Kerala High Court
Dr. T.T. Thomas vs Smt. Elisa And Ors. on 11 August, 1986
Equivalent citations: I (1987) ACC 445, AIR 1987 Ker 52
Author: Thomas
Bench: K Paripoornan, K Thomas
JUDGMENT Thomas, J.

1. Devaluation of standards in professional ethics is a dangerous trend. Its proliferation in medical profession is more calamitous than in other professional or occupational areas. "There can be few, if any, professions other than that of medicine about which it is possible to fashion a television series entitled 'Your Life in Their Hands' --(Mason and McCall Smith -- Law and Medical Ethics). Failure to make a proper diagnosis sometimes may be the consequence of human error. But when diagnosis is correctly made, the imperative duty of the medical man to take adequate and prompt curative steps need not be over-emphasised, for, any inertia on his side is at his risk as to all costs and consequences. If the allegations in this case are true, this would fall within the amplitude of the above proposition.

2. The facts : The second plaintiffs husband was admitted in the General Hospital, Ernakulam as an inpatient at about 3.30 p.m. on 11-3-1974 for complaints of severe abdominal pain. It was diagnosed as a case of acute appendicitis. Dr. T.T. Thomas, the appellant, who was one of the civil surgeons of the General Hospital during the relevant time, examined the patient and confirmed the diagnosis, pursuant to which the patient was removed from the Casualty Ward to the Surgical Ward. No surgery was performed on the patient on the day of his admission in the hospital. On the next day his condition deteriorated fast and surgery could not have been performed on him. He breathed his last by about 8.30 a.m. on 13-3-1974. His death was due to "perforated appendix". These are the broad facts over which there is no serious dispute between the parties.

3. The mother, the widow and the children of the deceased are the plaintiffs who filed this suit for damages, limiting their claim to half a lakh of rupees. The claim was made against the appellant as the person primarily liable for damages and against the State of Kerala as vicariously liable for the same.

4. The further allegations in the plaint relevant for this appeal, are that when the patient was examined by the duty doctor, he found that it was a case which required immediate operation to save the life of the patient, and that the appellant also examined the patient on the same day, but the patient was removed to the surgical ward only on 12-3-1974 where he was prepared from operation, that medicines and categut were bought by the 2nd plaintiff from outside as prescribed by the doctors, and that the appellant did not care to attend the patient after the first day's examination though the patient was writhing in pain during day and night. The further allegations are that the 2nd plaintiff paid a sum of Rs. 25/- to the appellant as she came to know that the appellant might not turn up to operate without money being paid to him in private, that the appellant did not turn up at any time after 8.45 a.m. on 12-3-1974 since the appellant had gone to an outside private nursing home to conduct operations on other patients, and that the appellant came back only after the death of the patient.

5. In the written statement, the appellant admitted that he examined the patient on the 11th itself and diagnosed his disease as "perforated appendix with peritonitis" and that he advised immediate operation. But the main contention of the appellant, in his written statement is that no surgery was done on the patient on 11-3-1974 because of the reluctance of the patient to undergo a surgery saying that "he had similar attacks before and he used to get relief with injuctions and other medicines." So, according to the appellant, other measures were taken to ameliorate the condition of the patient which grew worse on the next day when he was not in an operable condition, though the patient was then willing to be operated upon. The appellant denied having recieved any amount from the plaintiffs. He also denied that he was absent in the hospital and that he went to the General Hospital only after the death of the patient on 13-3-1974. He emphatically denied the allegation that the death of the patient was due to his negligence.

6. The court below found that the condition of the deceased was "conducive enough for an operation" on 11-3-1974 as well as on 12-3-1974, and the operation was performed on 11-3-1974, "there would have been chances for survival" of the deceased. The plea of the appellant, that non-performance of surgery on 11-3-1974 was due to want of consent from the patient, has been repelled by the learned Sub Judge, who found that the death of the patient was the consequence of the negligence of the appellant. However, the learned Sub Judge absolved the State of Karala from liability on account of certain reasons peculiar to the facts of this case, which need not be adverted to in this appeal since the plaintiff has not challenged the decree. The lower court granted a decree against the appellant for a total sum of Rs. 37,700/- payable to all the plaintiffs together.

