to act towards his patient with the standard of care reasonably to be expected of him, and as a foreseeable result of the doctor's breach of duty a child is born whose potential for life would have been lawfully terminated but for the doctor's negligence, the law entitles the mother to recover damages for the foreseeable loss and damage she suffers in consequence of the doctor's negligence.

(ii) The mother is entitled to damages for the financial loss incurred in the upkeep of the child although adulthood and for the financial loss suffered, because of loss of earnings or the incurring of expenses as a result of her obligation to the child which she would otherwise have sought to avoid.

(iii) The mother is entitled to recover general damages for the discomfort and pain associated with the continuance of her unwanted pregnancy and delivery of her abortion had to be set off against the quantum of general damages. In appropriate cases, the mother is also entitled to general damages for the foreseeable additional anxiety, stress and burden involved in bringing up a handicapped child.

32. In the case on hand, for reasons best known to the Defendants, they chose to adduce no evidence. There was no attempt from the side of the State at all to show that there was no negligence on the part of the Surgeon, who had conducted the sterilization operation. We do not mean to say that the burden is on the State initially to show that there was no negligence. But this Court cannot omit to note the testimony of P.W.2, which shows that the ring on the right side was on the Megosalaphenx and not on the Fallopian tube and she attributes the pregnancy possibly to that cause. When there is evidence to show that such a possibility of negligence on the part of the medical practitioner, who had carried out the sterilization operation, it was incumbent on the part of the State to show

that it was not sp. Merely because in Ext. B-1 it is shown that in exceptional cases the lady could conceive again will not absolve either the medical practitioner or the State from its liability. It was for them to show by giving evidence that there was no want of care from their part while conducting the operation and the subsequent pregnancy was due to reasons beyond their control and due to natural and other causes. There is no such evidence in this case. The Plaintiffs have discharged their initial burden. Thereafter it was for the Defendant to adduce rebuttal evidence. There is none. The court below has elaborately considered this issue and has come to the conclusion that the subsequent pregnancy of the first Plaintiff was due to the negligence on the part of the medical practitioner, who had conducted the sterilization operation. The finding is based on materials on record and the evidence adduced in the case and cannot be said to be either perverse or unwarranted calling for interference by a court of appeal.

33. As regards the quantum of damages granted, it seems to be reasonable and the court below has given reasons for granting the damages and the different heads under which damages had been granted. True, the compensation granted for bringing up the child quantified at Rs. 45,000 may not be strictly permissible. But there are several other heads of claims under which compensation could have been awarded as is discernible from the decision referred to earlier. It does not appear that the compensation of Rs. 75,000 granted is excess or is unjustified.

The result is that this appeal is without any merits and it is liable to be dismissed. We do so confirming the judgment and decree of the court below with costs to the Respondents.