

Supreme Court, Division Bench
Honorable Justice Hari Prasad Phyal
Honorable Justice Til Prasad Shrestha

Order

078-CI-0703

Sub: Compensation

Appellant/Plaintiff: Dhurba Kumar Biswakarma resident of Rasuwa District, former Lahare Pauwa Village Development Committee Ward No. 4, currently Uttar Gaya Rural Municipality Ward No. 4 currently residing at Suryavinayak Municipality Ward Np. 4, Harsha Chowk, New Thimi

Vs.

Respondent/Defendant: Kanti Children Hospital, Maharajgunj, Kathmandu

Decision at the First Instance: Five Members including Chief District Officer Mr. Kedarnath Sharma District Administration Office, Compensation Committee, Kathmandu

Date of Decision: 2074/09/06 (December 21, 2017)

Decision at the Appellate Level: Honorable Justice Mr. Krishnalal Bhattarai

Hon'ble Judge Mr. Natibabu Lamichhane High Court Patan

Date of Decision: 2076/02/10/6: (corresponding to 24 May, 2019)

Honorable Justice Hari Prasad Phyal: A leave for review has been granted to the petition filed pursuant to Clause 12 (1) (a) and (b) of the Judicial Administration Act, 2073, wherein the petition has been registered equivalent to an appeal petition and the brief facts and findings of the present case are as follows;

Fact

A complaint petition filed by Dhurba Kumar Biswakarma reads as follows: I had taken my eight-month-old son, Alok Baral, to the emergency ward of Kanti Children's Hospital on 2073/03/22 (corresponding to 6 July, 2016) due to a problem in his throat. As advised by the doctor, we were sent to the observation room for steam inhalation. The child's condition became normal upon taking the steam, however, he was not discharged and a cannula was inserted. Following the doctor's advice, I administered Hydrocortisone Injection—85 mg twice, during which the child's condition remained normal. However, at around 11:30 p.m., a nurse came with an injection and forcibly administered it to the child. After that, the child began to lose control over bowel and bladder movements and experienced severe difficulty. Despite administering pump and CPR for

about 40 minutes, his heartbeat showed only 77 percent wherein at around 2:00 a.m., the child was referred to the International Children Friends Hospital. After eighteen months, the child developed conditions such as immobility of the legs, loss of hearing, and loss of vision due to dried optic nerves. His body weight has also been decreasing steadily. When I inquired about the cause of the incident, I found that the third injection administered to my child was from a vial labeled *Montaz IV*, a medicine intended for treating meningitis and malaria. It was later discovered that this medicine had actually been brought to be administered to Shambhu B.K. a 10-year-old boy who was in the adjacent bed. When I immediately raised the issue, the hospital administration threatened and intimidated me and since my child's treatment was my foremost responsibility, I prioritized for his medical care first. After that, my child was kept on a ventilator for 28 days for treatment. On 2073/05/24 (9 September, 2016), I submitted an application requesting an investigation into the treatment. However, no action was taken against the application. Later, while receiving treatment at Patan Hospital on 2074/01/05 (18 April, 2017), I was informed that my child had sustained a permanent disability with no possibility of recovery. Therefore, as there has been a breach of the duty of care and medical negligence in the treatment of my son, Alok Baral, the complainant pursuant to Clause 24 of the Consumer Protection Act, 2054 seeks a compensation of a lump sum amount of Rs. 546,753 (five million four hundred sixty-three thousand seven hundred fifty-three rupees) along with 10 percent interest thereon until full payment.

A summon bearing dispatch number 4228, dated 2074/02/10 (May 24, 2017), was issued in the name of the respondent, Kanti Children's Hospital, Maharajgunj, directing it to submit a rejoinder within seven days. The summon was served to Kanti Children's Hospital, Maharajgunj, on 2074/03/01 (June 15, 2017), and registered under No. 677.

The rejoinder submitted by Kanti Children Hospital on 2074/2/7 (corresponding to 21 June, 2017) reads as follows: Kanti Children's Hospital is a dedicated institution committed to providing selfless healthcare services for children and serving the nation. It is undisputed that the petitioner's son, Alok Baral, received treatment at the hospital's emergency ward on 2073/03/22 (June 5, 2016). Owing to breathing difficulties and deteriorating health conditions, the child required CPR. Only the medicines prescribed by the attending physician were administered, and even in an emergency, nurses are not authorized to administer any medicine without a doctor's directive. Therefore, Alok Baral's worsened health condition cannot be attributed to any negligence on the part of the nurse. The claim that the nurse administered the *Montaz IV* injection, which was intended for another patient, Shambhu B.K., is baseless. From the patient's record, it is undisputed that *Montaz* injection was not administered. The present petition, seeking compensation under Clause 22 of the Consumer Protection Act, 2054, without first pursuing immediate legal remedies for the alleged wrong medicine administration, is motivated by improper intent. The patient's disability was not caused by an overdose or the administration of an incorrect injection, but rather by complications including sepsis with neuroretinitis, cerebral edema, respiratory failure, pneumonia, renal calculi, and urinary tract infection. According to the patient records from the International Children Friendly Hospital, there is evidence of a *perinatal insult to the brain parenchyma with leucomalacia (chronic morbidity)*, indicating that the child had a pre-existing brain disability. Furthermore, the investigation committee constituted by the hospital submitted a report stating that there was no negligence on the part of the doctors or nurses. Therefore, the present petition for compensation, based on false claims, should be dismissed.

Medical opinion submitted by Dr. Aayushma Ragmi from District Health Office on 2074/6/31 (corresponding to 17 October, 2017) reads as follows: After reviewing all these, I came to the conclusion that the child's condition later is due to the long-term consequences of the disease periventricular Leukomalacia. The anoxic brain injury that the child suffered while in emergency department of Kanti Children Hospital might be the cause but it could not be said that it is due to the side effect of medication injection montaz given as said by the child's father through there is not documentation.

It is evident that health services are included under the classification of the General Agreement on Trade in Services (GATS). It is undisputed that individuals consume not only goods but also services. In the present dispute, the Consumer Protection Act, 2054 (1997) is therefore applicable. While his child was undergoing treatment at Patan Hospital on 2074/01/05 (April 18, 2017), the petitioner, Dhruva Kumar Bishwakarma, reportedly learned that his child's condition was irreversible and appeared before the District Compensation Committee, Kathmandu, within 24 days of acquiring this knowledge. Dhruva Kumar Bishwakarma, who bore the responsibility of ensuring proper care for his eight-month-old child, prioritized the child's treatment immediately. It appears reasonable that he only initiated the complaint process after realizing that the child's condition could not improve due to alleged negligence. Accordingly, the present petition is considered to have been filed within the prescribed limitation. Since it was found that effective treatment was not provided to Alok Baral at Kanti Children's Hospital, and referral documents and other records were not clearly maintained, it was established that the hospital did not exercise adequate care in treating the patient, confirming medical negligence. Consequently, the District Compensation Committee, Kathmandu, by its decision dated 2074/09/06 (21 December, 2017), ordered Kanti Children's Hospital to pay a lump sum compensation of Rs. 1,500,000 (One million five hundred thousand rupees) to the petitioner, Dhruva Kumar Bishwakarma.

