IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE T.R.RAMACHANDRAN NAIR
&
THE HONOURABLE MR. JUSTICE K.P.JYOTHINDRANATH

FRIDAY, THE 19TH DAY OF JUNE 2015/29TH JYAISHTA, 1937

AS.No. 99 of 2002 (B)

AGAINST THE ORDER/JUDGMENT IN OS 607/1995 of PRL.SUB COURT,TRIVANDRUM
APPELLANT(S)/DEFENDANT 1 TO 4:
---

1. THE K.P.S.C
REP.BY ITS SECRETARY, PATTOM, PATTOM PALACE
THIRUVANANTHAPURAM.

2. SRI.UPENDRA VARMA, DEPUTY INSPECTOR
GENERAL OF POLICE (TRAINING) OFFICE OF THE DEPUTY
INSPECTOR GENERAL OF POLICE (TRAINING)
THIRUVANANTHAPURAM.

3. SRI.ABDUL HAMEED, DEPUTY COMMANDANT,
KERALA ARMED POLICE, IIND BATTALION, MUTTIKULANGARA
PALAKKAD.

4. DR.NARENDRANATH DATHAN, IIND GRADE
PROFESSOR IN PHYSICAL EDUCATION, UNIVERSITY COLLEGE
THIRUVANANTHAPURAM.

BY ADV. SRI.P.C.SASIDHARAN, SC, KPSC

RESPONDENT(S)/PLAINTIFF AND DEFENDANTS 5 TO 9:
---

1. B. SETHUKUTTY AMMA
W/O. LATE SRI.K.P.GOPALAN NAIR, HINDU, AGED 63
RESIDING, AT RAJ VIHAR, T.C.15/1933
VOLTAS LANE, VAZHUTHACAUD, THIRUVANANTHAPURAM -14.

2. DR.T.C.JOSEPH, DIRECTOR,PROFESSOR AND
HEAD OF THE DEPARTMENT OF ORTHOPAEDICS,
MEDICAL COLLEGE HOSPITAL, THIRUVANANTHAPURAM.

3. DR.S.VIJAYAN, ASSISTANT PROFESSOR,
DEPARTMENT OF ORTHOPAEDICS, MEDICAL COLLEGE HOSPITAL,
THIRUVANANTHAPURAM.

4. DR.V.RAMACHANDRAN, ASSISTANT PROFESSOR,
DEPARTMENT OF ORTHOPAEDICS, MEDICAL COLLEGE HOSPITAL,
THIRUVANANTHAPURAM.

5. DR.SUNDER RAJ, ASSISTANT PROFESSOR,

DEPARTMENT OF ORTHOPAEDICS, MEDICAL COLLEGE HOSPITAL, THIRUVANANTHAPURAM.

6. THE STATE OF KERALA, REPRESENTED BY THE CHIEF SECRETARY TO GOVERNMENT, THIRUVANANTHAPURAM.

R6 BY GOVERNMENT PLEADER SHRI VIJU THOMAS
R,R1 BY ADV. SRI.VADAKARA V.V.N.MENON
R,R1 BY ADV. SRI.T.N.SUKUMARAN

THIS APPEAL SUITS HAVING BEEN FINALLY HEARD ON 2-06-2015, ALONG WITH RFA. 1/2004, THE COURT ON 19/6/2015 DELIVERED THE FOLLOWING:

T.R. RAMACHANDRAN NAIR &
K.P. JYOTHINDRANATH, JJ.

- -

A.S.No.99/2002 and R.F.A. No.1/2004

- -

Dated this the 19th day of June, 2015

JUDGMENT

Ramachandran Nair, J.

These appeals arise from the judgment and decree in O.S. No.607/1995 on the file of the Principal Sub Court, Thiruvananthapuram. A.S. No.99/2002 is filed by defendants 1 to 4 in the suit and respondents are the plaintiff as well as defendants 5 to 9. R.F.A. No.1/2004 is filed by the plaintiff in the suit.

2. The suit was filed by the plaintiff as one for damages consequent on the death of her son. An amount of Rs.2,40,000/- has been decreed with interest at 6% per annum and the trial court held that the defendants shall be jointly and severally liable for the said sum. Defendants 1 to 4 challenge the said decree. In the appeal filed by the plaintiff, the quantum of compensation is under challenge. Defendants 5 to 9 are respectively the Doctors of the Medical College,

Thiruvananthapuram and the State of Kerala. There is no appeal by them.

3. The facts of the case show the following: The plaintiff's son deceased Shri Radhakrishnan was working as a Cashier-cum-Clerk in the State of Bank of Travancore, Venganoor Branch, Thiruvananthapuram. He was an applicant to the post of Sub Inspector (Trainee) in the Police Department pursuant to a notification issued by the first defendant in the suit, viz. the Kerala Public Service Commission represented by its Secretary. He got qualified in the written test and was later called upon to attend the Physical Efficiency Test. The test was to be conducted on 22.9.1986 at the Parade ground of Oolampara Police Camp. The candidates were directed to attend any five out of the eight items of sports, viz. Long Jump, High Jump, Short-put, Cricket Ball throw, Pull-ups, Rope climbing, 100 metres race and 1500 metres race. One of the items opted by the deceased was Long Jump. During the test and while he was performing the said item, he sustained a fracture on his right femur. The plaintiff alleged that the same happened due to the substandard conditions of the ground,

especially the jumping pit which was prepared temporarily for the purpose. It was also alleged that there was no provision for medical aid at the spot and not even a vehicle was made available at the spot to take the injured to a hospital.

4. It was also alleged that the deceased was lying unattended for nearly half an hour. Only after persistent attempts were made by the other competitors, a Doctor attached to the Police Hospital, S.A.P., Thiruvananthapuram was brought to the spot. He referred the deceased to Orthopaedic department of the Medical College Hospital, Thiruvananthapuram after examination. It was also alleged that even though he was taken to the Orthopaedic wing, he was left uncared and unattended in the stretcher itself in the verandah of the outpatient wing of the said department. After the bystanders raised a hue and cry, the 6th defendant in the suit, Dr. S. Vijayan came to attend the deceased. He was admitted to Ward No.20 of the Medical College Hospital. It was alleged that due to the negligence and mismanagement on the part of the Medical Officers, the deceased developed secondary complications and finally he died on 29.9.1986.

5. Defendants 1 to 4, according to the plaintiff, had conducted the test without providing proper facilities and they did not take proper care and caution. The 9th defendant is the State of Kerala and defendants 5 to 8 are Doctors attached to the Medical College Hospital. It was alleged that had they taken timely care and extended proper treatment, the deceased would not have died prematurely, at the age of 26 years.

6. The plaintiff has averred that going by the background of the deceased, he had undergone rigorous physical training and was a product of Kazhakoottam Sainik School. He had participated in almost all the sports and games and had also undergone karate training and was a black belt of SHITO-RYU-KARATE DO SCHOOL. He was a student pilot licence holder and was provisionally selected in the Indian Military Academy and BSF/CRPF to the post of Deputy Commandant and was also a member of the District Basketball Association and Kerala State Hand Ball Association.

7. The deceased was aged 26 at the time of accident. Even if he was not selected to the post of Sub Inspector, he would have gone up

to a higher cadre in State Bank of Travancore and would have become an officer. He was drawing a monthly emoluments of Rs.1,150/- from his job and was getting a monthly honorarium of Rs.1,000/- as Chief Instructor of Alan-Thilak-Shito Ryu Karate School attached to National Club, Thiruvananthapuram. As a part-time Senior Demonstrator, he was getting Rs.250/- each from the other three centres. Thus, he was getting a total monthly honorarium of Rs.1,750/- in those capacities.

