

Supreme Court, Division Bench

Honorable Justice Deepak Kumar Karki

Honorable Justice Hari Prasad Phyuul

Judgement

Date of Decision: 2077/10/7 (corresponding to 20 January, 2021)

Case: Compensation

07-CI-0366

Appellant/Defendant: Dr. Buddha Basnyat, resident of Ward No. 16 currently Ward No. 3 Maharajgunj and working in Nepal International Clinic Pvt. Ltd. Located at Kathmandu District Kathmandu Metropolitan City Ward No. 1 Lal Durbar

Vs.

Respondent/Plaintiff: Jyoti Baniya et.al., General Secretary and authorized representative of Consumers Protection Forum, Central Executive Committee (Registration No. 463/051/052, Post Box No. 11168, Kathmandu)

070-CI-0367

Appellant/Defendant: Advocate Purna Bhakta Dangol, resident Bagmati Zone, Lalitpur District Chapagaon V.D.C. Ward No. 9 Bulu and authorised representative Nepal International Clinic Pvt. Ltd., located at Kathmandu District Kathmandu Metropolitan City Ward No. 1 Lal Durbar

Vs.

Respondent/Plaintiff: Jyoti Baniya et.al., General Secretary and authorized representative of Consumers Protection Forum, Central Executive Committee (Registration No. 463/051/052, Post Box No. 11168, Kathmandu)

- Physicians and healthcare providers have a duty to exercise a high degree of care toward their patients. If a physician conducts an examination negligently that is, without exercising appropriate caution, then such conduct falls within the ambit of tort.

(Para 15)

- In the course of a health examination, the concerned service recipient inherently possesses the right to obtain an accurate and complete health report; correspondingly, it is the duty of the physician involved and the concerned health institution to ensure that such reports are prepared in an accurate and truthful manner.

(Para 18)

- In any given case, while determining as to whether or not an act of medical negligence has been committed in contravention to the Consumer Protection Act, a significant consideration must be given as to whether or not the duty to examine and treat the patient was accepted.

(Para 23)

On behalf of the Plaintiff: Learned Advocate Mr. Jyoti Baniya

On behalf of the Defendant: Learned Senior Advocate Mr. Lok Bhakta Rana

Precedents Cited:

Nepal Law Reporter 2075, Unit 7, Decision No. 10061

Nepal Law Reporter 2066, Unit 11, Decision No. 8262

Relevant Laws:

Constitution of Nepal

National Civil Code, 2074

Consumer Protection Act, 2075

Court of First Instance:

District Compensation Committee, Kathmandu

Decision at the Appellate Level

Honorable Justice Tanka Bahadur Moktan

Honorable Justice Hari Kumar Pokharel

Decision

Honorable Justice Hariprasad Phuyal: The brief facts and findings of the present case filed within the jurisdiction of this court pursuant to Section 12 (a) and (b) of the former Justice Administration Act, 2048, and Section 12 (a) and (b) of the prevailing Justice Administration Act, 2073, are as follows:-

Fact Section

A foreign employment company called *High Himalayan Gorkha Services Pvt. Ltd.* had published an advertisement seeking candidates to be sent to Israel for the post of caregiver. I contacted the said company and I was informed that for the purpose of travelling to Israel, a medical examination had to be conducted at Nepal International Clinic. Accordingly, I visited the clinic, paid the requisite fees, and underwent the medical examination. The clinic issued a certificate declaring me to be in good health, and on that basis I was sent to Israel for employment. However, upon my arrival in Israel and after undergoing a further medical examination by the company operating there, I was found to be suffering from asthma, rendering me unfit for work, whereupon I was repatriated to Nepal. As the opponents had issued an incorrect medical fitness certificate, and as I was compelled to return to Nepal from Israel due to my deteriorated health condition, the improper conduct of the opponents and the negligence committed in the course of providing services caused me mental, physical, and economic loss. Therefore, in accordance with Sections 22 and 24 of the Consumer Protection Act, 2054, the claimants Kiran Basnet and Jyoti Baniya have sought compensation in the sum of Rs. 24,10,000/-.

The rejoinder submitted by the appellant states that Section 22 of the Consumer Protection Act, 2054, provides a legal basis for a consumer organization to claim compensation. In the present petition, however, the Central Executive Committee of the Consumer Organization, Kathmandu, has filed the complaint, and the opponent Consumer Welfare Protection Forum Nepal, Central Executive Committee, Kathmandu, does not have the locus-standi to lodge such a complaint. The blood sample of the opponent Kiran Basnet was collected from this clinic and his health as well as physical examination was carried out. From the tests conducted, no abnormality was detected in the opponent's health. Likewise, the opponent Kiran Basnet had carried out an X-ray of his chest from Super X-ray Clinic Pvt. Ltd., and upon submission of that report before this clinic no defects were found in his health. Although it has been stated that, after reaching Israel, he experienced chest pain and difficulty in breathing, the matters as to when exactly he arrived in Israel and after how many days did the chest-related problems commence have not been clearly and conclusively disclosed. In addition to this, in the form filled in person by the opponent on 2061/8/14 (corresponding to 29 November, 2004), he has stated that he did not have asthma and has written, "My health is very well." In such circumstances, where he himself in person has declared in the form that he did not have asthma, chronic illness, it cannot later be claimed that negligence, carelessness or any improper act was committed. Hence, the claim of the opponents should be dismissed and since the opponents have lodged a false complaint they ought to be punished.

