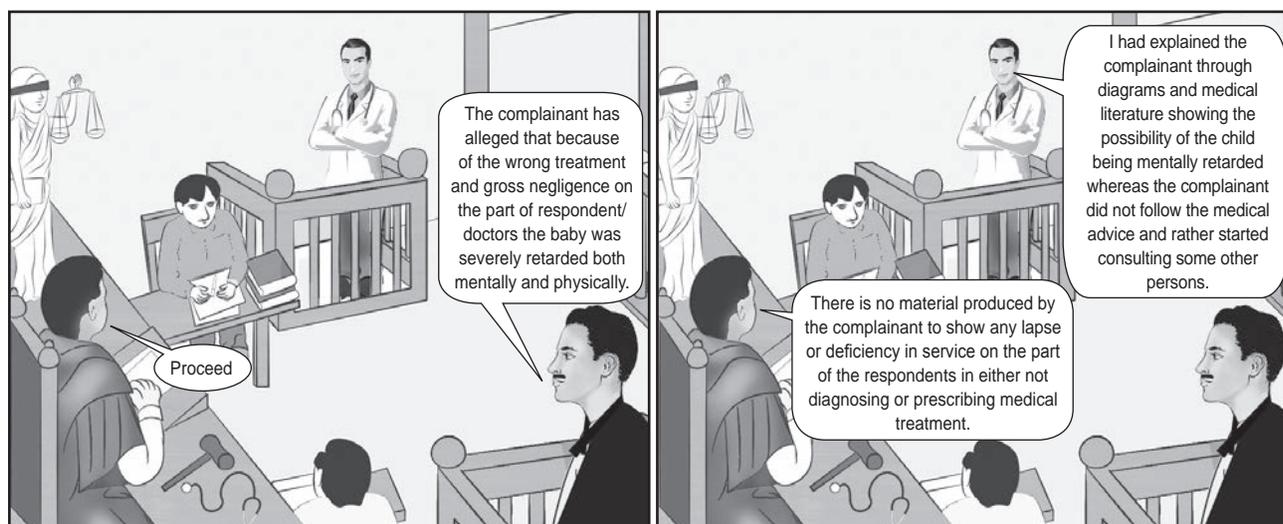


# Onus to Prove Medical Negligence or Deficiency Lies on the Complainant



**Lesson:** In its order in the First Appeal No. 490 of 2007 NCDRC stated that the appellant has not been able to prove through any credible evidence that there was medical negligence or deficiency on the part of the respondents or any action or omission on their part which resulted in or aggravated the congenital condition of the infant. On the other hand, there is credible evidence that right through the prenatal period and after the birth due medical attention and proper treatment was given by both respondents who are well-qualified specialists in their fields. We agree with these findings and therefore, uphold the order of the State Commission. The first appeal is dismissed.

## COURSE OF EVENTS

- This first appeal has been filed by the complainant before the State Commission and appellant herein, being aggrieved by the order of the State Consumer Disputes Redressal Commission, Delhi (hereinafter referred to as the 'State Commission') which has rejected his complaint of medical negligence against Respondents No. 1 and 2, respectively.
- In his complaint to State Commission, appellant had contended that his wife delivered a male child at Shubham Hospital, New Delhi and the delivery was handled by Respondent No. 1 who was a Gynecologist and thereafter by Respondent No. 2, a Pediatrician.
- The appellant had alleged that because of the wrong treatment and gross negligence on the part of respondent/doctors the baby was severely retarded both mentally and physically.
- The appellant had specifically stated that his wife who was suffering from fever in her 32-34 weeks of pregnancy had visited Respondent No. 1 who failed to conduct a basic test known as TORCH test, which would have clearly indicated the nature of the prenatal viral infection and whether it had infected the fetus. Instead the patient was given only paracetamol to check the fever.
- The baby was born after 36 weeks of gestation i.e., 4 weeks before the full gestation period with symptoms of the present disease but he was not given the required medical treatment at birth as a result of which, as per the certificate issued by the All India Institute of Medical Sciences (AIIMS) in 1996, he has cerebral palsy with spastic tendencies, mental retardation and 90% permanent physical impairment.
- The certificate from AIIMS specifically stated that the perinatal viral infection was the cause of this condition. If due medical treatment had been

given at birth instead of just tonics and vaccines by Respondent No. 2, appellant contended that the extent of disability would not have been so extensive.

