

W.P.(MD).Nos.21853 of 2016, 11235, 12799,
15525, 12979 & 18256 of 2017 & 20654 of 2015

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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RESERVED ON 03.12.2024	PRONOUNCED ON 06.01.2025
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CORAM:

THE HON'BLE MR.JUSTICE K.KUMARESH BABU

W.P.(MD).Nos.21853 of 2016, 11235, 12799, 15525, 12979 & 18256 of 2017
& 20654 of 2015

and W.M.P.(MD).Nos.8620, 9900, 14695, 14696 of 2017 & 2399 of 2018

W.P.(MD).No.21853 2016

Vasudevan

... Petitioner

Vs

1.The Secretary to Government,
Health and amily Welfare Department,
State of Temil Nadu,
Secretariat,
Fort St.George, Chennai.

2.The Director,
Department of Medical and Rural Health services,
No.258, 3rd Floor, DMS Complex,
Annasalai, Thenampettai, Chennai.

3.The district Collector,
Office of the District Collector,
Ramanathapuram district.

4.The Medical Superintendent,
Government District Head Quarters Hospital,
Ramanathapuram District.

... Respondents

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PRAYER:- Writ Petition filed under Article 226 of the Constitution of India, to issue a Writ of Mandamus to direct the respondents No.1 and 2 to take appropriate action against the respondent No.4 and duty doctor and nursing staffs of OG Ward. Government District Head Quarters Hosptial, Ramanathapuram for the death of petitioner's wife, consequently direct the respondent No.1 and 2 to pay Rs.Thirty Lakhs as compensation for the death of his wife within the time stipulate by this Court.

For Petitioner(s): Mr.R.Alagumani

in W.P.(MD).No.21853/ 2016 & 18256/ 2017
: Mr.R.Venkatesan in W.P.(MD).No.11235/2017
: Mr.R.Suriya Narayanan in W.P.(MD).No.12799/2017
: Mr.S.Rajasekar in W.P.(MD).No.20654/2015
: Mr.C.M.Arumugam in W.P.(MD).No.12979/2017
: Mr.T.M.Madasamy in W.P.(MD).No.15525/2017

For Respondents : Mr.N.Ramesh Arumugam in all W.Ps.

Government Advocate

Mr.V.Ramakrishnan for R3toR5 in W.P.(MD)No.12979/17

COMMON ORDER

These batch of Writ Petitions seeks for damages/compensation for death arising out of medical negligence.

2. A preliminary objection had been raised by the respondents as regards the maintainability of the Writ petition seeking compensation for the death arising out of medical negligence. The primordial contention of the respondent was that under



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Article 226 of the Constitution of India, this court cannot decide the negligence,
nor the compensation and should have to relegate the petitioners to a civil suit.

3. Countering these objections, the learned counsels for the petitioners had contended that under Article 226, this Court can also decide the negligence as well as the compensation. Hence, all these matters have been clubbed together to decide whether this Court under Article 226 of the Constitution of India can decide the negligence and compensation in cases of claim based on death due to medical negligence.

4. The learned counsels for the petitioners would submit and that the reasons for the death of the individual arose out of clear medical negligence on the part of the Doctor who had treated them.

5. The learned counsels for the petitioners would submit that the Writ Petitions are maintainable. The learned Counsels for the petitioners, in support of their contentions, had relied upon various judgements made by the learned Single Judges of this court to contend that even under Article 226 of the Constitution of



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India, this court had entertained Writ Petitions for grant of compensation in cases where allegations of medical negligence have been made out. They had relied upon various judgements which are as follows:-

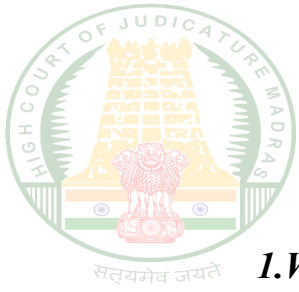
1.W.P.(MD).No.4505 of 2016, dated 28.04.2023

2.W.P.(MD).No.5091 of 2020, dated 04.10.2023

3.W.P.(MD).No.4301 of 2013, dated 01.09.2016

4.W.P.(MD).No.1332 of 2010, dated 10.12.2010

6. Further, they would submit that the Hon'ble Apex Court in a judgement reported in **2001 (2) LW 58** had held that the State authorities are vicariously liable for the negligence for its officers and therefore, even without going into the issues relating to the negligence, by taking into account that each of the victims had suffered during the treatment for their illness at the hands of the doctors employed by the State, the State is vicariously liable for grant of compensation. They had also relied upon the Government Order in G.O.Ms.No.395, Health and Family Welfare H1 Department, dated 04.09.2018, which had also be relied upon by this Court in judgement made in



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1.W.P.(MD).No.13326 of 2012, dated 29.06.2021

2.W.P.(MD).No.2721 of 2017 dated 01.12.2021

3.W.P.(MD).No.3368 of 2013, dated 23.08.2022 for grant of compensation
for medical negligence.