8. The suit was filed initially by the parents and subsequently the father died and the mother alone remained in the field. It was alleged that the plaintiff mother was aged 54 at the time of the accident and had a normal life expectancy of 21 years more. A total amount of Rs.3,74,050/- was claimed as damages from the defendants which she would have obtained as she was fully depending upon the income of the deceased.

9. Defendants 1 and 3 filed a joint written statement. The third defendant was the Deputy Commandant, Kerala Armed Police, IIIrd Battalion. It was contended that the S.A.P. Parade ground and the long jump pit were constructed years back and it was well maintained by

the S.A.P. Unit. The long jump pit at S.A.P. ground is a permanent one and it is being maintained regularly. The condition of the ground and the long jump pit was perfectly alright at the time of the physical efficiency test on 22.9.1986. Before the commencement of each item the technical expert who was one of the members of the board had a personal check up regarding the accuracy, correctness of the measurement and the conditions of the ground, long jump pit and the other equipments required and used for the test. On 22.9.1986 the technical member of the board had checked and satisfied himself and other members of the board. All the candidates who have applied for the test including the deceased also used the same long jump pit and nobody had made any complaint or remarks regarding the condition of the long jump pit. In paragraph 4 of the written statement, the allegation that there was no provision for medical aid at the spot nor was any vehicle made available to take the injured to the hospital, is denied. It was contended that when the physical efficiency test was conducted in the ground, a medical officer with para medical staff has been arranged on the spot to meet and to attend to any contingencies.

There was a Medical Officer and required qualified medical staff present in the ground and they were accommodated in a tent pitched for this purpose in the S.A.P. ground itself. On 22.9.1986 S.A.P. Unit Doctor Shri V.J. Joseph and medical attender Shri Lekshmanan were present at the spot. In addition to this, there was an ambulance vehicle with driver, a Havildar of S.A.P. unit with vehicle and a motor cycle rider with a motor cycle to attend to any emergency were also on duty.

10. Defendants 1 and 3 also contended that after the deceased sustained injury, he was immediately attended to by the Doctor present there and then he was taken to the Medical College Hospital for further treatment. He was immediately attended to and first aid was given before taking to the Medical College Hospital. It is also contended that there was no defect in the facilities and the arrangements for the test. When the deceased jumped, he fell down on the hard ground and sustained injury. In paragraph 14, it is contended that the first defendant is a statutory body which is functioning under law for the purpose of recruitment and accordingly the applications for

appointment were invited and processed. What is expected to be done by defendants 1 to 3 have been done with due care and caution. It is contended that they are not liable to pay any amount of compensation to the plaintiff.

11. The 8th defendant is a Doctor. He is an Assistant Professor in the Department of Orthopaedics, Medical College, Thiruvananthapuram. In paragraph 4 of the written statement filed by him, it is stated that the injury as stated, is not a serious one and it will not result in death. The alleged secondary complication also will not lead to death in a short span. It is further contended that as on the date of accident, he was not on duty in Unit I of the Medical College Hospital, Thiruvananthapuram.

12. In the written statement filed by the 9th respondent, the Superintendent of Medical College, Thiruvananthapuram, it is contended that the deceased was given proper care and attention by the Doctors of Orthopaedic Department and that even after giving proper treatment the Doctors of the Medical College, Thiruvananthpuram could not save the life of the deceased. It is stated further that all the

available medicines and treatment were given to the deceased immediately he was brought to the hospital and the averment that the Doctors are negligent, was also denied.

13. Exts.A1 to A25 were marked on the side of the plaintiff and P.Ws.1 to 3 were examined. Ext.B1 was marked on the side of the defendants and D.Ws.1 and 2 were examined.

14. The plaintiff was examined as P.W.1 and P.W.2 is one of the elder brothers of the deceased who had gone along with the deceased on the date of test. P.W.3 is a candidate who attended the test. D.W.1 is the third defendant and D.W.2 is the Doctor who gave first aid to the deceased.

15. The court below found that proper care and caution was not taken by defendants 1 to 4 and there were negligence and laches on their part. It was held that defendants 1 to 4 did not give effective first aid also to the deceased. It was also found that if proper examination was done in the Medical College and if the patient was subjected to thorough check-up apart from the routine process, they could have found out the seriousness sufficiently early. During the course of the

discussion, the court found that there was sheer negligence in giving adequate medical care and there was no contest by defendants 5 to 7. Going by the evidence of P.W.2(brother of the deceased), the specialist doctor, viz. Dr. Krishnadas who examined the patient on the day on which the operation was proposed, opined that bone marrow fused with blood and blocked the functioning of the lungs and heart and then only the other Doctors knew about the seriousness.

16. While quantifying the quantum of compensation, the monthly income of the deceased was fixed at Rs.1,150/- . He was aged 26 years at the time of accident and the life expectancy of the plaintiff was calculated for a period of 20 years and by calculating the financial benefit of Rs.1,000/- per month, the total compensation was fixed at Rs.2,40,000/-. His future promotion chances were also considered for fixing the amount.

17. In A.S. No.99/2002 filed by the Public Service Commission on behalf of it and on behalf of defendants 2 to 4, learned Standing Counsel for the Commission submitted that there was no lack of care in preparing the long jump pit. It is submitted that the pit had a width

of 3 metres and length of 7 metres. The take off point was 3 metres from the pit and by relying upon the oral evidence of D.W.1 who is the third defendant in the suit, it is submitted that the deceased fell partly on the hard ground and partly in the pit and therefore it is only because of the lack of capability of the deceased that he sustained injury. It is submitted that in the selection the candidate who clears 15 ft. would be considered as qualified. It is therefore submitted that defendants 1 to 4 could not be alleged of any negligence in conducting the test. No injury has been caused to any other candidates and there was no complaint also. While explaining the evidence of D.W.1, learned counsel submitted that the pit was arranged through the S.A.P. D.W.1 was working as a Deputy Commandant and was one of the members of the Board which conducts Physical Efficiency Test. By heavily relying upon the evidence of D.W.1, it is submitted that the allegation in the plaint that no first aid was given and the candidate was remaining unattended for half an hour is not correct. A Doctor was already there in the tent, arranged in the ground and after giving first aid he was taken in an ambulance to the Medical College. Therefore, it

is submitted that in conducting physical efficiency test no kind of negligence could be attributed to defendants 1 to 4 and the injury was caused only because of the inexperience of the candidate in clearing the hard surface.

18. Learned counsel for the plaintiff, while answering to the above contentions, submitted that the evidence will show that the long jump pit was not one dug below the surface. Actually, they had spread sand over the hard surface itself. This is spoken to by P.Ws.2 and 3. This has caused the accident. Actually the deceased had jumped correctly and because of the small size of the pit he had reached the other side of the pit. Thus, it is submitted that the preparation of pit was not in a scientific manner and with due technical expertise which alone has caused the accident. It is submitted that the candidate cannot be blamed for the said fault. The deceased was a product of Sainik School, and was proficient in sports and games and was well qualified in karate. He also submitted relying upon the evidence of P.Ws.2 and 3 that the suggestion by the defendants that the candidate did not reach the pit and fell down in the point between the hard surface and soft

surface, is not correct. He also submitted that the Public Service Commission had the duty to maintain proper standards. There is no evidence on their part either with regard to the specifications made for preparing the pit or to the instructions given to the third defendant (D.W.1). None of the relevant documents have been produced before the court to show that they had taken proper care.