The law provides that if a person suffers any harm, they are entitled to financial compensation based on the loss or special damages incurred. "Special damages" refer to physical injury (physical loss) as well as harm suffered due to mental pain and suffering (loss for mental agony) whereas, "economic damages" includes economic loss incurred for medical treatment, loss of earnings affecting one's livelihood and other financial losses. The District Compensation Committee, recognizing a serious breach of the duty of care owed by the medical provider and the resulting loss and damage suffered by me, ordered the respondent to pay a compensation of Rs. 1,500,000 (one million five hundred thousand rupees) without interest. However, the Committee's decision does not specify the basis or rationality for determining the compensation amount of fifteen lakh rupees. The decision failed to specify the nature or extent of the loss and damage I suffered and, as a result, awarded me a meager and inadequate compensation without interest, far below my claim. Since the decision also contradicts established judicial principles, I, Dhruva Kumar Bishwakarma, have filed this appeal seeking partial reversal of the said decision and full payment of the lump sum amount of Rs. 5,463,753 (Five million four hundred sixty-three thousand seven hundred fifty-three rupees) along with interest at the rate of 10 percent until full settlement, in order to obtain justice.

The appeal petition filed by Mangal Sundar Silpakar on behalf of Kanti Children Hospital, Kathmandu District, Kathmandu Metropolitan City Ward No. 3, Maharajgunj reads as follows: The decision of the District Compensation Committee dated 2074/09/06 (21 December, 2017) was

rendered without adopting any transparency and is in violation of Clause 25, 26, and 54 of the Evidence Act, 2031, Clause 22 and 24 of the Consumer Protection Act, 2054, and Rules 41 and 45 of the Consumer Protection Regulations, 2056, as well as Clause 16 of the Good Governance (Management and Operation) Act. The decision failed to provide clear grounds or reasoning, and was issued prematurely without properly determining whether any negligence, in violation of No. 194(a) and No. 195 of the *Muluki Ain* (Country Code), had occurred. Furthermore, in *A.C. Garments vs. respondent Mahendra Man Shrestha, Chairman of Namaste Travels Pvt. Ltd.* (Nepal Law Reporter 2069, Unit 1, Decision No. 8744,) the Court explained that the limitation period is not subject to a party's discretion to constrict or extend; it is a legal right prescribed purely by statutory law, and cannot be interpreted in a manner favorable or unfavorable to any party. Accordingly, a claim for cancellation of registration cannot be entertained simply by showing that a relevant document was purportedly received on a particular date, and cannot claim for deregistration by seeking the limitation prescribed under No. 17 under the Chapter of Land Mapping (*Jagga Pajani*).

Before adjudicating the merits of a dispute brought before it, the court must first determine as to whether or not the matter was presented within limitation period prescribed by law. Any decision contrary to this principle, as laid down in (Nepal Law Reporter 2069, Unit 9, Decision No. 8884, p. 1224), is inconsistent with established judicial principles. Accordingly, the initial decision of the District Compensation Committee, Kathmandu, dated 2074/09/06 (21 December, 2017), should be annulled, and the respondent should be granted relief by separating the petitioner's claim from the complaint process.

Seeing that the petitioner, Dhruba Kumar Biswakarma, filed an appeal claiming that the District Compensation Committee awarded inadequate compensation, and the respondent, Kanti Children's Hospital, also filed an appeal alleging that the compensation amount was fixed without proper basis or reasoning, the High Court, Patan, by its order dated 2075/04/27 (11 August, 2017), directed that both appeals pursuant to No. 202 of the *Muluki Ain* (Country Code) be heard together and directed the case to be presented for hearing.

In the course of treatment, an eight-month-old infant who had been receiving Hydrocortisone Injection – 85 mg as prescribed by the doctor was mistakenly administered Montaz IV injection. The question arises as to what symptoms may appear in the infant's body and what long-term health effects could result from this error. For this purpose, an opinion will be sought from a three-member panel of medical experts from Tribhuvan University Teaching Hospital, Maharajgunj. It has been noted that Kalpana Baral was admitted to Paropakar Maternity and Women's Hospital, Thapathali, Kathmandu, on 2072/07/18 (4 November, 2015). In connection with her health examination and the birth of the child, certified copies of the relevant hospital records and documents were to be obtained. Since it was recorded that the appellant's child received treatment at Kanti Children's Hospital, Maharajgunj, on 2073/03/22 (6 July, 2016), the High Court, Patan, by its order dated 2075/09/02 (17 December, 2018), directed that certified copies of all records and documents prepared during the treatment be obtained from the hospital and submitted in accordance with the law. Since no evidence could substantiate any differing medical opinion, it was established that the child's health was adversely affected due to medical negligence. Accordingly, the District Compensation Committee, Kathmandu, ordered Kanti Children's

Hospital to pay a lump sum compensation of Rs. 1,500,000 (Fifteen lakh) to the petitioner, Dhruva Kumar Bishwakarma, which appears consistent with the principles of justice. However, the court does not concur with the appeal filed by the petitioner, Dhruva Kumar Bishwakarma, the appeal filed by the respondent, Kanti Children's Hospital, or the arguments presented by the learned advocates and the government attorney.

Petition filed by Dhurba Kumar Biswakarma before this court reads as follows: I had taken my eight-month-old son, Alok Baral, to the emergency ward of Kanti Children's Hospital on 2073/03/22 (6 July, 2016) due to a throat problem. The District Compensation Committee, Kathmandu, had clearly found that Kanti Children's Hospital failed to provide effective treatment and that referral documents and other records were unclear, confirming medical negligence. Despite this, the decision of the High Court, Patan, upholding the award without considering the serious loss and damage I suffered in determining the compensation amount, is flawed. Due to the hospital's negligence, my minor son today is facing a life-threatening situation, contrary to the fundamental rights guaranteed by the Constitution. While administering medicines and other treatment procedures, the attending doctors, nurses, and other staffs are required to exercise due diligence. Effective treatment necessitates the correct medicine, in the correct dosage, by the correct method, and within the correct timeframe. Provided, any harm occurs due to failure to exercise such due diligence by the doctors, nurses and other staffs involved in the treatment, the affected person has the right to receive appropriate and reasonable compensation. When awarding compensation to a minor, who is entitled to special protection, the minor cannot be treated in the same manner as for an adult. The harm caused by the absence of a higher level of duty of care differs between an adult and a minor. In this case, the minor child has been forced to endure a lifetime of suffering and live with a disability, dependent on the compassion and sympathy of others. Although the District Compensation Committee, in its decision, recognized Kanti Children's Hospital's medical negligence and failure to provide effective treatment, it did not, under Clause 24 of the Consumer Protection Act, 2054 (1997), award compensation fully reflecting the loss and damage I have suffered. Considering the harm caused to my child due to the negligent service, I am entitled to receive from the respondent hospital compensation for serious injury resulting in loss or impairment of bodily functions, economic loss, loss of livelihood, and mental agony and suffering. Furthermore, due to the respondent's negligence, my son, at a very young age, has lost his vision and hearing, his brain has not developed or functioned properly, and he is unable to move other parts of his body. Considering the expenses incurred for medical treatment as well as the mental and physical suffering endured, the High Court, Patan's decision upholding the District Compensation Committee, Kathmandu's award, is inconsistent with Articles 16 (1), 18, 21(2), 35, 39, and 44 of the Constitution of Nepal, as well as Clause 24 of the Consumer Protection Act, 2054 (1997). Therefore, under Clauses 219 (1) (a) and (b) of the National Civil Procedure Code, 2074, the petitioner seeks the honorable court for a review of the case.