7. On the other hand, the learned counsels appearing on behalf of the respondents had relied upon two judgements made by the learned Single Judge of this court in ***W.P.(MD).No.13369 of 2024, dated 20.06.2024 and W.P.(MD).No. 21669 of 2021, dated 21.11.2023*** specifically to contend that the learned Judges of this Court have also taken a contrary view that a Writ Petition under Article 226 seeking for compensation for medical negligence cannot be entertained by this Court.

8. I have considered the submissions made by the learned counsels appearing for the respective parties and had perused the materials available on record.

9. The various judgements relied upon by the learned counsels appearing on either side are relating to the orders passed by this court. The learned Judges have



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taken contradictory views in respect of grant of compensation. It is worthwhile to note that the Hon'ble Apex Court's judgments relied upon by the learned counsels appearing on either side which arose out of judgements and decrees made by a competent Civil Court in which suits for damages were filed. Therefore, even the judgement relied upon by the learned counsels for the petitioners in the case of ***State of Haryana & Others Vs Smt.Santra*** reported in **2001 2 LW 58** cannot be said to be a judgement which lays down a ratio that the High Court sitting under Article 226 can deal with the cases of medical negligence.

10. It is also to be noted that in a judgement in the case of ***State of Punjab Vs Shiv Ram and Others*** reported in **2005 7 SCC 1** relied upon by the learned counsel appearing on behalf of the respondents, after considering the facts of the said case, the Court was pleased to make certain observations. After considering the case of ***Jacob Mathew*** reported in **2005 7 SCC 1**, the Hon'ble Apex Court had observed that unless negligence is established, the primary liability cannot be fastened on a medical practitioner and vicarious liability on the State cannot be imposed without the establishment of the primary liability. The Hon'ble Apex Court had also observed as to how a medical practitioner should respond and



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finally the Hon'ble Apex Court had held the need for devising a welfare fund or an insurance scheme.

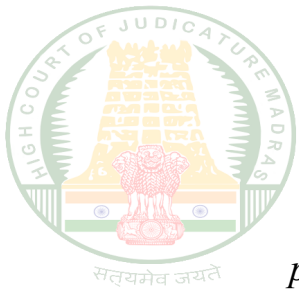
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11. The Hon'ble Apex Court in the judgment made in Jacob Mathew's case reported in **2005 6 SCC 1**, had summed up their conclusions on the issues of negligence. For better appreciation, relevant paragraph is extracted hereunder:-

“ 48. We sum up our conclusions as under:

(1) Negligence is the breach of a duty caused by 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. The definition of negligence as given in Law of Torts, Ratanlal & Dhirajlal (edited by Justice G.P. Singh), referred to hereinabove, holds good. Negligence becomes actionable on account of injury resulting from the act or omission amounting to negligence attributable to the person sued. The essential components of negligence are three: “duty”, “breach” and “resulting damage”.

2) Negligence in the context of the medical profession necessarily calls for a treatment with a difference. To infer rashness or negligence on the part of a professional, in



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particular a doctor, additional considerations apply. A case of occupational negligence is different from one of professional negligence. A simple lack of care, an error of judgment or an accident, is not proof of negligence on the part of a medical professional. So long as a doctor follows a practice acceptable to the medical profession of that day, he cannot be held liable for negligence merely because a better alternative course or method of treatment was also available or simply because a more skilled doctor would not have chosen to follow or resort to that practice or procedure which the accused followed. When it comes to the failure of taking precautions, what has to be seen is whether those precautions were taken which the ordinary experience of men has found to be sufficient; a failure to use special or extraordinary precautions which might have prevented the particular happening cannot be the standard for judging the alleged negligence. So also, the standard of care, while assessing the practice as adopted, is judged in the light of knowledge available at the time of the incident, and not at the date of trial. Similarly, when the charge of negligence arises out of failure to use some particular equipment, the charge would fail if the equipment was not generally available at that particular time (that is, the time of the incident) at which it is suggested it should have been used.