7. The arguments in this appeal were focused on the main question whether there was negligence on the part of the appellant in not performing surgery on the deceased. Counsel for the appellant was fair in submitting that he is not challenging the quantum of damages fixed by the court below albeit a ground being taken up in the memorandum of appeal on that count also.

8. The evidence consists of the testimonies of ten witnesses for the plaintiff and three witnesses for the appellant, besides a few documents marked on both sides, Ext. XI is the certified copy of the Case Sheet maintained in the General Hospital, Ernakulam pertaining to the deceased. P.W. 1 is the 2nd plaintiff, widow of the deceased.

P.W. 3 is the Resident Medical Officer of the said hospital during the relevant period. P.W. 9 is Dr. K.Y. Roy, Professor of Surgery in the Medical College, Alleppey, and P.W. 10 is the Superintendent of Government Hospital, Ernakulam. D.W. 1 is another Civil Surgeon of the General Hospital, Ernakulam. D.W. 2 is the appellant. D.W. 3 is Dr. Mathew Varghese, Professor and Head of the Department of Surgery in the Medical College, Kottayam. P.W. 9 and D.W. 3 were examined as experts in surgery, by the respective sides. Both are well qualified in the subject. The appellant himself is a well qualified surgeon. He holds F.R.C.S.

9. The appellant's definite case is that the condition of the patient on 12-3-1974 was not conducive for a surgery. It appears that both P.W. 9 Dr. Roy, and D.W. 3 Dr. Mathew Varghese, are in agreement with each other on the said point. Both of them had gone through the entries in Ext. XI Case Sheet. PW. 3, the Resident Medical Officer of the General Hospital, Ernakulam, has also given

evidence in the same line. There is thus overwhelming evidence in this case to show that the patient was not in an operable stage on 12-3-1974. We therefore dissent from the finding of the court below on that aspect.

10. There is almost unanimity in the evidence of witnesses that the position on 11-3-1974, when the patient was admitted in the Hospital, was different. All the doctor witnesses examined in this case deposed in one voice that what normally a surgeon would have done on 11-3-1974 when a patient like the deceased was found to be suffering from perforated appendix was to subject him to an emergency operation. The appellant, as D.W. 2, admitted that when he examined the patient at 3.35 p. m. on 11-3-1974, he diagnosed the case as "perforated appendix with general peritonitis". D.W. 1, the other surgeon in the General Hospital, Ernakulam, admitted during cross-examination that if he were the surgeon, he would have conducted the operation on the 11th itself. D.W. 3, Dr. Mathew Varghese, was more explicit in his stand that he, as a surgeon, would have conducted the operation on the first day itself if the deceased was his patient and that the failure to conduct an operation would have led to the "bursting" of the appendix. Thus, there is clinching evidence to show that the patient was in a condition to undergo an operation on the 11th, and that any delay in performing the surgery was fraught with dangerous consequences.

11. The appellant has advanced a case that he did not perform the operation on 11-3-1974 as the patient did not give consent to it. About this consent aspect, an understanding about its requirement is of help in this case. Why should a doctor insist on consent from his patient for the course of treatment to be adopted by him? Consent from the patient is evidently not for the safety of the patient, but for the protection of the physician or the surgeon, as the case may be. Every surgery, whether minor or major, is fraught with some degree of hazard or risk which varies in accordance with the seriousness of the disease. If a patient collapses during the course of a surgery or during the course of a treatment, law gives protection to the medical man, provided, he establishes that the risky step was adopted with the consent, express or implied, from the patient. In fact it is a defence available to the doctor as envisaged in Section 88 of the Penal Code. The consent factor may be important very often in cases of selective operations which may not be imminently necessary to save the patient's life. But there can be instances where a surgeon is not expected to say that "I did not operate him because, I did not get his consent". Such cases very often include emergency operations where a doctor cannot wait for the consent of his patient or where the patient is not in a fit state of mind to give or not to give a conscious answer regarding consent. Even if he is in a fit condition to give a voluntary answer, the surgeon has a duty to inform him of the dangers ahead or the risks involved by going without an operation at the earliest. In this context, we find it advantageous to refer to a passage from "Law and Medical Ethics" by Mason and McCall Smith (page 113 of the 1983 edition) under the sub-title "is consent always necessary?" The relevant passage is quoted below :

"As a general rule, medical treatment, even of a minor nature, should not proceed unless the doctor has first obtained the patient's consent. This consent may be expressed or it may be implied, as it is when the patient present himself to the doctor for examination and acquiesces in the suggested routine. The principle of requiring consent applies in the overwhelming majority of cases, but there are certain circumstances in which a doctor may be entitled to proceed without this consent -- firstly, when the patient's balance of mind is disturbed, secondly, when the patient is incapable of

giving consent by reason of unconsciousness; and, finally, when the patient is a minor."