An order set aside by this court on 2079/02/23 (6 June, 2022) reads as follows: the present petition seeks a lump sum compensation of Rs. 5,463,753, together with interest thereon until full payment. Clause 24 of the Consumer Protection Act, 2054, clearly provides for the award of compensation to a victim based on the loss and damage suffered. However, the decision of the High Court, Patan, dated 2076/02/10 (24 May, 2019), which upheld the award of the District Compensation Committee, Kathmandu, set the compensation amount without a proper analysis of the actual loss suffered by the petitioner and without articulating any reasonable grounds, thereby reflecting a

misinterpretation of the provisions of Clause 24 of the Consumer Protection Act. In view of the foregoing, and in accordance with Clause 12 (1) (b) (a) of the Judicial Administration Act, 2073 and Clause 219 (1) (a) of the National Civil Procedure Code, 2074, permission has been granted to review of the present case and directs to proceed accordingly.

An order dated 2079/06/20 (corresponding to 6 October, 2022) had been issued by this court which reads as follows: it has been noted that Kanti Children's Hospital had received the summon issued by this court on 2079/03/28 (corresponding to 12 June, 2022) but failed to appear through a legal representative. Accordingly, the case is scheduled for hearing on 2079/07/15 (corresponding to 1 November, 2022), and Kanti Children's Hospital is directed to appoint a legal practitioner for the purpose of argument. Furthermore, as the case was previously represented by the Government Attorney during the proceedings before the High Court, the Office of the Attorney General is directed to ensure the presence of a Government Attorney for the argument on the same date and to do in accordance with the law.

An order dated 2079/7/15 (corresponding to 1 November, 2022) had been issued by this court which reads as follows: it is noted that the eight-month-old Alok Baral was taken to Kanti Children's Hospital on 2073/03/22 (corresponding to 6 July, 2016) for medical treatment. Accordingly, the court directed that the relevant case file reflecting the treatment administered on that day be obtained through the legal representative of Kanti Children's Hospital and submit the same by 2079/07/21 (6 November, 2016).

An order was issued by this Court on 2079/8/28 (corresponding to 14 December 2022), which reads as follows: in this regard, since the learned advocates appearing on behalf of the appellant/petitioner requested the Bench to be given an opportunity to submit a note of deliberation clarifying the medical terminologies, the Bench, in accordance with the request, directed the appellant and the respondent to submit their deliberation notes within 15 days and, upon receipt, to present them in accordance with the rules.

The deliberation note submitted by Advocate Bhuvan Dahal on behalf of Kanti Children's Hospital states the following: According to the respondent's claim, it was mentioned that the medicine *Montaz IV* that was to be administered to the adjacent patient Kamal B.K., is a drug typically given for meningitis or malaria patients. According to the petitioner's claim, it is alleged that *Montaz IV* was administered by mistake. Provided, if that is the case, the side effects of *Montaz IV* may include an increase in WBC and platelets, skin allergy, vomiting, and diarrhea. Alok Baral, the minor patient was administered *Hydrocortisone Injection – 85 mg*, a medicine prescribed for pneumonia. This medicine is used in emergency situations to rapidly improve the condition of patients who are seriously ill. As the condition of the patient further deteriorated, CPR and pump were administered as required. Since the patient's condition became critical and NICU (Neonatal Intensive Care Unit) admission was necessary. However, since NICU was not available at Kanti Children's Hospital, the patient was referred to the International Child-Friendly Hospital. The minor patient was admitted to the hospital due to severe pneumonia. As per the claims, the patient was not brought to the hospital as a routine case. Had the patient been a routine case, there would have been no need to bypass nearby hospitals and bring the child all the way to Kanti Children's

Hospital. The patient's condition was not due to an overdose or the use of an incorrect injection but was caused by sepsis with neuroretinitis, cerebral oedema, respiratory failure, pneumonia, renal calculi with UTI. In other words blood infection, eye complications, swelling of the brain, respiratory failure, pneumonia, as well as kidney stones and urinary problems. According to the patient's medical records from the International Child-Friendly Hospital, it is documented that the child suffered from perinatal insult to brain parenchyma with leukomalacia (chronic morbidity), a condition resulting from insufficient oxygen supply during birth. These facts indicate that the patient had been afflicted with a brain disability from birth. The condition of the minor child was not caused by the administration of *Montaz IV*. Rather, it resulted from insufficient oxygen during birth and the petitioner therefore, seeks relief from these false allegations.

The deliberation note submitted by Learned Advocate Mr. Dhurba Koirala and Ms. Sashi Basnet on behalf of the petitioner/plaintiff Dhurba Kumar Biswakarma states the following: On 2073/3/22 (corresponding to 6 July, 2016), when the minor Alok Baral, was taken to the emergency department of Kanti Children's Hospital for treatment he was 8 months old and weighed 8.5 kg. At the emergency department of the hospital, the hospital records indicate that the doctor noted "noisy breathing, running nose, and fever" on the prescription sheet. There is no mention of any chronic illness, suspicion of such illness, or disability in the child. Although the respondents claimed that *Montaz (1 gm IV)* was not administered to Alok Baral, the hospital's own report dated 2073/5/31 (corresponding to 16 September, 2016) states that this medicine was given to a 10-year-old patient, Shambhu B.K. Provided, a medicine intended for a 10-year-old child is administered to an 8-month-old infant, it would constitute an overdose and could adversely affect the child's body in a manner that would pose a risk to life. The report submitted by Dr. Aayushma Regmi from the District Public Health Office on 2074/6/31 (corresponding to 17 October, 2017), states that the immediate side effects of *Inj. Montaz* include rash, itchiness, fever, diarrhea, leukopenia, pain at the injection site, and nausea/vomiting. It is also noted that, in rare cases, life-threatening complications such as severe anaphylaxis (allergic reaction) and respiratory compromise (cessation of breathing) may occur, which could potentially be fatal. Similarly, the report prepared by Kanti Children's Hospital on 2073/5/31 (corresponding to 16 September, 2016) also notes that the child experienced desaturation, gasping, and choking, requiring CPR, thereby confirming that the observed symptoms corresponded to the known side effects of the medicine. Likewise, upon discharge from the International Child Friendship Hospital, the child was diagnosed with sepsis with neuroretinitis, cerebral oedema, respiratory failure, pneumonia, renal calculi, and urinary tract infection. According to the World Health Organization, the term *sepsis* is defined as "a life-threatening organ dysfunction caused by a dysregulated host response to infection." Similarly, since the child was noted to have respiratory failure, it is further confirmed that the side effects of the medicine, as mentioned in Dr. Aayushma Regmi's report, include respiratory compromise, that is, failure of breathing. Consequently, due to the negligent actions of Kanti Children's Hospital, the minor Alok Baral suffered harm to his health and pursuant to Clause 24 of the Consumer Protection Act, 2054, and on the basis of loss and damage, and following the principle of *Restitutio in Integrum* (just compensation/adequate compensation), and taking into account the standards of compensation outlined in Clause 52 of the same Act, the petitioner claims compensation of Rs. 54,63,753/- in a lump sum, along with interest at the rate of 10% per annum until full payment is made.

Findings

Having been duly listed in the cause list in accordance with the rules, the present case was placed before the Bench for adjudication. The appeal petition, along with the case file and all documents attached with the case file has been carefully examined.

