

# Advantage Consumer

Monthly News Letter of Consumer Protection Council, Rourkela

" An aware consumer is an asset to the nation"

Website : [www.advantageconsumer.com](http://www.advantageconsumer.com)

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ADVANTAGE - XII

## Queries & Answers through the Web

([www.advantageconsumer.com](http://www.advantageconsumer.com) is the website of Consumer Protection Council, Rourkela. One of the major attractions of the website is that a visitor can ask queries on issues relating to consumer protection. Answers to these queries are made free of cost, by the Chief Mentor of the Council, Sri B. Vaidyanathan.)

Continued from November 2021 issue.....

### Medical negligence established by applying “but for” test, and relief given to the complainant.

NATIONAL CONSUMER DISPUTES REDRESSAL COMMISSION  
NEW DELHI

REVISION PETITION NO. 2699 OF 2008

(Against the Order dated 10/03/2008 in Appeal No. 732/2006 of the State Commission Delhi)

SHIV KUMAR SHARMA

S/o Late Sh. Prem Chand Sharma, Resident of D-11, Main  
Road, D Block, East Azad Nagar Nearby MCD School

Krishna Nagar

Delhi

.....Petitioner(s)

Versus

1. ST. STEPHENS' HOSPITAL & ORS.

Boulevard Road, Near Tis Hazari Court

Delhi - 54

2. NEW INDIA INSURANCE COMPANY LTD.

2nd Floor, Jeewan Deep Building, 10 Parliament Street,

New Delhi.

.....Respondent(s)

#### **BEFORE:**

HON'BLE MR. JUSTICE R.K. AGRAWAL, PRESIDENT

HON'BLE DR. S.M. KANTIKAR, MEMBER

**Dated : 08 Jul 2021**

#### **ORDER**

**PER DR. S.M. KANTIKAR, MEMBER**

12. The contention of Complainant was that the X-ray taken on 02.09.2003 prior to the operation did not show any intra capsular fracture of neck femur. However, the X-ray taken after surgery within 24 hrs.

on 03.09.2003, clearly revealed the intra capsular fracture neck femur. Even during follow-up visits, the doctors failed to notice/ detect the intra capsular fracture neck femur. Thereafter, because of unsatisfactory union of bones, on 15.12.2003 the doctors advised for bone grafting, but the patient was not willing for the grafting. The patient again after 6 months for the pain in right hip and thigh came to the Opposite Party No. 1 Hospital on 04.06.2004. The X-ray revealed displaced intra-capsular fracture of neck femur. However, the patient did not opt for the advice for osteosynthesis surgery.

13. We have perused the standard book **Campbell's Operative Orthopaedics** and few medical literatures on the subject. As per the medical text; after stabilization of fracture of shaft femur due to stress iatrogenic fracture neck of femur may occur. Therefore, the presence of a sub-clinical occult fracture and failure to take necessary X-rays in external rotation of the shaft of femur may account for pre-operative mis-diagnosis. The pre-operative CT scan of the femur neck for all such patients were to be done before doing closed intra-medullary nailing for shaft fracture. The CT scan is repeated after closed nailing to confirm the state of the femoral neck, unless a fracture was seen on a plain film or during intra-operative fluoroscopy.
14. From the article '**Insufficiency fracture of the femoral neck after intramedullary nailing**' by Kitajama, J. Orthop Sci 1999; 4(4):304-6, we understand that even if the fracture neck femur was the result of the interlocked intra-medullary nailing. Despite due care and caution, the process of forcible hammering can either result in fracture neck femur or aggravate the missed fracture. It leads to the earlier undisplaced fracture becomes displaced.
15. In the instant case, we find that the operation for intramedullary nailing of shaft femur was performed without any fault by the qualified Orthopaedic Surgeon. However, failure to take appropriate X-rays with external rotation of the shaft of the femur to rule out the presence of a sub-clinical occult fracture, may account for pre-operative mis-diagnosis. The pre-operative CT scan of the femur neck for all such patients was to be done before intra-medullary nailing of shaft fracture, i.e. closed nailing. The CT scan was to be repeated after closed nailing to confirm the condition of the femoral neck, unless a fracture was seen on a plain film or during intra-operative fluoroscopy. If the fracture of neck femur is suspected / evident, then in one sitting both the surgeries for fracture neck and the shaft of femur shall be performed.
16. Having regard to the settled law that an error of judgment/failure to make diagnosis of a complicated condition by itself does not amount to negligence, but it can be said that missing fracture neck femur which normally is missed in 50% cases, is an act of negligence.
17. Another article titled "Ipsilateral femoral neck and shaft fractures: current diagnostic and treatment strategies" Orthopaedics. 2015 Apr;38(4):247-51, states that about 1% to 9% cases reported as the femoral shaft fractures are associated with ipsilateral femoral neck fractures. The associated femoral neck fracture is often non-displaced, and in 1/3<sup>rd</sup> cases, the diagnosis is delayed or missed. Thus, it is essential to carefully evaluate the femoral neck in all patients sustaining high-energy femoral shaft fractures. Although there are a number of different implant options available for management of this challenging injury, most authors recommend that priority be given to anatomic reduction and optimal stabilization of the femoral neck fracture because non-union, malunion, or avascular necrosis of this injury is more difficult to treat successfully.
18. It is therefore important to understand that, especially in polytraumatized patient, present with femoral shaft fracture, the highest level of suspiciousness must be maintained for the concomitant presence of an ipsilateral femoral neck fracture. Thus the combination of specific radiographic preoperative, intraoperative and postoperative views of the femoral neck should be integrated in the ATLS algorithm of the polytraumatized patient to help reduce the incidence of a missed femoral neck fracture.