19. It is also submitted that actually the deceased, after sustaining injury, remained lying there and only for clearing the pit for the other candidates to continue the event, he was removed to the side of the pit by the persons standing nearby including Policemen and no Doctor was available there for giving immediate attention. In this context, he relied upon the evidence of P.W.2. It is submitted that P.W.2s evidence will show that he had to call the Doctor and had to arrange everything including ambulance to take the deceased to Medical College Hospital. Even in the Medical College Hospital he was kept waiting in the verandah for some time. Learned counsel submitted that the Doctor who had attended the deceased near the jumping pit gave only first aid and the Medical College authorities and the Doctors had

to take immediate measures after proper medical examination. It is submitted that he was put on traction in a routine manner without further investigation. When the anesthetist came on the fourth day on which date a surgery was proposed to be done, he opined that it will be dangerous to put him in anesthesia and then Dr. Krishnadas came and examined the patient and found that his condition was remaining worse. P.W.2 asked for discharge of the patient to take him to Vellur Medical College, but the Doctor said that the next 72 hours will be crucial and he died before expiry of 72 hours. The reason for death noted by the Medical College Hospital is fat embolism. It is submitted that bone marrow got fused with blood, thereby the heart and lungs were blocked. It is submitted that it is purely due to medical negligence in not extending medical help in time and in giving him proper treatment for the fracture.

20. Learned counsel further submitted that none of the treatment records have been produced by defendants 5 to 8. There is no evidence before the court to prove the measures, if any, they had taken from the time when he was admitted in the Medical College Hospital, the

treatment given, the details of the medicine and other procedures adopted. Therefore, it is submitted that this is a clear case where the death was caused due to medical negligence.

21. Learned counsel appearing for the 8th respondent submitted, based on the written statement filed by him, that he was an unnecessary party in the suit and actually the deceased was admitted in Unit I of the Orthopaedic Department and he was in Unit II of the said department.

22. On the above, the following points arise for consideration: (i) Whether defendants 1 to 4 who are appellants in A.S. No.99/2002 are guilty of negligence in conducting the test, in preparing the long jump pit and are responsible for causing injury to the deceased; and (ii) The responsibility for medical negligence leading to his death and the amount of compensation.

23. Before going into the contentions of the parties, we will refer to the oral and documentary evidence in the matter. P.W.1 is the plaintiff. Her husband died subsequent to the filing of the suit. According to her, the deceased had completed four items and while performing the fifth item, viz. long jump, he reached beyond the pit

and sustained the fracture to the right leg. Nobody took care on him for half an hour. Her another son, P.W.2 and two other friends went to the S.A.P. Hospital and brought the Doctor. Without giving any first aid the Doctor referred the patient to Medical College Hospital. The Police took him to the hospital. Since it was raining during the previous day, there was no sand in the pit and it was a small one also. In the Medical College Hospital, he was remaining in the stretcher for about one hour and the Doctor who attended the deceased gave an opinion that it was not serious and the deceased was put in traction. According to him, it was a butterfly fracture. After four days, his condition became serious and then the Doctor said that it was a new illness as the bone marrow got fused into his heart. There was suffocation in the lungs also and he died on 29.9.1986. According to her, if he was properly attended and surgery was done at the correct time, his life could have been saved. She deposed that defendants 1 to 4 were negligent in preparing the ground for the test and defendants 5 to 8 were negligent in not giving him proper treatment. Various documents were marked through her. According to her, his monthly salary from the Bank was

Rs.1,150/- and he was an instructor in karate. P.W.1 was residing in a rented house and other three children were residing separately with their family and she was depending upon only the deceased and the pension amount of her husband. Her husband was an officer in Military. It was deposed by her in cross examination that her husband and elder son had gone along with the deceased son on the day of the test and nobody was allowed to enter the ground. In cross examination she denied the suggestion that in the ground medical facilities were provided. Actually, the initiative was taken by her husband and son to take him to the Medical College Hospital.

24. P.W.2 is the elder brother of the deceased. According to him, normally the pit will be made after digging and by filling and spreading sand. But in the S.A.P. ground the pit was made by spreading sand over its surface. It was a small pit having the measurement of 10 - 12 ft. The deceased had jumped beyond the pit and he fell down after fracturing his right leg. No external injuries could be seen and after he fell down, he was just laid outside it. There was no doctor or vehicle to take him and P.W.2 and two others were

went to S.A.P. Hospital and brought the doctor. The Doctor covered his leg with bandage and he was taken to the ambulance by the Policemen with hands and not in any stretcher. No ambulance was there, but it was arranged later. He was taken to the Medical College Hospital and after reaching there, he was kept in the verandah in a rolling stretcher for some time. Himself and one of the friends of his brother went and brought a doctor and after taking X-ray he was removed to the ward wherein his leg was put in traction. Then itself the doctor informed that it was a butterfly fracture and that the fracture caused cutting of veins around and 1 ½ litres of blood was already collected in the clot. He was admitted on Monday and on Tuesday and Wednesday no further treatments were done. On Wednesday the Doctor said that on the next day an operation has been fixed. On Thursday when the deceased was examined by the anesthetist he informed that operation cannot be conducted as he may not regain conscience. Immediately, the specialist doctor, Dr. Krishnadas came and examined him and he gave his opinion that bone marrow travelled through the ruptured blood vessels and has reached the heart and lungs blocking

them and the next 72 hours will be crucial. It was informed by the Doctor that the above condition is known as fat embolism. Then permission was sought by P.W.2 to take the deceased to Vellur Medical College, but the Doctors advised to take him only after 72 hours and before completing 72 hours, he died on Sunday, 29.9.1986 at 2.30 p.m.

25. At the time when the accident occurred, P.W.2 was working in Airforce and had been on leave during Onam season. He was having 15 years of service in Airforce. He knows various matters about sports as he has worked in the capacity of I Kerala AIR Squadran NCC officer. During the time of accident, his brother was staying along with the parents in the family house as others were living separately after marriage and he was looking after their affairs and that the only income now for the mother is the pensionary benefits of the father. The plaintiff is staying now in a rented house.

26. It was also deposed by him that his brother had passed the test for selection in the National Defence Academy and he was having flying licence and had passed the CRPF Deputy Commandant test also. He was a black belt holder in karate and was an instructor in the karate

school. According to him, his brother got injured as the jumping pit was prepared unscientifically and as there was not even a facility for giving first aid and due to medical negligence. In cross examination he reiterated the stand that the pit was having a length of 10 - 12 ft. and width of 5 - 6ft. Sand was spread over the hard surface of the ground and not by digging the ground. All the candidates had jumped in the same spot and take off line was drawn near the pit. He was standing some distance away, in a mud wall. According to him, there was no proper dimension for the pit and the deceased fell beyond the pit. It was also deposed by him that measurements were being taken after everyone of the candidates completed jumping. Again he reiterated that there was not even the facility to have first aid and the Doctor had arrived from the camp to attend the deceased. He denied the suggestion that the deceased fell down due to wrong take off. There were several oral complaints from among the candidates about the long jump pit.

27. P.W.3 was another applicant who participated in the events. He was working as a Police Constable in Trivandrum Armed Reserve

at that point of time. According to him, the pit was prepared only for the conduct of the test temporarily and the jumping pit was prepared by spreading sand in the hard ground itself which had 5 - 6 ft. in width and 12 - 13 ft. in length, approximately. On the previous day it was raining and the ground was actually made of red earth. There was a temporary tent provided for taking physical measurement of candidates. Only persons who were found fit after measurements alone were to participate in the sports events. The deceased had taken part in the long jump and he fell beyond the pit in the hard ground. Beyond the ground in an upper lying portion the relatives and parents of the candidates were waiting and they were keeping the dress of the candidates. After he fell down, he could not get up and after 2 - 3 minutes he was lifted and laid nearby by 2 - 3 people. This was for making provision for the next person to have the long jump. According to him, there was no facility for providing first aid in the ground and actually the deceased was carried away by other people and there was not even any stationary vehicle. As himself and other candidates went for participating in the next item, he is not personally aware about the

subsequent happenings.