The original documents relating to the the medical examination of the petitioner Kiran Basnet was attached with the case file.

Rajeev Chaudhary, witness of the petitioner deposing before the Chief District Officer, stated that the petitioner Kiran Basnet had gone abroad in the month of Mangsir, 2061, and returned within a few days. I took him to B & B Hospital for examination, and it was found that he was suffering from asthma. Prior to his departure, the doctor had stated that he had no illness and further stated that the doctor may have negligently written that he had no illness.

Kul Prasad Aryal, witness of defendant Dr. Buddha Basnet deposing before the Chief District Officer, stated the petitioner at the time of medical examination he did not fully disclose before the doctor the illness he was suffering from and owing to the environmental complications abroad his health may have been affected and therefore, it is possible that he recently developed the disease. Certificate of health was issued to the petitioner Kiran Basnet by the doctor only upon proper and thorough medical examination.

It is noted that on 2066/2/14 (corresponding to 28 May, 2009), the District Compensation Committee decided to award the petitioner a total compensation of Rs. 600,000 (Six hundred thousand rupees), comprising Rs. 300,000 (Three hundred thousand rupees) from Dr. Buddha Basnyat, who conducted the medical examination, and Rs. 300,000 (Three hundred thousand rupees) from Nepal International Clinic.

It is noted that the District Compensation Committee, Kathmandu on 2066/2/14 (corresponding to 28 May, 2009), had rendered a decision in the presence of representatives from Consumer Welfare Protection Forum. However, since the decision does not disclose the judicial basis, nor did it consider expert opinions to determine whether the physician or the medical institution conducting the health examination acted negligently, the decision of the District Compensation Committee, Kathmandu, dated 2066/2/14, had been overruled by the High Court, Patan, on 2067/6/10 (corresponding to 26 September, 2010), directing the parties to consider the matters required therein and proceed accordingly.

As it was observed that the signed opinion of the concerned expert had not been received from the Committee as of 2068/5/5 (corresponding to 22 August, 2011), an order was issued directing that the signed opinion of the expert be obtained from the Nepal Medical Council and submitted. Accordingly, it is noted that the opinion of the expert is now attached with the case file.

The opinion of expert Dr. Karbir Nath Yogi is as follows: Even upon re-examining the tests conducted by Kiran Basnet prior to his departure to Israel, or upon carrying out fresh examination, it cannot be conclusively established that he was suffering from asthma prior to his departure to Israel. When he visited Nepal International Clinic at Lal Durbar to obtain a medical fitness certificate, it is observed that, on the three-page health declaration form, which was required to be filled out in person by the patient, he had stated that he was not suffering from any illness and that his health was completely normal. It is observed that the chest X-ray (Code No. R0130) conducted by Kiran Basnet at Super X-ray Clinic, Dillibazar, was normal, and that the urine and blood reports from the laboratory of Nepal International Clinic indicated no possibility of any disease. The eosinophil count, which rises in cases of asthma, was 0.5 percent, falling within the normal range. Prior to his departure abroad, the doctor's examination revealed no symptoms or signs of the disease. As nothing adverse was observed on the X-ray and the eosinophil count in the blood was only 0.5 percent, no question can be raised regarding the medical fitness certificate issued by Nepal International Clinic on 2061/8/14, nor can the competence, skill, or intention of the physician be questioned. It is possible that the patient developed asthma (BHR/Asthma) due to a change in the environment.

It appears that the petitioner underwent a medical examination at the designated health clinic for overseas travel, during which blood and urine samples were taken and an X-ray was conducted by the clinic and the attending physician. The reports indicated that the petitioner's chest-related health was normal. On the basis of these findings, permission for overseas travel was granted. Subsequently, the petitioner had to return from abroad due to health reasons. As it was found that the petitioner suffered physical, economic, and mental loss due to negligent and careless conduct during his medical examination, the District Compensation Committee, Kathmandu, on 2068/6/8 (corresponding to 25 September, 2011), directed that the petitioner Kiran Basnet be awarded a total compensation of Rs. 600,000 (Six hundred thousand rupees), comprising of Rs. 300,000 (Three hundred thousand rupees) from the respondent Dr. Buddha Basnet and Rs. 300,000 (Three hundred thousand rupees) from the respondent Nepal International Clinic.

Separate appeal petitions having the same content were filed by defendant Dr. Buddha Basnet and Nepal International Clinic Pvt. Ltd., before the Appeal Court, Patan which reads as follows: It has been noted that the document concerning the health examination allegedly conducted by the opponent Kiran Basnet in Israel is in Hebrew language, and therefore prior to the decision, the document should have been translated into Nepali or English to verify its contents. The Consumer Welfare Protection Forum Nepal, Central Executive Committee, is does not have the locus-standi to lodge the complaint, since Section 22 of the Consumer Protection Act, 2054, provides that a complaint must be made by a consumer organization, not by its Central Executive Committee. Moreover, a complaint must be filed within 35 days of incurring the loss, whereas in the present case, the complaint has not been filed within the limitation period. Furthermore, since no negligence or careless conduct was carried out during the examination of the opponent, the decision of the District Compensation Committee awarding compensation to the opponent should be quashed.