Learned Advocates Mr. Dhurba Koirala and Ms. Shashi Basnet on behalf of the appellant/plaintiff, argued that the eight-month-old infant, Alok Baral, had been taken to the emergency department of Kanti Children's Hospital on 2073/3/22 (6 July, 2016) for treatment, as he was suffering from mild cough and cold with slight noisy breathing. The doctor's prescription note mentioned "*noisy breathing, running nose, and fever.*" It was further argued that an injection of *Montaz 1 gm*, which had been intended for a 10-year-old patient named Shambhu B.K., was instead administered to the infant. Following the administration of the injection, the child began to lose control over urination and defecation, and his breathing ceased, after which he was referred to another hospital for further treatment. The report prepared by Kanti Children's Hospital on 2073/5/31 (16 September 2016) states that the *Montaz 1 gm injection* was administered to a 10-year-old patient named Shambhu B.K. Furthermore, the report dated 2074/6/31 (17 October 2017) submitted by Dr. Ayushma Regmi on behalf of the District Public Health Office, Kathmandu, describes the side effects associated with this medicine. In addition, the report prepared by Kanti Children's Hospital's dated 2073/5/31 (corresponding to 16 September, 2016) records that the child had experienced *desaturation, gasping, and choking*, necessitating CPR. Since these symptoms correspond to the known side effects of the medicine, it is thereby confirmed that the infant, Alok Baral, suffered adverse effects due to the erroneous administration of *Montaz 1 gm injection*. It was further argued that due to the negligent actions of the respondent, Kanti Children's Hospital, the minor Alok Baral suffered severe harm to his health. However, the decision of the District Compensation Committee, Kathmandu upheld by the High Court, Patan, which awarded a compensation amount lower than the claim, was rendered without due consideration of the principle of *Restitutio in Integrum* (Just Compensation/Adequate Compensation) as enshrined under Clause 24 of the Consumer Protection Act, 2054 . Therefore, it was pleaded that, taking into account the standards of compensation provided under Clause 52 of the Consumer Protection Act, 2075, the compensation be reassessed and determined accordingly, and that the petitioner be awarded the claimed sum of Rs. 54,63,753/- in a lump sum, along with 10% annual interest thereon until full payment is made.

Learned Advocate Mr. Bhuvan Dahal, on behalf of the respondent/defendant Kanti Children's Hospital, Maharajgunj (Hospital), argued that although it has been alleged that there was negligent and improper treatment affecting the child's health, the Consumer Protection Act, 2054 (1997) is not applicable in the presence of the Health Act, 2074. The child had been admitted to the hospital suffering from pneumonia, Hydrocortisone Injection-85 was administered as part of the standard treatment for pneumonia. As per the plaintiff's allegation, it has been claimed that the medicine *Montaz IV injection* intended for another patient in the adjacent bed was mistakenly administered to the eight-month-old child. However, this is not true. The child had suffered from brain impairment since birth due to insufficient oxygen during delivery and was also affected by various

other illnesses. During the course of the child's treatment, there was no negligence on the part of the hospital. Therefore, the decision of the High Court, which upheld the initial judgment, is erroneous. As the compensation amount claimed by the petitioner is not legally justified, the learned advocate argued that the hospital should be released from the false accusation.

Considering the aforementioned facts, the documents attached to the case file, and the arguments presented by the learned advocates, it appears necessary to analyze the following issues in order to reach a decision:

- a. Whether medical negligence occurred in the present dispute?
 - b. How can the issue of the statute of limitation be determined in this case?
 - c. In the event that medical negligence is established, in what manner and to what extent should compensation be awarded?
 - d. Whether the judgment rendered by the High Court, Patan on 2076/02/10 (24 May, 2019) is consistent or not?
2. Upon consideration the decision, the complaint filed by Dhruva Kumar Bishwakarma states that in the treatment of the minor son, Alok Baral, there was a breach of the duty of care, resulting in medical negligence and the administration of an incorrect medicine, which caused severe harm to the health of the eight-month-old child, leading to irreparable damage. Accordingly, pursuant to Clause 14 of the Consumer Protection Act, 2054, compensation of Rs. 5,463,753/- along with 10% interest until full payment was sought. However, as per the patient's medical records, *Montaz IV* injection had not been administered, and since no legal remedy was sought immediately regarding the alleged use of the wrong medicine, the claim for compensation was filed after the expiration of the limitation period prescribed under Clause 22 of the Consumer Protection Act, 2054. Therefore, the present petition is deemed to have been filed with mala fide intent. The hospital's rejoinder states that the patient's condition was not caused by an overdose or the administration of an incorrect injection, but rather due to complications arising from sepsis with neuroretinitis, cerebral edema, respiratory failure, pneumonia, renal calculi, and urinary tract infection (UTI), among others. Furthermore, the medical records from the International Child Friendly Hospital indicates a diagnosis of perinatal insult to brain parenchyma with leucomalacia (chronic morbidity), which shows that the patient had been suffering from cerebral impairment since birth. As the investigation committee formed by the hospital submitted a report stating that there was no negligence on the part of the doctors or nurses, the Kanti Children's Hospital requests that the petitioner's complaint for compensation is based on false allegations and should be dismissed.
3. Since it was determined that the present dispute falls within the ambit of the *Consumer Protection Act, 2054*, and it was apparent that effective treatment had not been provided to the eight-month-old child, Alok Baral, at Kanti Children's Hospital, and that the relevant referral documents and accompanying records were ambiguous and inadequately clarified, it was held that the hospital had failed to exercise the requisite duty of care in the treatment of the patient. Consequently, medical negligence was established and accordingly, the District Compensation Committee, Kathmandu, rendered its decision directing Kanti Children's Hospital to pay a lump sum compensation of Rs. 15,00,000/- to the petitioner, Dhruva Kumar Bishwakarma. Being dissatisfied with the said decision, both parties preferred appeals before the High Court,

Patan, wherein the High Court, upon consideration, affirmed the decision of the District Compensation Committee. Thereafter, as the plaintiff, Dhruva Kumar Bishwakarma, remained aggrieved by the judgment of the High Court, he instituted the present petition before this Court, seeking leave to review the said decision. Upon the grant of such leave, the matter has now been brought before this Bench for final adjudication.

4. In this case, on 2073/03/22 (6 July, 2016), eight-month-old child Alok Baral was admitted to the Emergency Department of Kanti Children's Hospital for the treatment of a common cold and cough. As per the doctor's prescription, *Hydrocortisone Injection-85 mg* was administered twice, during which the child's health condition remained stable. However, at around 11:30 p.m., a nurse personally brought and administered another injection to the child, wherein the patient began to experience difficulty with involuntary passage of stool and urine. Upon inquiry into the cause, it was revealed that the *Montaz IV* injection, which was intended for ten-year-old Shambhu B.K. in the adjacent bed, had been mistakenly administered to the eight-month-old child, Alok Baral. It is seen that in the treatment of my son, Alok Baral, there was a breach of the duty of care, and due to medical negligence, his health suffered severe consequences. During the course of treatment, the child's heart had to be resuscitated through pump and CPR for about 40 minutes, after which the heartbeat was recorded at 77 percent, and at around 2:00 a.m., he was referred to another hospital, namely, the International Child Friendly Hospital. Although an application for investigation into the treatment was submitted on 2073/05/24 (9 September, 2016), no action was taken on it. During further treatment at Patan Hospital, on 2074/01/05 (18 April, 2017), it was informed that the child had become permanently disabled, with no possibility of recovery. As a result of the negligence of the respondent, Kanti Children's Hospital, the eight-month-old child has been rendered physically and mentally incapacitated for life, causing him and his family to suffer irreparable economic, mental, and physical distress. Consequently, the present case was initiated based on the complaint filed by the child's father, Dhruva Kumar Bishwakarma, seeking compensation for the grievous and irreparable harm caused to his minor son, Alok Baral.
5. First and foremost, it is necessary to analyze as to whether or not medical negligence occurred in the present dispute. Considering the concept of medical negligence, once a physician has agreed to provide services to a patient, a duty of care is created towards the patient. The duty of care entails responsibilities such as determining the appropriate treatment required for the patient, making decisions regarding the necessary course of action, and recommending or prescribing the medications essential for the patient's care. It includes taking into account the patient's medical history, determining the method of treatment accordingly, selecting the appropriate medication, obtaining the patient's informed consent for any surgical procedures if required, and, even after treatment, providing information in a language understandable to the patient about precautionary measures. If a physician acts negligently in any of these aspects of treatment, resulting in adverse effects on the patient's life or health or causing harm or loss, such conduct is regarded as medical negligence¹. If a person fails to perform a duty that a reasonable person would exercise, or engages in conduct that a reasonable person ought not to do, and as a result, causes harm to another, such conduct is regarded as negligence². Under