28. In cross examination, P.W.3 deposed that out of eight sports items, five had to be completed by the candidates. Himself and the deceased participated together. He did not qualify in the long jump test. He also deposed that he was standing about 25 ft. away from the deceased at the time when he sustained the injury.

29. On the part of the defendants, D.Ws.1 and 2 were examined. D.W.1 is the third defendant. He was a Police official working as Deputy Commandant. On the basis of the communication from the Public Service Commission, he was a member of the Board for conducting Physical Efficiency Test which was concurred by his department. In the appointment letter instructions were also supplied and in tune with the same the Physical Efficiency Test was conducted from 22.9.1986 to 29.9.1986. He deposed that he was in possession of the instructions received from the P.S.C.. Altogether, in eight items Physical Efficiency Test had to be conducted. According to him, before starting of the Physical Efficiency Test, the standards and measurements were fully explained to the candidates and only after

they were made aware of it, the test had to start. The Board had a technical member and he had to examine and then report to the Chairman and other board members. Apart from the same, in tune with the instructions from the P.S.C., it was incumbent on the Chairman to keep the accuracy of all the measurements. Instruction was also there that the Chairman and Board members will have to verify the measurements personally before starting of the test on each day of the test. Ext.B1 is a portion of the result sheet. Against register No.539, it was noted that the candidate concerned is hospitalised after sustaining injury. The said candidate had participated in three items, viz. 100 metres race, high jump and long jump and did not succeed. There would be a representative of the P.S.C. also and the said person has to prepare the list of the candidates who have been invited for the test. The first step is verification of certificates by the representative of the P.S.C. and thereafter only physical efficiency test will be conducted. Before the conduct of the test, height and chest measurements will be taken. Only the persons who qualify in the physical test alone will be permitted for physical efficiency test. The board members, candidates

and the Doctor and staff alone will be there in the ground and there will be Police officials and Police constables to conduct the test also. For long jump the minimum requirement was to cover 15 ft. and a person who jumps 15 ft. will qualify for the said item. Regarding the length and width of the pit, he deposed that it was having 3 metres width and 7 metres in length and the take off point was at a distance of 3 metres. The candidates will have to jump from that point. 15 ft. marking was also there. A candidate gets three chances. According to him, the pit was dug to a depth of 6" - 9" and sand from seabed was spread in the pit.

30. According to D.W.1, the deceased even though jumped from the take off point, he could not completely reach the pit and he fell down in the place where the hard ground meet the soft ground of the pit. He did not jump even 10 ft. and for which the board members and himself were witnesses. After he fell down sustaining the femur fracture, he was laid to the side of the pit and the Doctor and staff gave him first aid. He was taken to the ambulance in a stretcher and was sent to the Medical College Hospital. When he was being given first

aid his address and other details and phone numbers were collected by him and a messenger was sent to his house in a motor cycle. He sustained injuries by about 11 a.m. and by 11.15 a.m. he was taken to the Medical College Hospital. There was no external injury. He believed that due to defective jumping, the injury was caused. In the cross examination, he stated that he was one of the members of the board entrusted with the task of conducting physical efficiency test. The second defendant was the Chairman and the 4th defendant was the expert member. He had performed his duties as instructed by the P.S.C. and therefore the written statement was filed together with the P.S.C. According to him, the second defendant who was the Chairman, had forwarded a report to the P.S.C. in writing. To a specific question he answered that everything has been mentioned in the report. According to him, the Chairman had written to the Secretary of the P.S.C. about the incident. In the written statement no averments are there with regard to the communication between the Chairman and the P.S.C., as it was felt not proper to mention it.

31. To a specific question whether he could speak authoritatively

about the sports items, D.W.1 stated that he is not a sports expert and he joined service as Sub Inspector of Police and that at the time of Physical Efficiency Test he was in the rank of Superintendent of Police. According to him, there was a technical expert in sports in the committee. Long jump pit was prepared on the western side of the ground. He reiterated the details about the measurements as spoken to in chief examination. According to him, from the edge of the pit upto the take off point there was 3 metres distance and from that place to the opposite edge it was 7 metres in length. To a suggestion that the deceased was attended to and was removed to the side of the pit by some candidates and others, he answered that the Policemen on duty and the officers and participants would have helped in the matter. He denied the suggestion that ambulance, stretcher and para medical staff were not there. According to him, the father and brother of the deceased were not in the spot at that time and he got the phone number and house address from the deceased himself. To a specific question as to whether the Chairman Shri Upendra Varma had been in charge of conduct of the test, he answered that the Chairman and all the

members of the board were performing their assigned duties.

32. The evidence of D.W.2, the Doctor is to the effect that first aid was given to the deceased on 22.9.1986. He was on duty when the Physical Efficiency Test was conducted and the medical team was remaining there in the tent erected and located towards left side from the centre of the ground. In the medical team there was a nursing assistant and 5 - 6 Policemen and there was facility for providing first aid. When the candidate sustained fracture on 22.9.1986, there was no external injury and in the fractured portion splints were applied and by 11.15 a.m. he was sent to the Medical College in an ambulance along with a reference letter. At that time he was fully conscious also. According to him, half of the body of the deceased was found outside the pit and one-fourth of the remaining portion was in the pit. According to him, first aid was given while the deceased was remaining in the pit itself and after splint and cotton were applied, he was taken in stretcher to the ambulance and to the Medical College Hospital. According to him, the deceased was found healthy and normally a femur fracture could be cured by proper treatment. He

denied the suggestion of any medical negligence on his part. In re-examination he stated that he was not a specialist.

33. We will now refer to the contents of medical records. In Ext.A7 reference letter issued to the Medical College Hospital by D.W.2, the details of injury are given as "Fracture right femur". He was referred to Orthopaedic OP/casualty of Medical College Hospital, Thiruvananthapuram. The time of reference is not seen recorded in the above letter. Ext.A8 is the outpatient ticket of the deceased. In the said card no external injury has been noticed but "swelling thigh" is recorded. It is also recorded as follows:

> "Limb shortened, thigh segment splinted - swelling thigh - No external injury."

34. Going by the documents marked in evidence by the plaintiff, it is clear that the deceased was proficient in sports as well as in karate. Ext.A11 is the identity card issued from Karate school and Exts.A11(a) to A11(c) are Karate School Certificates. Ext.A11(d) is NCC certificate and Ext.A12 is the Student Pilot's licence. Ext.A13 to A14(a) are also certificates showing his proficiency in sports, NCC, etc. Ext.A14(b) is

the certificate from Kerala Handball Association. Ext.A15(a) is the certificate from District Basketball Association, Ext.A15(b) to A16(a) are also certificates Government Arts College. Ext.A17 is the letter from the Chief Minister. Ext.A18 is the certificate from Kerala Aviation Training Centre and Ext.A19 is the certificate from NCC Directorate. Ext.A20 is the certificate from University of Kerala.

35. That the deceased was perfectly healthy is clear from the evidence of D.W.2 Doctor also. He had proficiency in sports, karate and other activities as evident from the deposition of P.Ws.1 and 2 and the documents produced on behalf of the plaintiff.