The deposition made by expert Dr. Karbir Nath Yogi before the Appeal Court is as follows: On 2065/6/9, I provided my opinion after examining the reports of Kiran Basnet's medical examinations conducted at Nepal International Clinic prior to his departure to Israel, the reports from his

examination in Israel, as well as the reports from the B & B Hospital upon his return to Nepal. The opinion regarding his medical condition bears my signature.

The decision of the Appeal Court, Patan, on 2069/10/25 (corresponding to 7 February, 2013) states that the actions of the appellants were not free from dispute. In a highly sensitive activity such as a medical examination, negligence was found on the part of the appellants, and considering the absence of accountability and the nature of the work, there was a lack of due diligence. In such circumstances, the appellants, Dr. Buddha Basnet and Nepal International Clinic Pvt. Ltd., cannot be absolved of liability as per their appeal. Accordingly, the decision of the District Compensation Committee to award reasonable compensation of Rs. 600,000 (Six lakh rupees) to the aggrieved consumer, Kiran Basnet, is deemed appropriate.

Separate appeal petitions having the same appeal content was filed before this court by defendant Dr. Buddha Basnet and Nepal International Clinic Pvt. Ltd., which states the following: The opponent Kiran did not file the complaint within 35 days from the date of incurring the loss. The Consumer Welfare Protection Forum Nepal, Central Executive Committee does not have the locus-standi to file the complaint. Section 22 of the Consumer Protection Act, 2054, prescribes that a consumer organization itself may claim compensation and therefore, in the present case, it was not the consumer organization that filed the complaint, but the Central Executive Committee, Kathmandu which lacks the legal authority to do so. Legally, there is a distinction between a consumer organization and the Central Executive Committee of such an organization. The opponent Kiran while filling the form in person on 2061/8/14, stated that he did not have asthma and had asserted in writing that **“My health is very well.”** In light of this declaration, any assertion that the opponent Kiran Basnet had any pre-existing condition is estopped pursuant Section 34 (1) of the Evidence Act, 2031. Accordingly, the decision of the District Compensation Committee, Kathmandu, directing payment of Rs. 600,000 (Six hundred thousand rupees) as compensation and subsequently upheld by the Appeal Court, Patan should be quashed and justice be granted to the appellants.

An order had been set aside by this court on 2070/05/13 (corresponding to 29 August, 2013) which reads as follows: It is noted that Kiran Basnet received treatment for asthma in Israel and was discharged from the hospital on 11 May 2005 (corresponding to 2062/1/28) and returned to Nepal on 11 August 2005 (corresponding to 2062/4/27). The petitioner filed an application with the Consumer Welfare Protection Forum on 2063/3/8 (corresponding to 22 June, 2006), however, the complaint was lodged only on 2063/4/17 (2 August, 2006). In view of the legal provision under Section 22 of the Consumer Protection Act, 2054, which requires that a complaint be filed within 35 days of incurring loss, the Appeal Court's decision on 2069/10/25 to uphold the decision of the District Compensation Committee, is deemed to be contrary to Section 22 of the Consumer Welfare Protection Act, 2054 and the principles propounded in Nepal Law Reporter 2066, Unit 11, Decision No. 8262, and therefore, pursuant to Section 12 (1) (a) and (b) of the Judicial Administration Act, 2048, permission is hereby granted for review. It is hereby directed to submit the initial records and submit it accordingly with the case file.

Decision

The case that was entered in the cause-list was submitted for hearing before the Bench. Learned Senior Advocate Mr. Lok Bhakta Rana on behalf of the appellants argued that the complaint pursuant to Section 22 of the Consumer Protection Act, 2054, was not filed within the limitation period of 35 days from the date of incurring the loss. Although the opponent Kiran Basnet submitted an application to the Consumer Welfare Protection Forum on 2063/3/8, it appears that the loss had already occurred at that time of filing the application; however, the complaint was filed only on

2063/4/17. Section 22 of the Consumer Protection Act does not confer the Central Executive Committee of the Consumer Welfare Protection Forum the right to file a complaint and therefore, there is a lack of locus-standi. Since conditions such as asthma may not be detectable through a routine health examination, the form provided specifically inquires whether the individual has asthma or any other pre-existing condition. In the present case, the opponent Kiran Basnet in person has declared in the form that he did not have asthma or any pre-existing condition. In such circumstances, it cannot be held that there was negligence, carelessness, or improper conduct on the part of the respondents, and therefore, the Appeal Court's decision to uphold the decision of the District Compensation Committee should be quashed and set aside.

Learned Advocate Mr. Jyoti Baniya, appearing on behalf of the respondent/complainant, argued that prior to travelling to Israel, the Nepal International Clinic and the concerned physician failed to exercise due care and conduct a proper medical examination, as a result of which the victim, Kiran Basnet, had to suffer physical, mental, and economic loss. After the victim submitted an application to the Consumer Protection Forum, and in the course of correspondence with Nepal International Clinic, which had conducted his medical examination, the letter dated 2063/3/14 (corresponding to 28 June, 2006) sent by the said institution to the Consumer Protection Forum was taken as the basis for submitting the claim and therefore, the present claim falls within the statutory limitation period and is not subject to dismissal. Kiran Basnet had written in the health-examination form that he did not have asthma; however, the appeal submitted by the appellant-doctor Buddha Basnyat and the institution does not show that the particulars stated by him in such examination were correct. Since it also cannot be ascertained with certainty that the victim did not have that disease prior to going abroad, the decision of the District Compensation Committee directing the appellants to pay the victim compensation of Rs. 600,000 is proper, and the judgment of the Appellate Court affirming that decision is valid and should be upheld.