¹ Special Edition on Contract and Law of Torts, 2079, Negligence in Treatment, Dr. Khushi Prasad Tharu, pg. 194, National Judicial Academy

² Poonam Verma v. Ashwin Patel, 1996 AIR 2111, 1996 SC (4) 332.

American tort law, negligence is defined as a breach of a duty of care³. In the case of *Lussan vs. Insurance Co.*⁴, it has been held that if a service provider fails to exercise due care in the provision of medical services, resulting in serious harm to the beneficiary, such conduct constitutes gross negligence. From these definitions, it follows that if a physician, in the course of treating a patient, violates any treatment protocol, fails to provide the required service, or engages in an act that ought not to be done, thereby breaching the duty of care, and the patient suffers physical or mental harm, such conduct constitutes medical negligence. To establish medical negligence, the claiming party must prove the following four essential elements⁵. The four essential elements are as follows: (a) There existed a duty to care, which was breached; (b) The action or inaction of the concerned healthcare professional must demonstrate, from the perspective of a reasonable person, that the standard of care owed to the patient was not met (breach of duty); (c) It must be shown that the situation was such that foreseeable harm could result to the claimant (foreseeable damage) and (d) It must be established that the cause of the harm or loss was directly attributable to the breach of duty (cause of action).

6. In the present case, considering the medical background of the victim patient, Alok Baral, it is noted that he was born normally on 2072/07/20 (6 November, 2015) with a birth weight of three kilograms, as recorded in the discharge papers of Paropakar Maternity and Women's Hospital dated 2072/07/20 (corresponding to 6 November, 2015). On 2073/03/22 (6 July, 2016), the child, then eight months old and weighing 8.5 kg, was brought to the Emergency Department of Kanti Children's Hospital for treatment of a common cold and cough. The attending physician noted in the child's prescription records the symptoms as "noisy breathing, running nose, and fever." Apart from this, the patient's medical history does not indicate the presence or suspicion of any chronic illness, nor is there any record suggesting that the child was disabled. No issues regarding the child's growth and development were noted, and there is no indication that any special health examinations were recommended. In this context, the report prepared by Kanti Children's Hospital on 2073/05/31 (16 September, 2016) states that prior to coming to Kanti Children's Hospital, the child Alok Baral had been diagnosed with Laryngo malaria at T.U. Teaching Hospital. However, this information does not correspond with the child's medical background as recorded in the prescription papers prepared by Kanti Children's Hospital, and therefore, this fact prima-facie appears doubtful and questionable.
7. On the other hand, regarding the petitioner's allegation that the *Montaz 1 gm* injection, which was brought for a 10-year-old child, Shambhu B.K., was administered to the eight-month-old child, Alok Baral, the respondent hospital initially contended that neither the patient Shambhu B.K. nor the *Montaz (Montaz 1 gm IV)* injection was present at the hospital. However, in response to the application submitted by the guardian of Alok Baral, the report (Para No. 2, Point No. 4) submitted by Kanti Children's Hospital on 2073/05/31 (16 September, 2016),

³ Law of Torts (Principle and Practice) Dr. Narayan Ghimire, pg. 84

⁴ Ibid, pg. 85

⁵ Medical negligence, lawbook. Sa. Gov.au. Negligence is failure to take reasonable care to avoid causing injury or loss to another person. There are four steps in providing negligence. The plaintiff must prove:

1. That there is a duty in circumstances to take care duty of care ,
2. That the behavior or inaction of the defendant in the circumstances did not meet the standard of care which a reasonable person would meet in the circumstances (breach of duty),
3. That the plaintiff has suffered injury or loss which a reasonable person in the circumstances could not have been expected to foresee (damage),
4. That the damage was caused by the breach of duty (causation).

states that the *Montaz (Montaz 1 gm IV)* injection had indeed been intended for the 10-year-old child, Shambhu B.K. From this, it is evident that, contrary to the hospital's initial contention, both the child Shambhu B.K. and the *Montaz (Montaz 1 gm IV)* injection were present at the hospital, as claimed by the petitioner.

8. According to the nurse's daily record, in the Emergency Ward of the hospital, as per the doctor's prescription, the child Alok Baral was administered *Hydrocortisone Injection-85 mg* at 4:30 p.m. and *Hydrocortisone Injection-40 mg* at 10:00 p.m. on 2073/03/22 (6 July, 2016). Until the administration of these injections, the child's condition remained stable. However, at 11:30 p.m. that same night, when the nurse personally brought and administered another injection, the child began to experience difficulty, with involuntary passage of stool and urine. Subsequently, while continuing treatment, it was noted that the hospital did not have an ICU, and without completing the process of referral to another hospital instructing to take the child to another hospital at 2:00 a.m. cannot be regarded as reasonable and standard. Under the duty of care, matters such as taking the patient's medical history, determining the appropriate method of treatment considering that history, selecting suitable medication, obtaining the patient's informed and voluntary consent where necessary, and providing the patient or their close relatives with information in an understandable language regarding precautionary measures after treatment, are all considered standard practices within any hospital or treatment protocol. Furthermore, if the patient needs to be referred to another hospital with better facilities, it is the minimum duty of the referring hospital to complete all procedures for proper referral before sending the patient elsewhere. By directing the patient to be sent to another hospital at 2:00 a.m. without completing the necessary referral procedures, it is evident that the hospital and the attending physician failed to fulfill their duty of care. Moreover, in the report prepared by the hospital on 2073/05/31 (16 September, 2016), it was stated that prior to coming to Kanti Children's Hospital, the child had been diagnosed with *Laryngo malaria* at T.U. Teaching Hospital, a claim that cannot be substantiated and appears false. Consequently, it cannot be said that the hospital exercised an appropriate duty of care toward the patient.
9. In paragraph No. 7 of the report submitted by Dr. Aaysushma Regmi on behalf of District Public Health Office, Kathmandu On 2074/06/31 (17 October, 2017), it was noted that Inj. Montaz is the combination of two antibiotics: Inj. Ceftriaxone (1000 mg) and Inj. Tazobactam (125 mg). Ceftriaxone belongs to the third-generation cephalosporins, while Tazobactam is a beta-lactamase inhibitor that inhibits bacterial beta-lactamases. This medicine is used in the treatment of various infections caused by bacteria. Furthermore, in Paragraph No. 8, it was noted that the immediate side effects of Inj. Montaz include rash, itchiness, fever, diarrhea, leukopenia, pain at the injection site, and nausea/vomiting. Although rare, major life-threatening complications such as severe anaphylaxis (allergic reaction) and respiratory compromise may occur. Anaphylaxis is a severe, potentially life-threatening allergic reaction. Anaphylaxis causes the immune system to release a flood of chemicals that can cause you to go into shock - blood pressure drops suddenly and the airways narrow, blocking breathing. Respiratory compromise is a state in which there is a high likelihood of decompensation into respiratory insufficiency and failure, respiratory arrest or death, but in which specific interventions (continuous monitoring and therapies)

might prevent or mitigate decompensation⁶. Anaphylaxis and respiratory compromise refer to a failure of breathing (a condition in which respiration stops or is severely impaired). It is understood that anaphylaxis can pose a life-threatening risk, potentially leading to death if not promptly and properly treated.