36. Even though it is contended by the learned counsel for defendants 1 to 4, viz. the appellants in A.S. No.99/2002 that proper care and caution was taken to prepare the pit and there was no lapse on their part, the evidence of D.W.1 is not supported by any documents. It is clear from the deposition of D.W.1 that there were detailed instructions issued by the P.S.C. to the members of the Board which conducted the Physical Efficiency Test of which the second defendant was the Chairman and fourth defendant was the technical member.

According to him, the Chairman will have to give various instructions and will have to satisfy himself about the preparations. There is total lack of documentary evidence on the part of defendants 1 to 4 with regard to the instructions given for conduct of the test, the standards prescribed and other matters relating to the preparation of long jump pit including its measurements and the manner in which the long jump pit was to be verified and certified and found to be in proper standards. Even with regard to the take off point and the distance to be cleared by the candidates, there was only oral evidence on the part of D.W.1. Evidently, it is not a competition but a selection. A candidate will have to clear the minimum distance alone. The appellants have not produced the score sheet of any candidate and Ext.B1 only records that the deceased was injured and taken to the hospital. Therefore, there is total lack of evidence on these important and vital matters on the side of the appellants in A.S. No.99/2002. No competent officer from the P.S.C. has been examined.

37. When the plaintiff alleged in paragraph 8 of the plaint that the jumping pit was of substandard condition and the deceased sustained

fracture on account of the substandard condition of the ground, it was incumbent on defendants 1 to 4 to prove their contentions by proper documentary evidence also. Even in the written statement no sufficient details have been furnished with regard to the standards prescribed for the jumping pit for long jump and as to how defendants 1 to 4 were satisfied about its quality. They only said that the pit is one located in the SAP Parade ground. Even though in the written statement it is stated that before commencement of each item the technical expert, who is one of the members of the Board, had personally checked the accuracy and correctness of the measurements and the conditions of ground, long jump pit and other equipments required, no evidence has been tendered in support of the same. The technical expert has not been cited as a witness and was not examined. None of the documents covering the conduct of the test including the details which would show the preparation of pit and other relevant aspects have been produced and marked in evidence. Therefore, there is no evidence worthwhile on the part of defendants 1 to 4 (appellants in A.S. No.99/2002) to prove the same. These are aspects within the special

knowledge of the said appellants alone. Therefore, there is clear failure on the part of them to plead and prove the various essential details as regards the jumping pit.

38. Even though in the oral evidence of D.W.1, he deposed that along with the appointment letter for conducting the Physical Efficiency Test, detailed instructions were given by the P.S.C., they have not been produced. Being a selection for a post, the candidates had no other choice also. There is no evidence to show that the candidates were told about the details of the pit and other measurements. There is no evidence to show that the Chairman and the members of the Board had examined the pit and were satisfied about its condition. Therefore, the version of D.W.1 that the candidates were told about the conditions orally, cannot advance the case of the appellants. It is also in evidence that there was a representative of the P.S.C., but he was also not examined in support of the plea of the appellants, as to the measures taken. These aspects could have been proved only by examining the technical member and the oral evidence of D.W.1 that he was satisfied about the pit, cannot advance the case of

the appellants. What are the standards prescribed, the measurements including the length and width of the pit, etc. are not thus properly proved in evidence. It is evident, even going by the deposition of D.W.1, that there was report sent by the Chairman to the Secretary of the P.S.C. The same was also not marked or produced in evidence. Therefore, the essential documents have been withheld from the court which thus leads to taking adverse inference in all these matters. Except and first and third defendants, defendants 2and 4 have not filed any written statement showing these details. In this context, the evidence of P.Ws.2 and 3 are relevant. P.W.3 is a candidate who had participated in the test. Both of them have deposed before the court that there was actually no dug up pit but only the hard surface of the ground over which sand was spread. Both of them have unanimously deposed that there was rain on the previous day. The ground was prepared by red soil.

39. It is evident that the deceased sustained injury because of his contact with hard surface. The pit had to be prepared in such a manner as to avoid any such accident also. When such events are conducted, it

would be only normal to think that the persons who are entrusted with the task of conducting the test will be aware of the possibility of the candidates getting injured, if they come into contact with the hard surface. Therefore, apart from the jumping pit, they had to prepare the surroundings in a manner which will be conducive for the protection of the candidates and to avoid any health hazards to them. Hence, the appellants cannot take recourse to the version that it was due to the false jumping of the deceased that he came into contact with the hard surface. Even going by the evidence of D.W.1 and D.W.2 doctor, he had reached the pit also. Even though the evidence of D.Ws. 1 and 2 is to the effect that he fell before reaching the pit, the evidence of D.W.2 will show that first aid was given in the pit itself which will definitely prove that he was lying in the pit. Therefore, as regards these aspects and as to the hard nature of the surface, the softness of the pit and the conditions prescribed, there is no real contra evidence.

40. In this context it is clear that the doctrine of res ipsa loquitur will apply. Even if the P.S.C. has been performing a statutory duty in conducting the test for selecting candidates for appointment, it owes a

duty of care to avoid danger to the candidates who participated in the physical efficiency test. In this context, we will refer to the decision of a Division Bench of this Court in **Marakkar v. State of Kerala** (2009 (4) KLT SN 33 = ILR 2009 (4) Ker. 681) wherein the duty of public authorities has been explained.

41. Even though learned counsel for the P.S.C. argued that negligence need not be attributed on the part of the Commission, we find that the evidence show otherwise. It is well settled by judicial principles that negligence is a breach of duty caused by the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do. In a case where the defendants owes the duty of observing sufficient care and skill and if there is neglect of the same and the plaintiff suffered an injury to his person, the same will be actionable. As far as the legal right of a person is concerned, it includes private rights and public rights and private rights also will include rights of bodily safety. (See the Law of Torts by Ratanlal &

Dhirajlal - 26th Edn. pages 134 and 457, paragraph 135 - **Malay Kumar Ganguly v. Dr. Sukumar Mukherjee and others** - (2009) 9 SCC 221).

42. The Division Bench in **Marakkar's case** (supra) also considered the dictum laid down by the Apex Court in **Rajkot Municipal Corporation v. Manjulben Jayantilal Nakum** {(1997) 9 SCC 552} wherein it has been held that the ordinary principle of law of negligence applies to public authorities also. It was also held by the Apex Court that it should be considered whether a duty of care situation exists in public law tort which the law ought to recognise and whether in that situation the defendant's conduct was such that he should have foreseen the damage that would be inflicted on the plaintiff. We extract hereinbelow paragraphs 41, 42 and 43:

> "41. It has been noticed in the decision reported in *Rajkot Municipal Corporation v. Manjulben Jayantilal Nakum* ((1997) 9 SCC 552) that normally the public authorities are held liable only for positive action (mis-feasance) and not for omission (non-feasance). However, it is held that the ordinary principle of law of negligence applies to public authorities also. They are liable to damages because by a negligent act or failure to act

when they are under a duty to act or for a failure to consider whether to exercise a power conferred on them with the intention that it would be exercised if and when public interest requires it. It is also pointed out in the said decision that Where a public authority has decided to exercise a power and has done it negligently a person who has acted in reliance on what the public authority has done, may have no difficulty in proving that the damages which he has suffered have been caused by the negligence.

42. Statutory power may not be like a statutory duty. The proper approach according to the Apex Court is to consider whether a duty of care situation exists in public law tort which the law ought to recognise and whether in that situation the defendant's conduct was such that he should have forseen the damage that would be inflicted on the plaintiff. It has been held that public authorities discharge public obligations to the public at large. Therefore, it owes a duty of care at common law to avoid causing present or imminent danger to the safety of the plaintiff or a class of persons to which the plaintiff belongs. It is a statutory duty of care under common law which could give rise to actionable claim in the suit of the individual and it is capable of coexistence alongside a statutory duty.