19. Many times it is possible for an individual never to realize he or she has a fracture. Most individuals experience pain in the affected limb, especially when moving or rotating it. In the case of ipsilateral femoral neck fractures, the diagnosis was missed almost 30% of the time. Despite the bone being fractured all the way through, it can still move and rotate without issue. This makes it essential for doctors to carefully examine any patient who has experienced a high-energy trauma event.

20. We note that in the instant case the patient was evaluated with a pre-operative X-ray AP pelvis, which was negative. It was unclear whether a lateral view of the hip taken could have been more sensitive in detecting the femoral neck fracture. In our view the antero-posterior internal rotation hip X-ray if taken intra-operatively or immediately after the reduction of the femoral shaft fracture, could have helped in detecting the minimally displaced fracture of the femoral neck. Thus the intra-operative manoeuvres and radiographs should be used to rule out concomitant femoral neck fractures.

21. Among the elements of medical negligence the complainant will have to prove the doctor's violation of a duty was the actual and proximate cause of his/her injuries. In this case on hand the onus was on the Complainants to establish the causation. The doctor treated only fracture shaft of femur but failed to diagnose the fracture neck femur. In our view the "but for" causation test is applicable. The test depends on the balance of probabilities, "but for" the negligent act of doctor/ hospital, the injury would not have occurred. The Supreme Court of Canada in **Clements v. Clements**, 2012 SCC 32 (Can LII), Chief Justice McLachlin described this test as follows:

8. The test for showing causation is the "but for" test. The plaintiff must show on a balance of probabilities that "but for" the defendant's negligent act, the injury would not have occurred. Inherent in the phrase "but for" is the requirement that the defendant's negligence was necessary to bring about the injury - in other words that the injury would not have occurred without the defendant's negligence. This is a factual inquiry. If the plaintiff does not establish this on a balance of probabilities, having regard to all the evidence, her action against the defendant fails.

In the instant case on hand the complainant established that the delay/failure in diagnosis of fracture neck femur contributed to the unfavourable outcome.

22. We are of the considered view that in the instant case, the treating doctor failed in the duty of care in the administration of treatment. The Hon'ble Supreme Court laid down the duties of doctor towards the patient. In the case of **Dr. Laxman Balkrishna Joshi v. Dr. Trimbarak Babu Godbole and Anr.**, AIR 1969 SC 128 and **A.S. Mittal v. State of U.P.**, AIR 1989 SC 1570, laid down that—

"When a doctor is consulted by a patient, the doctor owes to his patient certain duties which are: (a) duty of care in deciding whether to undertake the case, (b) duty of care in deciding what treatment to give, and (c) duty of care in the administration of that treatment. A breach of any of the above duties may give a cause of action for negligence and the patient may on that basis recover damages from his doctor."

23. The Hon'ble Supreme Court has consistently in its decisions reiterated the principle of standard of care which is expected from a medical professional with a reasonable degree of skill and knowledge.

24. In the decision of **Kusum Sharma v Batra Hospital and Medical Research Centre** (2010) 3 SCC 480, the duty of care which is required of a doctor is one involving a reasonable degree of skill and knowledge.