10. It is evident that, even under normal circumstances, the administration of *Inj. Montaz* as prescribed by a doctor carries a risk of anaphylaxis or respiratory compromise that is, failure of respiration, which can be life-threatening. In the present case, the dose intended for a 10-year-old child was negligently administered to an eight-month-old infant, Alok Baral, thereby exposing him to a heightened risk of severe adverse effects. According to the petition, following the administration of *Inj. Montaz* at 11:30 p.m., the child experienced difficulty in breathing, along with involuntary passage of stool and urine, and during this period, resuscitative measures including manual ventilation and CPR were required, with the heartbeat recorded at only 77 percent. Furthermore, the report prepared by Kanti Children's Hospital on 2073/05/31 (16 September, 2016) corroborates these events, noting that the child experienced desaturation, gasping, and choking, necessitating CPR. The concurrence between the documented side effects of *Inj. Montaz* and the observed symptoms in the child establishes that the adverse reaction was directly linked to the negligent administration of the drug, thereby confirming medical negligence on the part of the hospital.

11. It is noted that from 2073/03/23 (7 July, 2016) the child Alok Baral was maintained on an ET tube for a period of 28 days at the International Child Friendship Hospital. Upon discharge, the child was found to be suffering from sepsis with neuroretinitis, cerebral edema, respiratory failure, pneumonia, renal calculi, with UTI. In other words, the discharge report of International Child Friendship Hospital confirms that the child experienced blood infection, ocular complications, brain swelling, respiratory failure, pneumonia, kidney stones, and urinary dysfunction. These facts demonstrate that the respondent, Kanti Children's Hospital, Maharajgunj, Kathmandu, in the course of treating the injured child, breached its duty of care by failing to exercise the necessary caution and diligence expected in medical treatment. Such omission and failure to fulfill the indirect obligations of careful treatment constitute a causation in the harm and loss suffered by the minor child, Alok Baral, thereby establishing medical negligence on the part of the respondent hospital.

12. Under Section 2(e) of the Consumer Protection Act, 2054, "service" is defined to mean any labor, facility, or consultation provided for any work in return for a fee or remuneration. This Court has observed that Section 2(m) of the Consumer Protection Act, 2075 (2018), which continues the provisions of the earlier Act, defines "service" to include utilities such as electricity, drinking water, telephone, information technology, health, education and consultation, transport, sewage, banking, or other similar services, and explicitly states that the term encompasses legal, medical, or engineering services. Since the provision of medical services involves the application of labor, skill, and knowledge to provide consultation and

⁶ <https://www.mayoclinic.org/diseases-conditions/anaphylaxis/symptoms-causes/syc-20351468/> Date 2080/02/25 (corresponding to 8 June, 2023)

treatment, medical services are thereby recognized as falling within the scope of the Consumer Protection Act⁷.

13. Clause 6 of the Consumer Protection Act, 2054, seeks to safeguard the rights and interests of consumers. It ensures that consumers have the right to be protected⁸ from goods or services that may cause harm to life, health, or property, and from unfair trade practices. Consumers are entitled to be informed⁹ about the price, quality, quantity, purity, and standard of goods or services, and under the prevailing Consumer Protection Act, they are guaranteed the right to claim compensation¹⁰ for loss or damage arising from the use of goods or services. Further, Part (g) of the same Clause provides that consumers have the right to receive redress or be heard by the competent authority or body empowered to protect consumer rights and interests.
14. Article 44 of the Constitution of Nepal, provides (1) Every consumer shall have the right to consume quality goods and services, and sub-article (2) prescribes that a person who has suffered injury from any substandard goods or services shall have the right to claim compensation in accordance with the law. This constitutional provision ensures that consumers are entitled to quality goods and services and protects them from suffering loss or damage due to unfair trade practices, thereby recognizing the rights of consumers as fundamental rights under the Constitution. For the purpose of implementing this provision, Clause 16 (1) of the Consumer Protection Act, 2075, provides that no person shall engage in or cause others to engage in unfair commercial or business practices. Further, sub-clause 2 (a) of the same Clause specifies that if a person sells or supplies goods or services by misrepresenting, concealing, or distorting their actual quality, quantity, price, or other attributes, such conduct shall be deemed to be an unfair commercial or business practice. Every minor child is entitled not only to the right to receive quality medical services under health-related rights, but this right is also intrinsically linked to Article 16(1) of the Constitution, which guarantees the right to live with dignity, and Article 39 of the Constitution, which secures the rights of children to education, health, nutrition, proper care, play, recreation, and holistic personality development. Accordingly, under the Consumer Protection Act, 2054 and subsequent constitutional and legal developments, the provision of quality medical services to children constitutes a direct duty of the physician, while the hospital, institution, or center providing such services bears an indirect duty to ensure such care is properly delivered.
15. Similarly, Clause 232 of the National Criminal Code, 2074, provides that a person authorized by law to provide medical treatment shall not treat anyone with gross negligence or carelessness, prescribe or administer medication improperly, or perform surgical procedures negligently and thereby criminalizes medical negligence. The law distinguishes between intentional torts and negligence-based acts, essentially dividing tort-related liability into two

⁷ Dr. Buddha Basnet vs. Consumer Protection Forum Nepal, Central Executive Committee Kathmandu et.al. (Nepal Law Reporter 2077, Unit 12, Decision No. 10621)

⁸ Clause 6 (1) (a) of Consumer Protection Act, 2054

⁹ Ibid Clause 6 (1) (b)

¹⁰ Clause 3 (2) (g) of Consumer Protection Act, 2075

categories. In cases of intentional torts, the injured party is entitled to compensation for physical harm. An act of tort committed through negligence is considered unreasonable by society, and when such an act causes harm or loss to a party, the injured party is entitled to compensation. It has been interpreted by this court that in such cases, it is not necessary to establish the violator's intention; it is sufficient to prove that the person failed to exercise reasonable care¹¹ under the circumstances at the time of the act. The laws have been systematically established under Nepal's civil and criminal codes to ensure that while examining and treating citizens, medical professionals exercise due care and avoid negligent or improper treatment. These provisions provide for compensation to be paid for wrongful treatment and, in cases of gross negligence, for the responsible party to be punished, thereby embedding¹² the principles and recognition of tort law within the legal framework.