Considering the matter, the foreign employment company named High Himalayan Gorkha Service Pvt. Ltd. had published an advertisement for recruitment to the post of caregiver for foreign employment, and since the company required a medical examination from Nepal International Clinic for going abroad, the victim Kiran Basnet is found to have undergone a health examination at that clinic. After the issuance of the certificate of fitness, when Kiran Basnet went to Israel, the employer in Israel conducted a medical examination in which asthma was detected, due to which he had to be repatriated. As a result, the complainant filed a plaint asserting that he owing to the respondents' negligence and carelessness he suffered mental, physical, and economic loss and therefore sought compensation. The respondents through their rejoinder claimed that from the clinical health-examination report and findings, no abnormality was detected in the respondent's health; therefore, it cannot be held that the clinic engaged in improper conduct or acted negligently while providing its services. The District Compensation Committee, Kathmandu had decided to direct payment of compensation of Rs. 300,000/- from the respondent Dr. Buddha Basnyat and Rs. 300,000/- from the respondent Nepal International Clinic. On the grounds of limitation and lack of locus-standi, an appeal had been filed challenging the said decision; however, the Appellate Court, Patan, by its decision dated 2069/10/25, affirmed the original decision of the District Compensation Committee. Dissatisfied with that judgment, the respondents Dr. Buddha Basnyat and Nepal International Clinic have filed the present appeal before this court seeking to have the appellate court's decision set aside.

In view of the above-stated facts, the documents annexed with the case file, and the submissions made by the learned Senior Advocate and the learned Advocate, it appears that the following issues need to be analyzed in order to reach a decision:

1. As to whether or not the Central Executive Committee of the Consumer Protection Forum Nepal has the locus-standi to file the complaint?
2. As to whether or not the complainant has filed the complaint within the prescribed limitation period?
3. As to whether or not the medical services fall within the scope of the Consumer Protection Act?
4. As to whether or not the judgment rendered by the Appellate Court, Patan on 2069/10/25 is legally sound?

On the basis of the advertisement published by High Himalayan Gorkha Services Pvt. Ltd., a foreign employment company, for sending workers to Israel for the position of caregiver, Kiran Basnet contacted the said company and, for the purpose of going abroad, underwent the required medical examination at Nepal International Clinic and upon obtaining a medical fitness certificate he proceeded to Israel. Upon undergoing a subsequent medical examination in Israel, asthma was detected, and he was repatriated on the ground that he was medically unfit to work. As it is alleged that he had to return from abroad due to the negligence of the opponents, Dr. Buddha Basnyat and Nepal International Clinic, Kathmandu, thereby suffering economic, mental, and physical distress, the present case seeking compensation had been instituted.

2. First and foremost, it is necessary to analyze as to whether or not the Central Executive Committee of the Consumer Protection Forum Nepal has the locus-standi to file the complaint. Section 22 of the Consumer Protection Act, 2054, provides that a consumer organization is entitled to file a complaint. A consumer organization is not a natural person, but a legal person established through a legal process. A legal person, by itself is incapable of performing any acts or proceedings and therefore, various committees are constituted within the organization to carry out its functions. The Executive Committee constitutes an important organ of the organization and conducts affairs of the organization. The Executive Committee of the organization operationalizes the legal person. Since the Executive Committee functions as an integral organ of the Consumer Protection Forum, and if one were to construe that the legal provision under Section 22 grants the right to file a complaint only to the consumer organization and not to the Executive Committee would create a situation where the organization would be understood in a limited sense. Such a restricted interpretation would unduly curtail the scope of the organization and, consequently impair the constitutionally guaranteed right of the aggrieved party to access justice as well as their right to consumer protection.
3. In this context, considering the provisions of the Consumer Protection Act relating to the protection of consumers, the prohibited acts under the Act, and the definition of “**consumer**” under Section 2 (a) includes both a “**person or an organization**”, as well as the social and educational circumstances of those affected by the supply of substandard goods or services, the phrase that a “consumer organization may file a complaint” cannot reasonably be interpreted in a restrictive manner to mean that only the consumer organization, and no one else, may file such a complaint. If interpreted otherwise, the actual aggrieved party would be barred from filing a complaint, thereby creating a situation of denial of remedy. Rather, the provisions should be understood to allow not only the aggrieved consumer and their family, but also the consumer

organization, to file a complaint. Accordingly, the aggrieved party and their family may file a complaint, and in circumstances where the aggrieved party is unable or prevented from doing so, or where a matter of public right or interest arises, the consumer organization may also file a complaint. As a result, a proper framework is maintained, enabling the exercise of rights guaranteed under the Constitution and the Act. This principle was also articulated in the compensation case of Nesar Ahmad Miyan versus Prithvi Chandra Hospital, Nawalparasi (Nepal Law Reporter 2075, Unit 7, Decision No. 10061). Based on this very principle, it is evident that the Consumer Rights Protection Forum Central Working Committee does indeed possess the right to file a complaint.