25. In the **Jacob Mathew v State of Punjab** (2005) 6 SCC 1, a three judge Bench of Hon'ble Supreme Court upheld the standard of the ordinary competent medical practitioner exercising an ordinary degree of professional skill, as enunciated in Bolam's principle. It held that the standard of care must be in accordance with "general and approved practice":

“24. The classical statement of law in Bolam has been widely accepted as decisive of the standard of care required both of professional men generally and medical practitioners in particular. It has been invariably cited with approval before the courts in India and applied as a touchstone to test the pleas of medical negligence. In tort, it is enough for the defendant to show that the standard of care and the skill attained was that of the ordinary competent medical practitioner exercising an ordinary degree of professional skill. The fact that a defendant charged with negligence acted in accord with the general and approved practice is enough to clear him of the charge. Two things are pertinent to be noted. Firstly, the standard of care, when assessing the practice as adopted, is judged in the light of knowledge available at the time (of the incident), and not at the date of trial. Secondly, when the charge of negligence arises out of failure to use some particular equipment, the charge would fail if the equipment was not generally available at that point of time on which it is suggested as should have been used.”

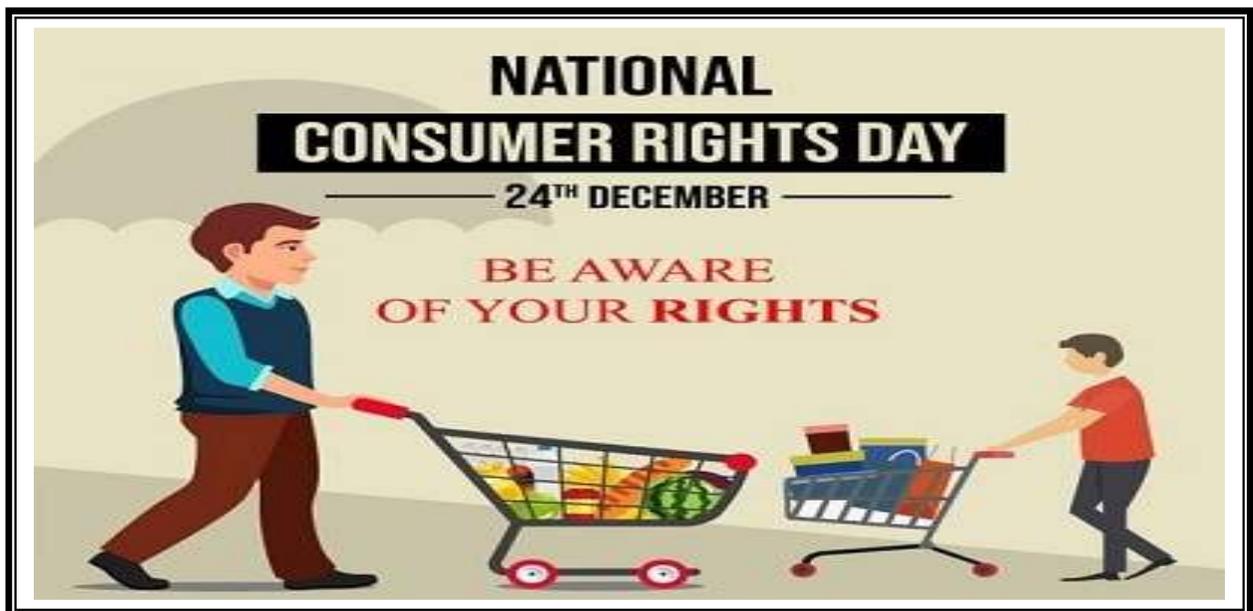
Thus, the doctor would be liable only where the conduct falls below the standards of a reasonably competent practitioner in the field.

26. The District Forum awarded Rs. 5.0 lac; whereas the State Commission reduced the award to Rs.2.5 lac. We disagree with the view taken by the State Commission to reduce the quantum of compensation, that there was limited deficiency and negligence from the Opposite Party No. 1. It is to note that after the treatment, subsequently, the Complainant underwent operation twice in Hedgewar Sansthan at Delhi but his physical condition did not improve. The doctors informed him about no possibility of complete cure in the future. He was the sole earning member in the family. The Complainant had been suffering since the year 2003 and we are now in 2021. Considering the loss of earning capacity and future prospects, in our view, the compensation of Rs.5.0 lac is just and fair.