43. Even though as already observed, initially law was shy to mulct public authority with liability for negligence etc, the law

did not remain static. The rule of law requires that the wrong should not go unredressed. Law of Tort is founded on the principle that every injury must have a remedy. In the decision reported in *Union of India v. United India Insurance Co. Ltd.* (AIR 1998 SC 640) the common law principle of awarding compensation was applied. Going by the above principle, it is abundantly clear that merely because no statutory duty as such has been pointed out against the defendant that by itself is no ground to reject the claim of the plaintiff."

43. Even though learned counsel for the appellants in A.S.No.99/2002 submitted that the plaintiff has not discharged her burden, we are sure in our mind that the said burden has been discharged by the plaintiff by showing that the accident itself had occurred while attending the physical test. In a case like this, it is evident that the principle of res ipsa loquitur will apply.

44. In **K.S.E.B. v. Kamalakshy Amma** (1986 KLT 1124), in paragraph 9, a Division Bench of this Court held that "the maxim "res ipsa liquitur" is a principle which aids the court in deciding as to the stage at which the onus shifts from one side to the other. Section 114 of the Evidence Act gives a wide discretion to the courts to draw

presumptions of fact based on different situations and circumstances. This is in a way, a recognition of the principle embodied in the maxim "res ipsa liquitur". Their Lordships have explained the principle in the following manner:

> "9.....The leading case on the subject is *Scott v. London and St. Katherine Docks Co.* ((1865) 3 H & C 596). Erle C. J. in the said case has stated that, "where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, *it affords reasonable evidence*, in the absence of explanation by the defendants, that the accident arose from want of care." Evershed M. R. in *Moore v. R. Fox & Sons* ((1956) 1 Q. B. 596) affirmed and followed the principle laid down in Scott's case. Winfield in his famous treatise on Tort, after referring to the decisions which founded the above doctrine, has mentioned the two requirements to attract the above principle. They are, (i) that the "thing" causing the damage be under the control of the defendant or his servants, and (ii) that the accident must be such as would not in the ordinary course of things have happened without negligence. This principle which was often found to be a helping guide in the evaluation of evidence in English decisions has been recognised in India also. The Supreme Court in *Syad*

Akbar v. State of Karnataka (AIR 1979 SC 1848) has discussed the applicability of the maxim res ipsa loquitur in civil as also criminal cases, in the light of the provisions of the Indian Evidence Act. Sarkaria, J. in the said decision has observed as follows:

> "The rule of res ipsa loquitur in reality belongs to the law of torts. Where negligence is in issue, the peculiar circumstances constituting the event or accident, in a particular case, may themselves proclaim in concordant, clear and unambiguous voices the negligence of somebody as the cause of the event or accident. It is to such cases that the maxim res ipsa loquitur may apply, if the cause of the accident is unknown and no reasonable explanation as to the cause is coming forth from the defendant. *The event or accident must be of a kind which does not happen in the ordinary course of things if those who have the management and control use due care.* Further the event which caused the accident must be within the defendant's control. The reason for this second requirement is that *where the defendant has control of the thing which caused the injury, he is in a better position than the plaintiff to explain how the accident occurred*."

45. Therefore, by applying the said principles, we are of the view that as far as the accident herein is concerned, it cannot happen in normal circumstances. The duty of care and caution to be exercised by defendants 1 to 4 (appellants) was of a high degree of standard. It is clear that by failing to adduce evidence in the matter as to the standards prescribed for the pit, the precautions taken, the manner in which the

technical member and other board members were satisfied about the pit, etc. the appellants have failed to discharge their burden. Therefore, clearly this is a case where negligence on them has been proved by the plaintiff. The doctrine of res ipsa liquitur will apply. Therefore, on the evidence a presumption will have to be drawn that the appellants in A.S.No.99/02 were negligent in the matter in causing the accident and they are primarily responsible for the injury sustained by the deceased.

46. As regards the removal of victim to the hospital, there are conflicting versions. According to P.Ws.2 and 3, the Doctor was summoned and was not present at the site. Of course, what was applied by the Doctor is only first aid with the help of splint and cotton. It is evident going by the evidence of DW.1 also that immediately after he fell down, he was just laid on the side of the pit and was helped by Policemen and other candidates. As to the sufficiency of medical aid apart from giving first aid, there is no real evidence. Of course, the Doctor is attached to SAP Hospital. The trial court was of the view as regards these aspects, that there were some laches on the part of the authorities also to get the injured admitted in the hospital without any

delay. We agree with the said view, as relevant evidence is not there with regard to the quality of medical aid that was arranged at the spot when large number of candidates had to participate in the test.

47. The evidence of P.W.3 who was a candidate, is to the effect that in the tent erected in the ground physical measurements were being taken. P.W.3 and D.W.1 have deposed that only after measurements were taken, the candidates who qualify were admitted to the physical efficiency test. D.W.2's version therefore that the tent was erected for the use of medical team cannot be believed. P.W.2's evidence that the Doctor was brought from the SAP Hospital is thus more probable. That the candidate was given first aid while lying in the pit itself shows that medical facilities provided were inadequate. Therefore, there were nothing worthwhile to meet an emergency during the test which had been scheduled for about 9 days from 22.9.1986 to 29.9.1986. The composition of the medical team, even if the version of D.W.2 is true, was himself and a nursing assistant and 5 - 6 Policemen. The same evidently, cannot be termed as a properly constituted medical team. The argument that no other candidate was injured, is not a

reason at all.

48. The next aspect is regarding medical negligence leading to the death of the victim. We have already referred to the contents of the plaint, especially paragraphs 11 and 12. The deceased was taken to the Orthopaedic wing of the Medical College Hospital, Thiruvananthapuram and it is averred that he was left uncared and unattended in a stretcher in the verandah of the outpatient wing of the said department and only after the bystanders raised a hue and cry, the 6th defendant came and attended him. He was admitted in the general ward. It is averred in paragraph 12 that there was utter mismanagement of the patient and the exact nature of the injury was not properly found out and no preventive action was taken to avoid complications. It is averred in paragraph 13 that the patient thereafter developed secondary complications and he died on 29.9.1986.

49. In the written statement filed by the 9th defendant State, the only averment in paragraph 3 with regard to the treatment given, is that the deceased was given proper care and attention by the Doctors of the Orthopaedic Wing and that there was no negligence. It is stated in

paragraph 4 that even after giving proper treatment, his life could not be saved. The written statement is shorn of details of the diagnosis, the treatment extended and the nature of the complications developed and the proper reason for the same. Nobody has been examined on behalf of defendants 5 to 9 and the treatment records have not been produced before the trial court also.

50.PW2 was with the patient even from the time of admission. Going by his evidence, after the deceased was taken to the Medical College Hospital in an ambulance he was left in the verandah in a rolling stretcher and no Doctors were there and later he along with one of the friends of the deceased went and brought a Doctor. After taking X-ray he was removed to the ward and the leg was put in traction. The Doctor informed then that it is butterfly fracture and that the bone has broken into two and the veins have been cut leading to collection of blood of about 1½ ltrs. This had happened on a Monday and on Tuesday and Wednesday no further treatments were extended.When P.W.2 met the Doctor on Wednesday, he was informed that operation will be conducted on Thursday and on Thursday afternoon the anesthetist

(Doctor) came and examined the patient and he stated that operation cannot be conducted as he may not regain consciousness once anesthesia is applied. Thereafter, one specialist doctor, Dr. Krishnadas came and examined him and he informed that the bone marrow has reached the lungs and heart through the nerves which blocked the functioning of lungs and heart and the next 72 hours will be crucial and that the situation was explained as fat embolism. P.W.2 then sought for permission to take him to Vellur Medical College and the Doctor said that he can be removed only after 72 hours, but before the expiry of 72 hours, he died at 2.30 pm. on Sunday. PW2 was working in Airforce at that point of time and had been on leave during the period. In cross examination by 8th defendant, it is further stated that X-ray was taken after the patient remained in the casualty for about 1½ hours.