4. Now, turning to the second question as to whether or not the opponents filed the complaint within the limitation period, a review of the legislative intent of the Consumer Protection Act, 2054, shows that its overarching purpose is to safeguard the rights and interests of consumers, to protect them from any harm or loss arising from the use of goods or services, and to ensure that consumers can exercise their fundamental rights effectively, thereby maintaining consumer sovereignty¹ in an active and vigilant manner. Ordinarily, depending upon the nature of the case, the limitation period is calculated from the date of occurrence of the event or from the date when one became aware of the incident whereas in some cases the limitation commences from the date of loss and damage or from the date of knowledge of such loss and damage. In certain situations, it may not be possible to file a complaint immediately after the event and in such cases, the calculation of the continuity of the limitation period may need to be suspended for some time, and this situation is addressed under the **doctrine of tolling**. This principle generally pertains more to matters of torts rather than criminal liability. If the results of the health examination are immediately apparent and affect the aggrieved consumer, the limitation period can commence on that basis or if the effects of the examination become evident only after a certain time interval and continue to persist, the limitation period should be determined by taking into account the consumer's condition and the continuous impact of the harm.
5. Even though Section 22 of the Consumer Protection Act, 2054, provides that a complaint must be filed within 35 days of incurring harm, under the said principle the limitation period does not immediately commence from the moment the person is aware of the harm but rather the limitation period should commence from the date when the aggrieved consumer during the course of treatment gains definitive knowledge of the harm or its effects. In such matters, the court should not adopt a strict literal interpretation of the law. Rather, it must interpret the provisions liberally to protect the rights of the aggrieved consumer and to ensure that the responsible person or institution can be held accountable. The objective is to prevent further hardship or prejudice to the affected individual while ensuring that liability can be duly enforced and the court should be mindful of these facts. The principle laid down in the compensation case of Dr. Dinesh Vikram Shah vs. Bhojraj Air (Nepal Law Reporter 2066, Unit 11, Decision No. 8262) states that: ***"The date on which the aggrieved party becomes aware of the loss or damage shall be regarded as the date giving rise to the cause of action. In disputes arising from the use of medicine, it would be an absurd interpretation to calculate the limitation period from the first day of taking the medicine. Instead, the limitation period should be calculated from the date on which the effects***

¹ Consumer Sovereignty means Consumer sovereignty is the idea that it is consumers who influence production decisions. The spending power of consumers means effectively they 'vote' for goods. Firms will respond to consumer preferences and produce the goods demanded by consumers. It is a manifestation of the 'invisible hand' retrieved from <https://www.economicshelp.org/> on 26 April 2021.

of the medicine became apparent.” The principle establishes that while interpreting the Act, a purposive approach rather than a frustrated approach must be adopted.

6. In *V.N.Shrikhande vs Anita Sena Fernandes [(2011) 1 SCC 53]*, Supreme Court of India interpreted that in cases of medical negligence, no straitjacket formula can be applied for determining as to when the cause of action has accrued to the consumer. Each case is to be decided on its own facts. If the effect of negligence on the doctor’s part or any person associated with him is patent, the cause of action will be deemed to have arisen on the date when the act of negligence was done. If, on the other hand, the effect of negligence is latent, then the cause of action will arise on the date when the patient or his representative- complainant discovers the harm/injury caused due to such act or the date when the patient or his representative-complainant could have, by exercise of reasonable diligence discovered the act constituting negligence. Since medical negligence is a highly technical and specialized matter, it cannot be construed that the consequences necessarily manifest immediately upon providing service. The effects of treatment or medication may appear after a time lapse or persist over a period. Therefore, it cannot be strictly held that a complaint must be filed within the strict timeframe prescribed by a section of the law.
7. In this context, it is noted that the aggrieved party, Kiran Basnet, underwent a health examination at Nepal International Clinic on 2061/8/14. Subsequently, Basnet underwent a second health examination in Israel and was discharged from the hospital on 2062/1/28. Even after returning from Israel, he had undergone continued treatment. Furthermore, based on the complaint submitted to the Consumer Rights Protection Forum, an inquiry was conducted to verify the health examination conducted by the clinic and the doctor prior to Basnet’s travel to Israel. In this regard, the response provided by Nepal International Clinic to the Consumer Rights Protection Forum on 2063/3/14 confirms that the aggrieved faced economic, physical, and mental suffering and within the limitation period prescribed in the Act, a complaint on behalf of the victim was filed on 2063/4/17, and therefore, it is deemed that the the complaint had been filed within the statutory limitation period.
8. As per Section 2 (e) of the same Act, “service” is defined as **“any labor, facility, or consultancy provided for any work in return for any kind of fee or consideration.”** Giving continuity to the Consumer Protection Act, 2054, Section 2 (m) of the Consumer Protection Act, 2075, elaborates that “service” includes electricity, drinking water, telephone, information technology, health, education and consultancy, transportation, drainage, banking, or other similar services, and further clarifies that the term encompasses legal, medical, or engineering services and explicitly includes health services within the ambit of the Act. Pursuant to the aforementioned legal provision, medical service falls within the ambit of service and since medical services involve labor, skill, and expertise to provide consultation and treatment, they are unquestionably covered under the Consumer Protection Act.
9. Under Section 6 of the Consumer Protection Act, 2054, certain rights are guaranteed to consumers to safeguard their interests. For instance: Section 6 (a) ensures the consumer’s right **to be protected from the sale or distribution of goods and services that may cause harm to life, health, or property.** Section 6 (b) ensures the consumer’s right **to be informed about the price, quality, quantity, purity, and standard of goods and services to protect against unfair commercial practices.** Similarly, under Section 3 (2) (g) of the Consumer Protection Act, 2075,

the law provides **the right to receive compensation for loss or damage arising from the use of goods or services**. Furthermore, Section 3 (2) (g) ensures the consumer's right to seek remedy or have their grievance heard by the competent authority or designated body responsible for the protection of consumer rights and interests.