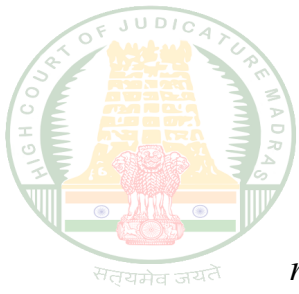
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(3) *A professional may be held liable for negligence on one of the two findings: either he was not possessed of the requisite skill which he professed to have possessed, or, he did not exercise, with reasonable competence in the given case, the skill which he did possess. The standard to be applied for judging, whether the person charged has been negligent or not, would be that of an ordinary competent person exercising ordinary skill in that profession. It is not possible for every professional to possess the highest level of expertise or skills in that branch which he practices. A highly skilled professional may be possessed of better qualities, but that cannot be made the basis or the yardstick for judging the performance of the professional proceeded against on indictment of negligence.*

(4) *The test for determining medical negligence as laid down in Bolam case [(1957) 1 WLR 582 : (1957) 2 All ER 118 (QBD)] , WLR at p. 586 [[Ed.: Also at All ER p. 121 D-F and set out in para 19, p. 19 herein.]] holds good in its applicability in India.*

(5) *The jurisprudential concept of negligence differs in civil and criminal law. What may be negligence in civil law may not necessarily be negligence in criminal law. For negligence to amount to an offence, the element of mens*



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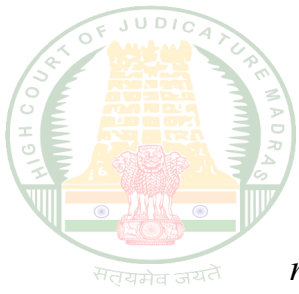
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rea must be shown to exist. For an act to amount to criminal negligence, the degree of negligence should be much higher i.e. gross or of a very high degree. Negligence which is neither gross nor of a higher degree may provide a ground for action in civil law but cannot form the basis for prosecution.

(6) The word “gross” has not been used in Section 304-A IPC, yet it is settled that in criminal law negligence or recklessness, to be so held, must be of such a high degree as to be “gross”. The expression “rash or negligent act” as occurring in Section 304-A IPC has to be read as qualified by the word “grossly”.

(7) To prosecute a medical professional for negligence under criminal law it must be shown that the accused did something or failed to do something which in the given facts and circumstances no medical professional in his ordinary senses and prudence would have done or failed to do. The hazard taken by the accused doctor should be of such a nature that the injury which resulted was most likely imminent.

(8) Res ipsa loquitur is only a rule of evidence and operates in the domain of civil law, specially in cases of torts and helps in determining the onus of proof in actions relating to



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negligence. It cannot be pressed in service for determining per se the liability for negligence within the domain of criminal law. Res ipsa loquitur has, if at all, a limited application in trial on a charge of criminal negligence.”

12. The said judgement indicates three essential components of negligence namely the duty, the breach and the result in damage should be established in the manner known to law. Such establishment of the said three components can only be primarily made on oral and documentary evidences barring in certain cases. The Hon'ble Apex Court has also held that as long as a Doctor follows a practice acceptable by the medical profession, he cannot be held liable for negligence merely because a better method of treatment was available. The Hon'ble Apex Court had also held that a professional may be held liable if he had not possessed the requisite skill or he had not exercised reasonable competence in a given case the skill which he does not possess.

13. In such view of the matter, I am of the conclusive view that this Court sitting under Article 226 of the Constitution of India cannot go into the question of fixing liability of medical negligence of a doctor primarily and therefore, the State



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cannot also be made vicariously liable without proving the primary liability on the Doctors. Such negligence could only be proved before an appropriate Civil Court by making a claim for damages of the tortious liability.

14. Reliance had been made by the learned counsels for the petitioners to three of the judgements of this Court, wherein, the learned Judges had relied upon the Government order in G.O.Ms.No.395, Health and Family Welfare Department (H1) dated 04.09.2018 for grant of compensation from the corpus fund that had been envisaged under the said Government Order. I do not concur with the views expressed by the learned Judges for the simple reason that the said Government Order does not envisage a compensation to the victim or their dependents, but is a Government Order which had been made for creation of the corpus fund by the contribution of the Doctors to contest the claims made against the Doctors and the Government on the allegations of medical negligence.