- Appellant, therefore, approached the State Commission on ground of medical negligence and requested that respondents be directed to pay him ₹ 15 lakhs as compensation for mental agony and to enable him to provide the necessary treatment for his child.
- Respondents filed a written rejoinder denying that there was any medical negligence in the care and treatment of the appellant's wife and infant.
- The appellant's wife approached Respondent No. 1 for prenatal treatment for the first time in December, 1991 and she was accordingly advised necessary tests including ultrasound and no abnormalities were detected.
- In her 32-34 weeks of pregnancy the appellant's wife had fever and was prescribed crocin to control the fever and no other drug.
- Growth retardation of the baby was noted at 34-35 weeks and the appellant's wife was advised bed rest.
- The appellant's wife was brought to the hospital in the 36th week in advanced labor and delivery took place within 1 hour with the umbilical cord wound thrice around the baby's neck and he had passed meconium because of which there was difficulty in spontaneous initiation of breathing at birth but the baby was successfully resuscitated within 2 minutes with normal Apgar count. Since, the baby was small for date, he was kept in a thermoneutral environment under an oxygen hood and prescribed prophylactic antibiotics and also medication for the mild jaundice which is common in newborns.
- The baby was discharged on 24.06.1992 in a suitable condition.
- On 03.07.1992, the baby was brought to the hospital with complaints of vomiting, lethargy and disinterest in suckling and Respondent No. 2 after examining him advised hospitalization, which was not accepted by the appellant who thus acted against medical advice.
- On 01.08.1992 during another visit, spastic tendencies were visible and Respondent No. 2 explained the medical condition as also the prognosis to the parents and advised them to bring the baby for follow-up visit within 7 days but the baby was brought only after 21 days in poor medical

condition. Amoxicillin for 10 days was prescribed but the parents discontinued the antibiotics after 3 days. Thereafter, the parents never brought the child to the respondent and probably got him treated elsewhere. There was thus no medical negligence in the treatment of either the mother or the baby and it was the appellant and his wife who repeatedly failed to follow medical advice.

- It was also contended that the first appeal was time barred as it was filed beyond the statutory period of 2-year from the date on which the cause of action had arisen.

### ORDER OF THE STATE COMMISSION

- The State Commission after hearing both parties and on the basis of evidence filed before it concluded that no case of medical negligence was made out. The relevant part of the order of the State Commission is reproduced:

Here is a case where the child was born at 36 weeks gestation on 16-06-1992. The last when the complainant contacted the OP was till 15, September, 1992. The child subsequently has been diagnosed as suffering from cerebral palsy in 1996, which is indication of mental retardation. The complainant was advised hospitalization of the child but he declined. Medical treatment prescribed was not followed. There is no cure for cerebral palsy. TORCH test is prescribed only if the mother is suffering from such fever in the first 12 weeks of pregnancy and not 34 weeks of pregnancy. Giving PCM (Paracetamol) to a mother who is in 34 weeks of pregnancy is absolutely safe and by no means can cause any kind of infection or abnormality to the child. The mental retardation of the child cannot be projected in the ultrasound examination. Merely because the child was born underweight is known as SFD (Small for Date).

The OP contended that the doctor had explained the complainant through diagrams and medical literature showing the possibility of the child being mentally retarded, whereas the complainant did not follow the medical advice and rather started consulting some other persons. There is no material produced by the complainant to show any lapse or deficiency in service on the part of the OPs in either not diagnosing or prescribing medical treatment as is apparent from the aforesaid contentions. .... The child was born with umbilical cord surrounding its neck. Though we have all the sympathy for the complainant but the aforesaid facts do not make out a case of medical negligence or any deficiency in service on the part of the

OP Hospital or doctors and they cannot be held liable for any lapse or negligence during or after delivery of the child. The complaint is dismissed being devoid of substance.

Hence, the present first appeal.

### ALLEGATIONS OF COMPLAINANT

Appellant who was present in-person and Counsel for Respondents made oral submissions.

- Appellant reiterated that if proper tests including the TORCH test had been conducted, the type of viral infection from which both the mother and the fetus had been obviously infected would have been detected and the mother could have been given proper medication instead of only crocin and the baby could have been given the medical attention required in such cases at birth instead of only antibiotics and tonics.
- The certificate from AIIMS clearly indicated that the condition of the child, who unfortunately is no more, was because of the perinatal viral infection. If proper medication had indeed been given immediately in all possibility the retardation would have been checked at birth instead of increasing over the years.
- Appellant apprehended that there was every possibility that the mother was given certain medications which were contraindicated though on a specific query from us, he could not state what other medicines were given.

### REJOINDER OF RESPONDENTS

- Counsel for respondents on the other hand stated that both respondents are well-qualified doctors with specializations in Gynecology and Pediatrics, respectively.
- Respondent No. 1 took due care during the pregnancy and right in the beginning various tests including ultrasound were conducted which could have revealed some growth problem but not spastic tendency or cerebral palsy because spastic tendencies cannot be diagnosed in a fetus.
- The fever which occurred in the 32-34 weeks of the pregnancy in the mother cannot cause fetal malformation, which can occur if the mother contracts an infection in the first trimester i.e., 12 weeks of the pregnancy.
- Since an ultrasound had confirmed that the fetus was small for date, as per medical practice, respondent planned to induce labor but before

this could be done, the appellant's wife herself delivered 1 month prematurely with only 1 hour of labor pains.