10. With the objective that no citizen suffers loss or damage due to unfair commercial practices Article 44 of the Constitution of Nepal ensures the **right of every consumer to access quality goods and services**, thereby ensuring and safeguarding the rights of consumers. For the purpose of implementing the said Article, Section 16 of the Consumer Protection Act, 2075, provides that acts such as **reducing the quality or quantity of any consumable goods or services, misleading consumers, selling or distributing such goods or services, or preparing false reports** also falls within the ambit of Article 44. Doctors, health professionals, and health testing institutions that obtain fee and provide medical examinations that would cause harm to life, body, or property also falls within this category. The right to receive quality medical services is not only a health-related entitlement but is also inherently linked to the constitutional right to live with dignity under Article 16 (1). Consequently, under the Consumer Protection Act, 2054, and subsequent constitutional and legal developments, providing quality medical services constitutes a direct duty of the physician, while the institution or center providing such services bears an indirect responsibility.
11. Medical negligence falls under the broader category of tort law, which is often considered the “mother” of consumer rights law because it establishes the foundation for holding individuals or entities accountable for harm caused by their wrongful acts. Generally, even among parties who have not entered into a contract, provided, a person who causes harm to the life, body, property, or rights of another person or persons, the principle under tort law is that the wrongdoer must provide compensation for the damage caused. The primary objective of tort law is to hold individuals accountable for harmful conduct they undertake and that economic losses resulting from any party's risky behavior be remedied. It is not the objective of the law to punish the wrongdoer.
12. In the United Kingdom, tort law developed over time based on judicial observations in various cases² concerning certain human behaviors that do not fall under contract or criminal law. In the United States, tort law evolved somewhat differently from the British common law practice, allowing courts³ to determine liability in tort claims depending on the involvement of the injured party. Similarly, in the U.S., there are precedents where service providers, failing to exercise due care regarding potential harm from the goods or services consumed by customers, were held liable. In cases involving gross negligence or criminal negligence, significant compensation has been awarded to the victims, both to remedy the harm and to deter other wrongdoers⁴. Recently, as an alternative to tort law, substitute schemes such as compulsory motor vehicle insurance or

² In *Vaughan v. Menlove* (1837), the court developed the concept of the “reasonable person standard”. Similarly, in *Donoghue v. Stevenson* (1932), the House of Lords developed the concept of a duty of care owed to foreseeable consumers, establishing that a producer or service provider must take reasonable care to avoid acts or omissions likely to cause injury to consumers. Based on these foundational principles, consumer protection laws evolved, and in Nepal, this is reflected in the Consumer Protection Act, 2075, as well as in Chapter 18 of the National Civil Code, 2074, which provides for liability arising from defective products.

³ In *Baltimore & Ohio Railroad v. Goodman* (1927), the U.S. Supreme Court held that if the plaintiff did not act as a reasonably prudent person, contributory negligence would be deemed, and the plaintiff would be barred from recovering damages. Similarly, in *Palsgraf v. Long Island Railroad Co.* (1928), the New York Court of Appeals developed the principle that if the plaintiff is not foreseeable within the reasonable anticipation of the defendant, the plaintiff cannot recover damages, establishing the concept of foreseeable harm in negligence law.

⁴ *Liebeck v. MsDonald's Restaurant*, 1994, *BMW v. Gore*, 1996 SC USA, *Phillip Morris v. William* 2007 SC USA

third-party insurance, and workers' compensation insurance for workplace accidents have been implemented. Under these schemes, and depending on the nature and circumstances of the incidents, claims for damages arising from negligence are transferred or addressed through the insurance framework.

13. Tort law can be classified into different categories. The first is intentional torts, where the wrongdoer acts with deliberate intent; in such cases, the injured party is entitled to compensation for the physical harm caused. The second category is negligence-based torts, which arise from acts deemed unreasonable by society and result in harm or loss to a party where compensation is provided to the aggrieved party. In negligence cases, it is not necessary to prove intent on the part of the wrongdoer; it is sufficient to demonstrate that the person failed to exercise reasonable care.
14. In the context of Nepal, although the National Civil Code, 2074, does not explicitly classify types of torts, it is recognized that a duty of care exists within tort claims, and the evaluation of evidence is left to the discretion of the court. Similarly, Nepalese tort law has incorporated the principle of contributory negligence, meaning that the standard of care a negligent party owes to the client must be considered. Consequently, the extent of negligence on the part of the service provider and the seriousness of the harm caused to the consumer are assessed. In practice, this approach merges the common law concept of contributory negligence with comparative negligence, allowing courts to evaluate liability proportionately. Therefore, courts are competent to interpret and apply the doctrine of contributory negligence in such cases.
15. Physicians and healthcare providers have a duty to exercise a high degree of care toward their patients. If a physician conducts an examination negligently that is, without exercising appropriate caution, such conduct constitutes a tort. To establish negligence, it must be proven that the healthcare provider owed a duty of care to the patient, that this duty was breached, and that the breach caused damage or harm to the patient. In a medical negligence claim, if harm or loss occurs due to a physician's error, negligence, or failure to perform their duty according to professional standards, it is presumed that the damage would not have occurred had the duty been properly performed. This principle, known as *Res Ipsa Loquitur* allows the fact of the harm itself to establish negligence, without the need for extensive additional evidence or investigation. Accordingly, medical services are considered within the scope of tort law, and this principle is actively applied in practice. In this context, in the case of *Glass v Cambridge Health Authority*, it has been interpreted that the principle of *Res Ipsa Loquitur* is applicable to negligence in medical practice⁵.
16. In a medical negligence claim, since the persons engaged in medical practice are expected to observe a high standard of care, the duty of care and breach of such duty alone can be established under the principle of *Res Ipsa Loquitur* i.e. "the thing speaks for itself." This principle allows the wrongdoer's liability to be inferred from the circumstances of the act or event. Furthermore, if the victim's contributory fault cannot be established, the wrongdoer is required to bear the responsibility for the resulting damage.
17. In *Nesar Ahmad Miyan vs. Dr. Pramod Paudel* (Nepal Law Reporter 2075, Unit 7, Decision No. 10061) concerning claims for compensation, the following principle was propounded "**In assessing whether a physician or the associated institution has been negligent in treating a patient, the fundamental consideration is whether the duty of care was properly exercised**