16. Under Clause 11 of the Public Health Service Act, 2075 (2018), every health institution is required to obtain the informed consent of the service recipient when providing health services. The law mandates that the patient or service recipient must be clearly informed about the methods of treatment, the reasons for their use, and the potential effects, and that medical services may be provided only after obtaining the patient's consent. This legal duty forms the basis of the principle and practice of informed consent under tort law, particularly in cases of medical negligence.
17. This court has consistently held in various cases that physicians engaged in medical treatment owe a duty to exercise a high degree of care toward their patients. If a physician conducts an examination negligently, failing to exercise due caution, such conduct may constitute a tort. To establish negligence, it must be shown that the physician owed a duty of care to the patient, that there was a breach of that duty, and that the resulting act caused harm or loss to the patient. In claims of medical negligence, when a physician's error, negligence, or failure to fulfill professional standards of care results in harm or loss to the patient, the fact itself establishes that had the duty been properly performed, or negligence avoided, the harm would not have occurred. This principle, known as *Res Ipsa Loquitur*, has been applied¹³ by this court to medical services, situating them firmly within tort law and providing that further evidence or investigation is not required to establish the occurrence of negligence. In this context, in the case of *Glass vs Cambridge Health Authority* (1995) 6 Med LR 91 the Queen's Bench Division, UK held that when a patient suffers a myocardial infarction due to the application of an improper treatment method during medical care, the occurrence of such an event itself establishes gross negligence on the part of the health authorities and all involved personnel. The court interpreted this under the *Res Ipsa Loquitur* principle¹⁴, affirming that the facts speak for themselves in proving negligence without requiring additional evidence. In the present case, the eight-month-old child, Alok Baral, was admitted to the hospital's emergency ward without a complete medical history. After the third injection was administered at night, the child's condition became critically serious, and the hospital failed to complete the necessary

¹¹ Dr. Buddha Basnyat vs. Consumer Protection Forum Nepal, Central Executive Committee, Kathmandu et.al. Nepal Law Reporter 2077, Unit 12, Decision No. 10621

¹² Law of Torts (Principles and Practice) Dr. Narayan Ghimire pg. 96

¹³ Dr. Buddha Basnyat vs. Consumer Protection Forum Nepal, Central Executive Committee, Kathmandu et.al., Nepal Law Reporter 2077, Unit 12, Decision 10621

¹⁴ Tort Law (Principles and Practices) Dr. Narayan Ghimire pg. 98

procedures for referral before directing transfer to another hospital. This situation itself establishes the hospital's negligence, invoking the *Res Ipsa Loquitur* principle, whereby the facts speak for themselves in demonstrating medical negligence.

18. A fundamental principle of tort law is that a person must be able to foresee or have knowledge of the potential harm or loss that their actions may cause to others. This principle is equally applicable in cases of medical negligence. In the context of medical negligence, this court in the case of *Nesar Ahmad Miyan v. Dr. Pramod Paudel* (Nepal Law Reporter 2075, Unit 7, Decision No. 10061), the court held "that when determining whether a physician or the associated institution was negligent in treating a patient, the essential consideration is whether the duty of care was properly exercised and whether there is a direct causal relationship between the physician's actions and the resulting harm. The physician's duty of care includes obtaining the patient's consent, providing treatment, and exercising due caution and vigilance during treatment. A breach of this duty of care constitutes negligence, which may give rise to two types of liability. The first is civil liability, under which the individual or institution at fault is obliged to provide compensation under tort law or the Consumer Protection Act.
19. In the present case, the facts, reports, and statements of the petitioner indicate that the victim Alok Baral, was admitted to the emergency ward of Kanti Children's Hospital for treatment of a common cold. During the night, an injection intended for another patient was administered to him, and as a result of this wrong medication (*Montaz IV*), the child's health deteriorated significantly, necessitating referral to another hospital. Furthermore, when the child was referred to the other hospital at 2:00 a.m., the referral procedures were not properly completed, and thereafter, the child's condition continued to worsen. Where *Hydrocortisone* was to be administered but instead the *Montaz IV* injection, intended for another patient, a 10-year-old Shambhu B.K. was negligently given to the eight-month-old victim Alok Baral, it is evident that the child suffered severe health consequences. According to the discharge report from International Children Friendship Hospital, the child developed sepsis with neuroretinitis, cerebral oedema, respiratory failure, pneumonia, renal calculi, with UTI that is, blood infection, ocular complications, brain swelling, respiratory failure, pneumonia, kidney stones, and urinary dysfunction. Thus, the respondent, Kanti Children's Hospital, Maharajgunj, Kathmandu, breached its duty of care toward Alok Baral and failed to fulfill even the indirect obligation of exercising caution and providing appropriate medical treatment.
20. The second issue relates to analysis regarding the question of limitation. On 2073/03/22 (6 July, 2016), the eight-month-old child, Alok Baral, was being treated in the emergency ward of Kanti Children's Hospital for cold and throat-related issues. During treatment, at approximately 11:30 p.m., an injection was administered that caused the child to experience involuntary urination and respiratory distress, leading to a critical deterioration in health. Consequently, it has been observed that the child was referred at 2:00 a.m. to International Children Friendship Hospital for further treatment. The father of the victim child, Dhruva Kumar Biswakarma, submitted a petition to Kanti Children's Hospital, Maharajgunj on 2073/05/24 (9 September, 2016) requesting that a necessary investigation be conducted. On 2073/05/31 (16 September, 2016), the hospital reviewed the petition submitted by the father regarding his child, Alok Baral, and subsequently submitted a report based on that review. The report submitted by the hospital stated that the allegations made by the petitioner were unfounded and that no fault or negligence on the part of the hospital was apparent, thus the

matter of compensation was deemed irrelevant. On 2074/01/05 (18 April, 2017), during treatment at Patan Hospital, the child's father was informed that his child's health could not be improved. Subsequently, on the 24th day after receiving this information, i.e., on 2074/01/28 (11 May, 2017) the father, Dhruva Kumar Biswakarma, filed a complaint with the District Compensation Committee, Kathmandu.

21. Clause 22 of the then Consumer Protection Act, 2054, provides that “if any consumer suffers any form of loss or damage due to the sale, distribution, or provision of a consumable product or service in contravention of the Act, the consumer or a consumer organization on their behalf may file a complaint with the Compensation Committee within thirty-five days to claim compensation from the person or entity responsible for providing or distributing the product or service”. The father of the victim, Dhruva Kumar Biswakarma, upon being informed on 2074/01/05 (18 April, 2017) by Patan Hospital that his child, Alok Baral, could not recover, filed a complaint with the District Compensation Committee, Kathmandu within 24 days. In this regard, this court has held in the compensation case of Bhojraj Air vs. Dr. Dinesh Vikram Shah (Nepal Law Reporter 2066, Unit 11, Decision No. 8262) that the statute of limitation does not commence from the date the doctor prescribes the medicine or from the first day the medicine was consumed, but rather from the day the symptoms or effects of the treatment begins to manifest after the medication was administered daily. While interpreting the Act, a purposive approach must be adopted; an interpretation that frustrates or renders the law meaningless is impermissible. The statute of limitation commences from the date the consumer becomes aware of the loss or damage, which is deemed the date on which the cause of action arises. In disputes arising from administration of medication, provided, counting the limitation from the first day the medicine is taken, as done in some other cases, this would constitute an absurd interpretation. Instead, the statute of limitation must be calculated from the date the effects of the medication began to manifest and the consumer became aware of the resulting harm. This principle has been established in cases concerning medical negligence, emphasizing that the date of knowledge of damage is the proper date from which the statute of limitation period is reckoned.
22. In the present dispute, it is evident that the father of the child continued to seek treatment from 2073/03/22 (6 July, 2016), the date when the child was referred from the emergency ward of Kanti Children's Hospital to another hospital. Ordinarily, in medical negligence cases, the statute of limitation does not commence from the date the medicine was administered or taken. In this regard, in the writ petition case (079-WO-0159) against Vayodha Hospital Pvt. Ltd., vs. High Court Patan, it was held that “in a technical service like medical treatment, the consequences of treatment or cure do not manifest immediately. The results of treatment and medication generally appear after some time, and some medications may continue for a period. Therefore, it would be unjust to restrict filing a complaint within a strict time frame”. This judgment provides a comprehensive interpretation of the statute of limitation.
23. Pursuant to Clause 50 of the prevailing Consumer Protection Act, 2075, “Contrary to the provision of this Act, provided, the sale, distribution, or provision of any goods or services causes any consumer physical, mental, economic, material, or other harm or loss, or if damage is caused by the defective production of goods, the consumer himself, or any consumer organization on his behalf, or in the case where the consumer is incapacitated or deceased, his legal heir, may file a complaint before the court within six months from the date such harm or