12. Very often, poor and illiterate patients, and some times even the educated and the so-called sophisticated members of the society are averse to surgery, but most of them would agree to it when they are told about the grave consequences otherwise.

13. When a surgeon or medical man advances a plea that the patient did not give his consent for the surgery or the course of treatment advised by him, the burden is on him to prove that the non-performance of the surgery or the non-administration of the treatment was on account of the refusal of the patient to give consent thereto. This is especially so in a case where the patient is not alive to give evidence. Consent is implieit in the case of a patient who submits to the doctor and the absence of consent must be made out by the person alleging it. "In most instances, the consent of a patient is implied" (Mayne's "Criminal Law of India" by S, Swaminathan 4th Edn. -- at page 198). A surgeon who failed to perform an emergency operation must prove with satisfactory evidence that the patient refused to undergo the operation, not only at the initial stage, but even after the patient was informed about the dangerous consequences of not undergoing the operation.

14. In this case, the interested testimony of the appellant as D. W. 2 is hardly sufficient to prove that aspect. Ext. XI Case Sheet does not show that the patient did not give consent for the operation. D.W. 1, Civil Surgeon of the General Hospital, has stated that if the patient had not given his consent for the operation, that fact would have been noted in the Case Sheet. P.W. 9. Dr. Roy, has said that if a patient is not willing for the operation, usually the doctor will note the fact in the Case Sheet and will also get a declaration from the patient to that effect. In the light of the above evidence, we hold that the learned Sub Judge has rightly discarded the appellant's case that the patient did not give consent for the operation on 11-3-1974.

15. Our attention has been drawn to the following observation of the Supreme Court in Laxman v. Trimbak, AIR 1969 SC 128 "The doctor no doubt has a discretion in choosing treatement which he proposes to give to the patient and such discretion is relatively ampler in cases of emergency". Their Lordships in the said case quoted from "Halsbury's Laws of England" 3rd Edn. Vol. 26 p. 17:

"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."

In this context it will be useful to extract a passage from the address given by MeMair, J. in Bolam v. Friern Hospital Management Committee, ((1957) 2 All ER 118) while explaining the law to the jury.

"Counsel for the plaintiff put it in this way, that in the case of a medical man negligence means failure to act in accordance with the standarde of reasonably competent medical man at the time. That is a perfectly accurate statement, as long as it is remembered that there may be one or more perfectly proper standards; and if a medical man conforms with one of those proper standards then he is not negligent."

McNair, J. in the course of the same address made reference to the observation of Lord Clyde in a Scottish case. Hunter v. Hanlay, (1955 SLT 213 at 217) :

"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 acting with ordinary care."

In Clark v. Maclenna, (1983) 1 All ER 416 Peter Pain, J. after referring to various authorities, stated thus :

"Although in an action in negligence, the onus of proof normally rested on the plaintiff, in a case where a general duty of care arose and there was a failure-to take a recognised precaution and that failure was followed by the very damage which that precaution was designed to prevent, the burden of proof lay on the defendant to show, first, that he was not in breach of any duty and, second, if he failed to prove that he had not been in breach of duty, that the damage suffered by the plaintiff did not result from the breach. Accordingly, a doctor owed a duty to his patient to observe the precautions which were normal in the course of the treatment that he gave. Where a patient suffered damage after there had been a departure from the orthodox course of treatment the court had to inquire whether the doctor had taken all proper factors into account prior to taking action in order to determine whether that departure was justified."

Judged by the above standards, we hold that the burden of proof to show want of consent from the deceased is on the appellant, and he failed to discharge that burden. We also hold that the failure to perform an emergency operation on the deceased on 11-3-1974 amounts to negligence, and the death of the deceased was on account of that failure.

For the aforesaid reasons, we find that the court below was perfectly right in fastening the appellant with the liability for the death of the deceased. We, therefore confirm the decree and dismiss this appeal with costs.