⁵ *Glass v Cambridge Health Authority* [1995] 6 Med LR 91

and whether there exists a direct causal relationship between the physician's action and the resulting outcome. The physician's duty of care includes obtaining the patient's consent for treatment, providing the treatment, and performing it prudently and attentively". In the context of the cited case, based on the health examination conducted by Nepal International Clinic, the complainant Kiran Basnet traveled to Israel, where a subsequent medical examination revealed health issues, resulting in his return to Nepal. Therefore, it appears that the respondents, Nepal International Clinic and Dr. Buddha Basnyat did not conduct Kiran Basnet's health examination with due care and diligence.

18. In the course of health examination, the service recipient inherently has the right to receive an accurate and complete health report. Correspondingly, correspondingly, it is the duty of the physician involved and the concerned health institution to ensure that such reports are prepared in an accurate and truthful manner. If a report is prepared negligently, incorrectly, or in violation of the duty of care, and the service recipient suffers any harm as a result, the physician incurs direct liability, while the health service-providing institution bears vicarious liability.
19. Based on the above analysis, and considering as to whether or not the decision of the Appellate Court, Patan dated 2069/10/25 is justified, it is important to note that the relationship between the service recipient and the physician is not an equal one. The physician possesses technical knowledge and professional skills, whereas the service recipient lacks such expertise, information, or understanding. Due to this asymmetry, the physician is required to exercise their knowledge and skills fully and provide the service whether examination or treatment with a high degree of professional care and diligence, without negligence or recklessness. If a physician fails to exercise full professional diligence during a medical examination or treatment, or does not adhere to the appropriate protocols or accepted standards of medical practice, or misdiagnoses a disease, provides incorrect treatment, administers wrong medication, or conducts incorrect tests, and such actions result in harm or loss to the service recipient, it is considered medical negligence which is a tortious act under tort law.
20. If an individual has the right to receive medical services, providing such services constitutes the physician's direct liability. Similarly, the hospital or health examination center where the physician is employed, or from which the patient receives the service, bears indirect or vicarious liability⁶. Also, the liability of a doctor arises not when a patient merely suffers any injury, but when the injury results from the doctor's conduct that falls below the standard of reasonable care. However, this does not mean that the doctor is responsible for every harm that befalls the patient; it simply signifies that if the patient or service recipient suffers harm due to the doctor's failure to exercise the duty with duty of standard and reasonable care, the doctor must bear responsibility for that harm.
21. In this context, *caveat venditor* is an important principle concerning consumer protection. According to this principle, the person or institution providing a service or product must clearly inform the consumer about the nature and quality of the service or product being offered. Only after the consumer has received such information and given their consent should the such medical treatment commence. In the context of medical services, this aligns with the principle of *informed consent*, ensuring that the consumer does not suffer harm or loss due to lack of awareness. In this context, the doctor providing medical services and the medical institution

⁶ Joga Rao S. V. (2009). Medical negligence liability under the Consumer Protection Act: A review of judicial perspective. *Indian Journal of Urology: IJU : journal of the Urological Society of India*, 25(3), 361–371. <https://doi.org/10.4103/0970-1591.56205>

must clearly inform the patient or consumer about the nature of the service being provided and the possible effects or risks on their health. In the present case, had the doctor or clinic properly informed the victim, Kiran Basnet, about his health during the medical examination, he would not have had to return after going abroad. In this sense, the doctors and the clinic involved in Kiran Basnet's health examination did not adhere to the duty of standard of care and reasonable care.