15. The learned Judges had primarily relied upon Clause (g) (ii) of the Government Order. The said Clause ought not to have been read independently and should have been read with the object in which the said Government order had



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been made. Clause (c) of the Government Order envisages the engagement of special Advocates to represent the Doctors and Clause (d) deals with the legal fee structure payable to such special Advocates. Clauses (e) and (f) deal with the procedure for assistance to the Doctors for engagement of such special/ private Advocates and the meetings of Committees. Sub clause (3) of Clause (g) specifically indicates that the corpus fund created under the said Government order will cover the litigations in all judicial forums against the lapse of Medical Officers concerned. Therefore, the reliance made by the learned Judges on the said Government Order to grant compensation, in my view, cannot be said to be correct.

16. I have already indicated that the Hon'ble Apex Court in a judgement reported in **2005 7 SCC 1** had categorically held the need for devising a welfare fund or an insurance scheme. The said judgment dealt with failed sterilization. The Hon'ble Apex Court had thought it fit that the State Government should think devising or making a provision for the welfare funds or taking up with the insurance company a proposal for devising up for an appropriate insurance policy or insurance scheme which would provide for coverage for such claims where a

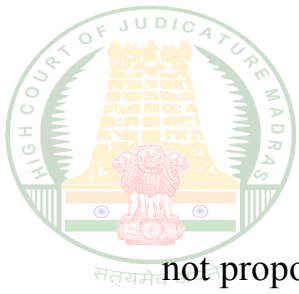


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child is born to a woman who has undergone a successful sterilization operation as in the present case. It is to be noted that the Government in G.O.Ms.No.119, Health and Family Welfare (R1) Department dated 30.05.2013 had issued a Government order covering the cases of sterilization alone.

17. The Government had issued G.O.Ms.No.395 Health and family Welfare Department dated 04.09.2018. A reading of the said Government Order would also indicate that the Government had only created a corpus fund for meeting out the exigencies for payment of compensation as decreed by the Courts. Unless and until the primary liability is fixed on the Doctors for the medical negligence, the State cannot be made vicariously liable for making the compensation and directed to utilise the corpus fund which had been created for payment of compensation based upon the judgments and decrees made by the Court and to engage counsels for defending the Doctors.

18. Be that as it may, it is the duty of the State Government to protect its citizens. It is also to be noted that the State Government had promulgated an insurance scheme to cover the medical expenses of its citizens. This Court does



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not propose to go into the niceties or the infirmities in the scheme. It is to be noted that the State in its object to comply with its fundamental duties, also established various hospitals to meet the needs of its citizens. It is its duty to also provide proper medical treatment to its citizens. The present cases all arise out of the sufferings that the petitioners have undergone on the allegations of medical negligence against the Doctors working in the Government hospitals. This Court also takes judicial notice of the fact that the respective petitioners also fall under the below poverty line and to drive them to go to a Civil Court would also require them to pay the Court fees as prescribed under law. The families have also suffered great loss.

19. This Court also takes judicial notice of the fact of the benevolence of the State Government in granting compensation to the victims of hooch tragedy, victims of animals and human conflicts, etc, which do not directly attribute any negligence on the part of the State Government.

20. In such view of the matter, I am inclined to direct the State Government to pay a sum of Rs.3,00,000/- to each of the petitioners as *ex gratia* amount within a period of four weeks from the date of receipt of a copy of this order.



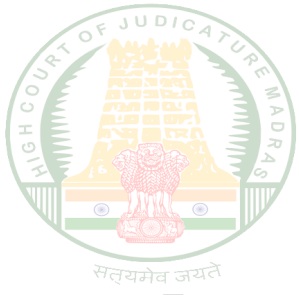
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21. In fine, all the Writ Petitions are disposed of with liberty to the petitioners to approach the jurisdictional Civil Courts seeking compensation. If the petitioners seek remedy before the Civil Court the concerned Court may exclude the period of pendency of the Writ Petitions while calculating the period of limitation. However there shall be no order as to costs. Consequently, connected miscellaneous petitions are also closed.

06.01.2025

Index: Yes/No
Speaking Order/Non Speaking Order
Neutral Citation: Yes/No
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To

1. The Secretary to Government,
Health and Family Welfare Department,
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K.KUMARESH BABU.,J.

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A Pre-delivery order made in
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& 20654 of 2015
and W.M.P.(MD).Nos.8620, 9900, 14695,
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