27. Based on the discussion above, the Order of State Commission is set aside. The Revision Petition No. 2912 of 2008 is dismissed and the Revision Petition No. 2699 of 2008 is partly allowed. The Opposite Party No. 1 is directed to pay compensation of Rs.5 lac with interest @ 6% per annum from the date of filing of the Complaint and Rs. 25,000/- towards the cost of litigation within 4 weeks from today, failing which the entire amount shall carry 10% interest till its realization.

The Registry is directed to send the copy of this Order within 3 days to all the Parties by speed post and email. ■

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**A delay in informing the Insurance Company should not be  
the sole reason for rejecting a genuine claim**

**NATIONAL CONSUMER DISPUTES REDRESSAL COMMISSION  
NEW DELHI**

**REVISION PETITION NO. 3367 OF 2016**

(Against the Order dated 06/10/2016 in Appeal No. 681/2016 of the State Commission Uttar Pradesh)

NATIONAL INSURANCE COMPANY LTD.

THROUGH ITS DULY, CONSTITUTED ATTORNEY,  
MANAGER, NATIONAL INSURANCE COMPANY LTD.,  
LEGAL VERTICAL, 2 E/9, JHANDEWALAN EXTENSION,  
NEW DELHI-110055

.....Petitioner(s)

Versus

RATNESH KUMAR

S/O. RAGHUBIR SINGH, R/O. BHADRI POST-AMOUR,  
TAHIL SHIKONA BAD,  
DISTRICT-FIROZABAD  
UTTAR PRADESH

.....Respondent(s)

**BEFORE:**

**HON'BLE MRS. JUSTICE DEEPA SHARMA, PRESIDING MEMBER  
HON'BLE MR. SUBHASH CHANDRA, MEMBER**

**Dated : 24 Aug 2021**

**ORDER**

1. The present revision petition has been filed by Insurance co. against the Order dated 06.10.2016 of the State Commission in appeal no. 681/2016 whereby the appeal of the petitioner insurance co. was dismissed. The appeal was filed by the insurance co. against the order dated 03.03.2016 of the District Forum in Complaint No. 46/2014 whereby the complaint was allowed and following directions were issued:

*....., the opposite party has repudiated the claim unfairly and without any basis which caused deficiency in service. Therefore, the complaint is acceptable.*

*Order*

*The Complaint is accepted against the opposite party insurance company and the insurance company is directed to pay the insured value of the tractor to the complainant which shall be payable within 30 days from this order. The complainant shall be entitled to get the interest @ 9% per annum on the insured amount from the opposite party from presenting the complaint till its actual payment and the complainant shall also be entitled to get the litigation cost as Rs.2500/-.*

2. Brief facts of the case are that the subject vehicle of the complainant / respondent was duly insured with the petitioner insurance company. During the existence of the policy the vehicle got stolen. The FIR was lodged after 10 days of the incident and thereafter the insurance co. was informed after 19 days from the date of theft. The claim was rejected by the insurance co. when presented by the complainant solely on the ground of delayed information.

3. Aggrieved the respondent/complainant filed the complaint. The petitioner insurance co. was duly served and they filed written statement wherein they had taken the same contention. Parties led their evidences. After hearing learned counsels for the parties and perusing the record, the District Forum rejected the contention of the Insurance Company that the delay had caused any prejudice to the Insurance Co. The District Forum has held as under:

*The investigator of the insurance company has unnecessary commented on the point that the report had been got registered on 08.09.2012 but still the complainant has stated to the police by giving a request letter on 27.05.2013 that the police is not registering his report, the copy of this request letter has also been made available to the investigator. In this connection, it shows that no possibility arises with respect to presenting the request letter to the police superintendent relating to not lodging the report after 7 and ½ months of its lodging report dated 08.09.2012. It seems that the date of letter has been wrongly typed which has been made available to the investigator.*

*The tractor has been found to be stolen in the police report, the investigator has expressed his doubt without any basis towards the incident.*

**To be concluded in the next issue.....**

### Support Your Cause

Consumer Protection Council, Rourkela is a registered voluntary organization, espousing the cause of the consumer. To a great extent, for its sustenance it depends on the good will of its donors like you. We solicit your support for sustaining the multifarious activities of the council. Donation to the council is eligible for tax exemption under Section : 80-G(5) (iv) of the IT Act. Donation may please be contributed through cash or crossed cheque / DD, drawn in favour of “ **Consumer Protection Council, Rourkela**”.

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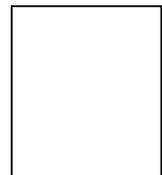
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