51. In the death certificate issued from the Medical College Hospital, Thiruvananthapuram marked as Ext.A5, in the column under the caption "cause of death" the "immediate cause" is shown as "ARDS following pulmonary fat embolism" and the "antecedent cause" is shown as "fracture shaft of femur right - sports accident."

52. Evidently, the plaintiff has discharged her burden of proof by leading evidence by examining herself as P.W.1 as also P.W.2. As we have already noted, there are no details in the written statement of the 9th defendant as to how the complications developed after he was admitted in the Medical College Hospital, Thiruvananthapuram itself which has got facilities of high quality and standard with experts. It is evident that for proper diagnosis and for treatment, expert opinion ought to have been obtained and it was possible also. He was admitted in the Orthopaedic department itself managed by several Doctors some of whom have been arrayed as defendants 5 to 8. There is no case for defendants 5 to 9 that complications have set in due to any unforeseen reason. There is no explanation as to whether any adequate steps have been taken for preventing fat embolism and any tests have been conducted. It is also clear from the evidence of P.W.2 that they were not informed about the complications and only when Dr. Krishnadas informed about the same, they were made award of it. It is clear that the Doctors had a duty to examine the patient thoroughly on admission and thereafter and not mechanically.

53. The principles as regards medical negligence have been examined by the Apex Court and this Court in different situations. In **Malay Kumar Ganguly v. Dr. Sukumar Mukherjee and others** {(2009) 9 SCC 221} there is discussion about the law of negligence under Tort law and particularly medical negligence, in paragraphs 135, 136, 143 and 145. We hereinbelow extract those paragraphs:

> "135. Negligence is the breach of a duty caused by the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do. [See Law of Torts, Ratanlal & Dhirajlal Twenty-fourth Edition 2002, at p.441-442] Negligence means "either subjectively a careless state of mind, or objectively careless conduct. It is not an absolute term but is a relative one; is rather a comparative term. In determining whether negligence exist in a particular case, all the attending and surrounding facts and circumstance have to be taken into account." [See *Municipal Corpn. Of Greater Bombay v. Laxman Iyer,* (2003) 8 SCC 731, para 6; Advanced Law Lexicon, P Ramanatha Aiyar, 3rd ed. 2005, p. 3161]
>
> 136. Negligence is strictly nonfeasance and not malfeasance. It

is the omission to do what the law requires, or the failure to do anything in a manner prescribed by law. It is the act which can be treated as negligence without any proof as to the surrounding circumstances, because it is in violation of statute or ordinance or is contrary to the dictates of ordinary prudence.

143. The law on medical negligence also has to keep up with the advances in the medical science as to treatment as also diagnostics. Doctors increasingly must engage with patients during treatments especially when the line of treatment is a contested one and hazards are involved. Standard of care in such cases will involve the duty to disclose to patients about the risks of serious side effects or about alternative treatments. In the times to come, litigation may be based on the theory of lack of informed consent.

145. In this respect, the only reasonable guarantee of a patient's right of bodily integrity and self-determination is for the courts to apply a stringent standard of disclosure in conjunction with a presumption of proximate cause. At the same time, a reasonable measure of autonomy for the doctor is also pertinent to be safeguarded from unnecessary interference.

The significant finding in paragraph 143 is that Doctors increasingly must engage with patients during treatments especially when the line of

treatment is a contested one and hazards are involved. They owe a duty to disclose to the patients about the risk of serious side effects or about alternative treatment. The courts will be justified in applying stringent standards in these matters.

54. In a recent decision of the Apex Court in **Balram Prasad v. Kunal Saha and others** {(2014 (1) SCC 384}, in paragraph 183, the Apex Court held, by relying upon the dictum laid down in **Paschim Banga Khet Mazdoor Samithy v. State of W.B.** {(1996) 4 SCC 37}, that right to health of a citizen is a fundamental right guaranteed under Article 21 of the Constitution of India. In the former case it was held that all the Government hospitals, nursing homes and polyclinics are liable to provide treatment to the best of their capacity to all the patients. In paragraph 184 it has been held that "the patients irrespective of their social, cultural and economic background are entitled to be treated with dignity which not only forms their fundamental right but also their human right."

55. Bearing in mind these principles we will examine the care and duty that the Doctors owe to a patient. One of the earliest

decisions of the Apex Court is the important decision in **Dr. Laxman Balkrishna Joshi v. Dr. Trimbak Bapu Godbole and another** (AIR 1969 SC 128). Therein, their Lordships have held, with regard to the duties of Doctors, as follows:

> "11. The duties which a doctor owes to his patient are clear. A person who holds himself out ready to give medical advice and treatment impliedly skill undertakes that he is possessed of skill and knowledge for the purpose. Such a person when consulted by a patient owes him certain duties, viz. a duty of care in deciding whether to undertake the case, a duty of care in deciding what treatment to give or a duty of care in the administration of that treatment. A breach of any of those duties gives a right of action for negligence to the patient. 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....."

56. A Division Bench of this Court has considered these aspects in **Adoration Convent v. Cicily** (2000 (1) KLT 84) wherein medical negligence was attributed. It was held in paragraph 22 that the principle of res ipsa loquitur will apply in such cases also. Therein,

reliance was placed on the decisions of the Apex Court in **Dr. Laxman Balkrishna Joshi's case** (AIR 1969 SC 128) and **Achutrao Haribhanu Khodwa v. State of Maharashtra** {(1996) 2 SCC 634}. In the later decision, viz. **Achutrao Haribhanu Khodwa's case** (supra), it has been held in paragraph 15 as follows:

> "15. In case where the doctors act carelessly and in a manner which is not expected of a medical practitioner, then in such a case an action in torts would be maintainable. As held in *Laxman* case by this Court, a medical practitioner has various duties towards his patient and he must act with a reasonable degree of skill and knowledge and must exercise a reasonable degree of care. This is the least which a patient expects from a doctor".

57. In **Ashish Kumar Mazumdar v. Aishi Ram Batra Charitable Hospital Trust and others** {(2014) 9 SCC 256}, in the case of medical negligence, the applicability of the principles of res ipsa loquitur was considered. We reproduce paragraph 10 of the above judgment hereinbelow:

> "10**.** The maxim res ipsa loquitur in its classic form has been stated by Erle C.J.

> *".....where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care.*" (*Scott v. London & St. Katherine Docks,* (1865) 3 H & C 596, 601)
>
> The maxim applies to a case in which certain facts proved by the plaintiff, by itself, would call for an explanation from the defendant without the plaintiff having to allege and prove any specific act or omission of the defendant.

In paragraph 11 reliance was placed on **Shyam Sunder v. State of Rajasthan** {(1974) 1 SCC 690} wherein the following dictum has been laid down:

> "11. In *Shyam Sunder and Others v. The State of Rajasthan*, (1974) 1 SCC 690, it has been explained that the principal function of the maxim is to prevent injustice which would result if the plaintiff was invariably required to prove the precise cause of the accident when the relevant facts are unknown to him but are within the knowledge of the defendant. It was also explained that the doctrine would apply to a situation when the mere happening of the accident is more consistent with the negligence of the

defendant than with other causes.