22. The UN Guidelines for Consumer Protection⁷ set standards that member countries should follow to safeguard consumers' rights and interests. These Guidelines outline principles that businesses must adopt when conducting commercial activities targeting consumers, including education and awareness-raising. According to the Guidelines, businesses should as appropriate develop programs and mechanisms to assist consumers in acquiring the knowledge and skills necessary to understand risks, including financial risks, to make informed decisions, and to access competent and professional advice and assistance, preferably from an independent third party, when needed. In this context, since Nepal is a member state of the United Nations, the standards established by these Guidelines serve as guiding principles for consumer protection in Nepal. Since Nepal International Clinic operates as a commercial entity, it falls within the scope of the UN Guidelines for Consumer Protection, which the Government of Nepal is obliged to implement. However, the clinic itself is also required to internalize and follow these standards. Under the important principle of informed consent in medical negligence, the institution providing the service has a mandatory duty to clearly inform the consumer (patient) about the nature and scope of the service being provided, and the possible effects or risks to life and health arising from the treatment or service. In the present case, the victim, Kiran Basnet, was undergoing a health examination for foreign employment. Under these circumstances, the clinic had an even higher duty of care to conduct the examination meticulously and also inform the patient about possible health risks that could arise due to changes in environment, such as climate or altitude. The expert opinion indicates that health problems could develop with environmental changes, yet the doctor and clinic failed to warn the consumer about the probable risk at the time of the initial examination. This demonstrates that the doctor and the clinic did not fulfill their duty of care appropriately, as required under medical and consumer protection standards.
23. Since the relationship between the service recipient and the doctor is not on an equal footing, the doctor has an implied undertaking to provide treatment with due care, using their professional knowledge and skills. If the doctor fails to uphold this standard, does not exercise adequate caution, violates accepted medical protocols, misdiagnoses the disease, or applies incorrect treatment, and as a result the service recipient suffers harm or loss, such conduct is considered medical negligence. In any given case, while determining as to whether or not an act of medical negligence has been committed in contravention to the Consumer Protection Act, a significant consideration must be given as to whether or not the duty to examine and treat the patient was accepted.
24. The Indian Supreme Court in the case of Jacob Mathew vs. State of Punjab⁸ stated that the essential components of negligence are threefold: "duty", "breach", and "resulting damage", that is to say: (1) the existence of a duty to take care, which is owed by the defendant to the complainant; (2) the failure to attain that standard of care, prescribed by the law, thereby

⁷ United Nations Guidelines for Consumer Protection (as expanded in 1999), https://www.un.org/esa/sustdev/publications/consumption_en.pdf

⁸ Jacob Mathew vs State Of Punjab & Anr on 5 August, 2005, Supreme Court of India, <https://indiankanoon.org/doc/871062/>

committing a breach of such duty: and (3) damage, which is both causally connected with such breach and recognized by the law, has been suffered by the complainant. If the claimant satisfies the court on the evidence that these three ingredients are made out, the defendant should be held liable in negligence. For medical negligence to be established, there must be actual harm or damage caused by a failure to exercise reasonable care. Similarly, in *R vs. Bateman*⁹, it was held that a doctor cannot escape liability if they act negligently in treating a patient, thereby causing adverse effects to the patient.

25. The chest X-ray of Kiran Basnet conducted at Super X-Ray Clinic, Dillibazar (Code No. R0130), was reported as normal, and the urine and blood reports from the laboratory of Nepal International Clinic also showed no indication of any disease. The eosinophil count, which rises in asthma, was 0.5%, falling within the normal range. This opinion was provided by the expert, Dr. Karvir Nath Yogi, who also submitted a written statement before the court. Generally, an “expert” refers to a person having knowledge or proficiency in a particular field. However, since medical negligence is a technical subject, it is essential to rely on the opinion of doctors. Given that professionals of the same field may have a tendency to provide opinions in favor of their peers, the evaluation of such expert opinions must be conducted objectively and impartially. In this context, Dr. Karbir Nath Yogi expressed the opinion that the patient’s asthma (BHR/Asthma) might have developed due to changes in the patient’s environment. At the time of examining the patient, Dr. Buddha Basnyat, the attending physician, had knowledge that environmental changes could potentially trigger the disease. According to the principle of foreseeability, he was obliged to exercise his duty and maintain the standard of care. However, neither Dr. Buddha Basnyat nor Nepal International Clinic Pvt. Ltd. appears to have fulfilled their responsibility and due diligence in this regard.
26. Based on the above facts, principles, comparative analysis, relevant legal provisions, and the principles laid down by the Supreme Court, it is evident that the defendants, Dr. Buddha Basnyat and Nepal International Clinic, acted negligently and carelessly during the health examination of the complainant, Kiran Basnet. Consequently, Kiran Basnet had to return from foreign employment, suffering mental, economic, physical, and material damages. It is further observed that these damages arose precisely because the defendants provided services in a manner contrary to the then Consumer Protection Act, 2054. Therefore, the court cannot agree with the defendants’ appeal.
27. Therefore, observing that the defendants Dr. Buddha Basnyat and Nepal International Clinic acted against consumer interests, it is appropriate to uphold the decision of the District Compensation Committee, Kathmandu, directing the defendant Dr. Buddha Basnyat to pay NPR 300,000 and the other defendant Nepal International Clinic Pvt. Ltd. to pay NPR 300,000 to the complainant Kiran Basnet. Since the Appeal Court, Patan, on 2069/10/25 had upheld the decision of the District Compensation Committee, the decision is justifiable and is further upheld and the appeal of the defendants cannot be entertained. It is hereby directed to remove the case from case registry and accordingly submit the case file to the Record Section.

Concurring with the above Opinion

Honorable Justice Deepak Kumar Karki

⁹ *R v Bateman* (1925) 19 Cr App R 8 (CA)

Bench Officer: Navaraj Joshi (Under-Secretary), Shradda Bista (Section Officer) and Raksha Ram Harijan (Chamar) (Section Officer)

Dated: Year 2077 of the Month of Magh Date 7 Day 4

(Corresponding to Year 2021 of the Month of January Date 20 Day 4)