- On birth, the infant was in respiratory distress because the umbilical cord was bound thrice round his neck and he had passed and swallowed meconium in the womb. He was immediately resuscitated, stabilized and put in intensive care and prescribed antibiotics and treated with other medication for mild jaundice and discharged thereafter in a stable and satisfactory condition.
- It was the appellant and his wife who failed to heed correct medical advice during subsequent follow-up visits by not agreeing to hospitalization of the baby and also not giving antibiotics for the prescribed period.

### OBSERVATIONS OF NCDRC

We have heard the appellant and the Counsel for respondent and have carefully gone through the evidence on record.

- We note from the record that as observed by the State Commission due care was taken in the prenatal care of the appellant's wife by Respondent No. 1 and necessary tests were conducted.
- Appellant's contention that there was negligence in not conducting the TORCH test when the appellant's wife contracted fever between 32-34 weeks of pregnancy is not borne out by the medical literature on the subject according to which a TORCH test is prescribed within first 12 weeks of pregnancy in case the mother is suffering from fever because this is the period when fetal malformation can occur due to certain infections (Reference: American Pregnancy Association and MCRCK, manual on high risk pregnancy risk factors).
- Admittedly, the appellant's wife suffered from fever only a few weeks before the delivery and she was given paracetamol, which is not contraindicated.
- While it is a fact that the child was born with cerebral palsy and related problems, as per the medical literature, this could not have been detected in the womb or caused because of any medication or wrong treatment when the appellant's wife had fever just prior to her delivery.
- Since the fetus was small for date, due care was taken and a few days after the birth when covert symptoms of cerebral palsy disease became apparent, appellant and his wife were immediately advised about the problem and also given a prognosis.

### OPINION OF NCDRC

Appellant has not been able to prove through any credible evidence that there was medical negligence or deficiency on the part of the respondents or any action or omission on their part which resulted in or aggravated the congenital condition of the infant. On the other hand there is credible evidence that right through the prenatal period and after the birth due medical attention and proper treatment was given by both Respondents who are well-qualified specialists in their fields. Further, the certificate from AIIMS on which the appellant has relied was given some years later and only a question mark was put regarding the cause of the cerebral palsy being the

prenatal viral fever from which the appellant's wife suffered and it was not a definite opinion on the same.

### ORDER OF NCDRC

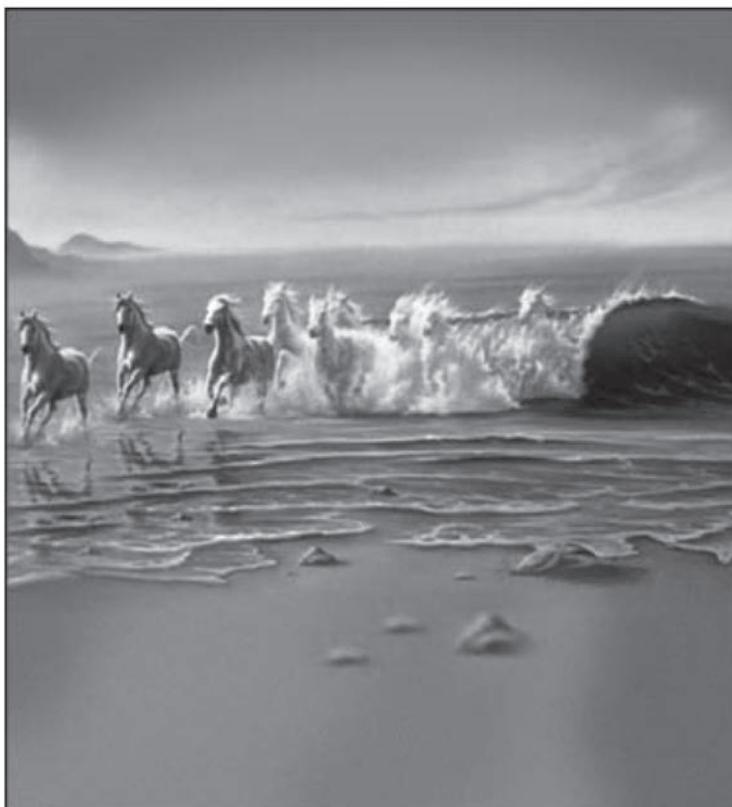
The State Commission has carefully considered all these aspects and has given a well-reasoned order concluding that the appellant has not been able to prove that this was a case of medical negligence or that there was any deficiency in service on the part of the respondents. We agree with these findings and therefore, uphold the order of the State Commission. The first appeal is dismissed with no order as to costs.

### Reference

1. Case no. 490 of 2007; Order date 13.09.2012.

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Different  
Perspectives  
of Life



J The unreal may look real. There are only three real horses.