Applying the above principle, it is clear in this case that defendants 5 to 9 have not discharged their burden. The plaintiff's duty was only to prove the happening of the death and the application of the doctrine of res ipsa loquitur herein will be consistent with the negligence of the hospital.

58. As far as the complications which could be developed into fat embolism are concerned, we will refer to the relevant aspects discussed in the book titled "Principles and Practice of Forensic Medicine" by Dr. B. Umadethan who was the Professor and Head of the Department of Forensic Medicine in the Medical Colleges of Trivandrum, Alappuzha and Thrissur and is currently the Professor and Head of the Department of Forensic Medicine, Amritha Institute of Medical Sciences, Ernakulam. Therein, in Chapter 15 under the title "Medicolegal Aspects of Injuries", how fat embolism will develop and the complications can occur based on it, have been stated as follows:

> "Fat embolism develops as a complication of fracture of long bones, injury to fatty tissue/fatty liver and burns. The mobilised fat globules appear in the pulmonary capillaries.

> Even normal lungs may show a few fat globules. Pulmonary fat embolism is not significant unless it is so gross as to produce hypoxia. Pulmonary capillaries can only retain a certain amount of fat and when the threshold increases, fat will appear in the systemic circulation.
>
> In fat embolism syndrome, fat in the systemic circulation will reach many organs like brain, kidneys or myocardium. Systemic fat embolism will produce punctate haemorrhages in the organs. Obstruction of arterioles can cause infarction of tissues. In brain stem it can cause sudden death. Fat embolism can be detected by staining the frozen sections of tissue with stains like Oil red O, Sudan 3, Osmic acid etc. Fat globules can also be detected in blood. To the sample of blood, add few drops of Sudan 3, centrifuge and examine the top layer microscopically by making a smear."

Going by the above, when such a syndrome develops, the fat in the systemic circulation will reach many organs like brain, kidneys or myocardium. It will produce punctate haemorrhages in the organs. In brain stem it can cause sudden death. How the syndrome can be detected have also been explained therein.

59. The evidence of P.W2, as we have already noted, explains the information passed on by Dr. Krishnadas with regard to the above. The

patient herein was well educated and he was working as a Clerk in a Bank. P.W.2 was working in Airforce at the relevant point of time and it can be seen that he being well educated, there was no difficulty for the Doctors to inform him sufficiently early about the complications, if any, and the treatment to be given.

60. The absence of any evidence on the part of defendants 5 to 9 is therefore significant. There is no evidence that the hospital authorities and the Doctors have exercised due skill, care and caution expected from them while treating the patient. No effective steps have been taken to diagnose, detect and prevent fat embolism. As regards the treatment given in the last couple of days also, there is no evidence. Therefore, it can be presumed that there is clear negligence as well as omission and commission on the part of the said defendants.

61. Defendants 5 to 9 have not filed any appeal also in the matter. Learned counsel for the 8th defendant based on the averments in the written statement, submitted that he was not in the unit in which the patient was treated.

62. The view taken by the trial court with regard to the medical

negligence, in paragraph 9 is that in the light of the evidence of P.W.2, it can be seen that there was sheer negligence to give adequate medical care. It was held that till the examination of the patient by Dr. Krishnadas, the Doctors of the Medical College have treated the case as if it is a simple fracture of right femur and if proper examination was done and if the patient was subjected to thorough check up apart from the routine process, they could have found out the seriousness sufficiently early so as to give necessary medical care to save the patient. In the light of the discussion already made by us, we also concur with the above view. This is so, since none of the Doctors have been examined and the Superintendent of the Medical College Hospital has not examined himself or produced the medical records. The 9th defendant State of Kerala is vicariously liable for the death occurred.

63. Now we will come to the appeal filed by the plaintiff seeking enhanced compensation. The trial court has granted a total amount of Rs.2,40,000/- as compensation. Learned counsel for the plaintiff submitted that the deceased was the younger son who was looking after the parents including the plaintiff. He was having sound health

and was an able sportsman and a very efficient karate trainer. He was in good health and had high prospects in life. He was already working in State of Bank of Travancore as Cashier-cum-Clerk. It is submitted that while granting compensation, the trial court should have considered the fact that there is loss of love and affection as far as the plaintiff is concerned and the sudden death of her son has deprived of her of the same. The learned counsel therefore sought for enhancement of compensation.

64. As regards the award of compensation is concerned, the trial court has taken the average age of the plaintiff as 75 years and as she was aged 55 years at the time of filing of the suit, it was held that she could have obtained financial benefit for a period of 20 years. It was held that the deceased would have obtained enhancement of salary if he would have been alive and would have become an officer in the Bank. Accordingly, the financial benefit to the plaintiff was calculated as Rs.1,000/- per month and an amount of Rs.2,40,000/- has been granted. The salary certificate is produced as Ext.A22. Going by the same, his total emoluments in September 1986 is Rs.1,376.21 including

Bank's contribution towards P.F.

65. As rightly held by the court below, the deceased would have gone up the ladder in service and would have obtained promotions also. The plaintiff had also claimed that the deceased was getting an amount of Rs.1,750/- as trainer in karate in three training centres, but the court below has not reckoned any amount he was getting as karate trainer, for calculating the monthly contribution. The evidence of P.Ws.1 and 2 will show that he was educated in Sainik School, Kazhakoottam. Exts.A11(a) to A22 are the certificates showing his achievements in different fields.

66. The salary and other emoluments will have to be fixed after considering his future prospects also. Since he was only aged 26 years at the time of death, for future prospects an addition of 50% can easily be made. He would have obtained promotion as an officer also. Therefore, we will be justified in fixing the monthly salary at Rs.3,000/- which will be just and fair.

67. The plaintiff has claimed contribution at the rate of one third from the deceased to her. Even though 20 years further is taken as life

span, we do not interfere with the same, since the multiplicand herein is a lower one. Therefore, the loss of estate will be Rs.2,40,000/-. No amount has been awarded towards compensation for pain and suffering of the deceased, loss of love and affection of the mother, amount spent towards hospital charges including extra nourishment, bystander's expenses and transportation charges. Hospital bills and cost of medicine have been produced as Exts.A9 to A10(a) and the total amount is Rs.269.75. The deceased had sustained very serious injuries and had been in the hospital for a period of 7 days. Therefore, for pain and suffering we award an amount of Rs.20,000/- which will be just and fair. Towards loss of love and affection, we grant an amount of Rs.50,000/- and towards hospital charges, cost of medicine, extra nourishment, bystander's expenses and transportation charges, we award an amount of Rs.5,000/-. Accordingly, the total compensation will be Rs.3,15,000/-.

68. The court below has awarded interest at 6% per annum from the date of suit till realisation which we confirm, even though the plaintiff has claimed interest at 12% per annum.

69. The first defendant Public Service Commission is primarily found liable for negligence in causing the accident and the 9th defendant State of Kerala is found vicariously liable for the negligence in not extending proper treatment to the deceased. The defendants, except 7th defendant, whose name has been deleted from the party array (R.F.A.No.1/2004) are jointly and severally liable for the compensation granted.

Accordingly, R.F.A. No.1/2004 is allowed and A.S. No.99/2002 is dismissed. The parties will suffer their costs before this Court.

(T.R. RAMACHANDRAN NAIR, JUDGE.)

(K.P. JYOTHINDRANATH,, JUDGE.)

kav/