loss occurred, seeking compensation from the person responsible for the production, import, storage, transportation, sale, distribution, or provision of such goods or services.” In the writ petition of certiorari order (079-WO-0159) filed against Vayodha Hospital Pvt. Ltd. vs. High Court, Patan, it has been interpreted that “the phrase “*when harm or loss has occurred*” as prescribed under Clause 50 of the Consumer Protection Act, 2075, does not refer to the date on which the incident took place, but rather refers to the date on which the effect of such harm or loss was actually experienced or realized by the victim. Provided, the legislative’s intent had been to calculate the statute of limitation from the date of the occurrence, the Act would have used the wording ‘*when the incident occurred*’. However, since the Act instead uses the term ‘*when harm or loss has occurred*’, the legislative’s intent clearly indicates that the statute of limitation commences from the date when the harm or loss becomes evident or was ascertained by the victim.” Thus, from the interpretation made in the said writ petition, it is established that under Clause 50 of the Consumer Protection Act, 2075, the statute of limitation is to be calculated not from the date of the incident but rather from the date when the victim actually realized or experienced the harm or loss. Upon examining the legal provision of Clause 22 of the former Consumer Protection Act, 2054, it is found that the provision uses the phrase “within thirty-five days of the occurrence of harm or loss” thereby employing the legal provision of the term “occurrence of harm or loss”. In accordance with the principles of the *Discovery of Harm Rule* and the *Doctrine of Tolling*, the computation of the statute of limitation must be suspended during the time between when negligence was committed against the victim and when the victim officially became aware of such negligence. Hence, the statute of limitation does not commence immediately upon the occurrence of harm to health; rather, it commences from the date on which the victim, during the course of treatment obtained definite knowledge that such harm had indeed occurred¹⁵. The interpretation made by this Court to that effect is therefore found to be reasonable and requires no deviation.

24. In the present case, it is noted that on 2073/03/22 (6 July, 2016), while the child Alok Baral was undergoing treatment in the emergency ward of Kanti Children’s Hospital, the administration of the third injection at around 11:30 p.m. caused the child to suffer from involuntary discharge of stool and urine, as well as respiratory difficulties, leading to a critical health condition. Consequently, the child was referred to the International Child Friendly Hospital at around 2:00 a.m. the same night. During the course of continuous treatment, when the child’s father was informed by Patan Hospital on 2074/01/05 (18 April, 2017) that the child’s health condition was unlikely to improve, the child’s father Dhurva Kumar Biswakarma filed a complaint before the District Compensation Committee, Kathmandu, on the 24th day. Hence, it is deemed appropriate to consider the date 2074/01/05 (18 April, 2017), the date on which the father obtained definite knowledge of the harm caused to the child as the date from which the statute of limitation should be reckoned.
25. With regard to the third issue as to how, in what manner, and to what extent compensation is to be awarded in cases involving medical negligence or carelessness, it is observed that Clause 24 of the Consumer Protection Act, 2054 provides that: “*If, upon investigation of a complaint filed pursuant to Clause 22 for compensation, the Compensation Committee determines that harm or loss has been caused to the consumer, it shall ensure that the consumer or his/her*

¹⁵ Vayodhya Hospital Pvt. Ltd. et.al., vs. High Court, Patan, Writ Petition of Certiorari/Mandamus (079-WO-0159) Date of Decision 2079/09/07 (corresponding to 22 December, 2022)

legal heir receives an amount of compensation based on the extent of such harm or loss.” Clause 51 of the prevailing Consumer Protection Act, 2075, prescribes the following legal provision: *“Provided, any person suffers injury due to the sale, distribution, or provision of goods or services in contravention of this Act, such person shall be entitled to receive expenses for medical treatment, interim relief for daily subsistence during the treatment period in accordance with the family’s circumstances, and, upon investigation of a complaint filed for compensation, if it is determined that harm or loss has been caused to the consumer, the consumer or, in the event of the consumer’s death, his or her legal heir in accordance with law shall receive compensation from the concerned producer, importer, hoarder, transporter, distributor, or seller on the basis of the extent of such harm or loss.”*

26. On 2073/05/03 (19 August, 2016), after Dhurva Kumar Biswakarma, father of the victim, child Alok Baral, filed a complaint with Kanti Children’s Hospital, the hospital’s report dated 2073/05/31 (16 September, 2016) mentions that the child experienced desaturation, gasping, and choking, and that CPR was administered, with the heart rate recorded at only 77 percent. Furthermore, the report prepared by Dr. Ayushma Regmi on behalf of the District Public Health Office, Kathmandu, dated 2074/06/31 (17 October, 2017), states that the side effects of *Inj. Montaz* may, in some cases, include respiratory arrest, as well as allergic reactions, rash, itchiness, fever, diarrhea, leukopenia, pain at the injection site, nausea, and vomiting. From this, it is noted that on the said date, the child exhibited symptoms such as difficulty in breathing, involuntary discharge of stool and urine, which correspond to the known side effects of *Inj. Montaz*. In this manner, owing to the hospital’s negligence in administering an excessive dosage (overdose) of medication, the eight-month-old child suffered life-threatening consequences along with lifelong physical and mental impacts. This establishes a case of vicarious liability on the part of the hospital. As per Clause 24 of the Consumer Protection Act, 2054, which provides that compensation based on harm or loss shall be awarded to the consumer or their legal heir, it is observed that upon determination that harm has indeed occurred, the hospital is required to ascertain the just or adequate compensation and ensure that the amount is duly paid to the legal heir of the victim.
27. Now, with regard to the third issue, namely, how compensation is to be determined and provided to the victim patient or to his legal heir in cases of medical negligence, it is noted that in the present case, the child patient, Alok Baral, suffers from permanent disabilities, including inability to move his legs, hearing loss, and blindness due to atrophy of the optic nerves, conditions that are irreversible and will persist throughout his life. Although such impacts cannot be fully compensated solely through a monetary award, it is noted that compensation must be provided based on a thorough assessment of the economic, social, and physical hardships endured by the child and the family. It is also observed that Alok Baral, being physically and mentally disabled will be unable to lead a normal life and will have to be dependent on others throughout his life. Therefore, while determining adequate compensation and to ensure that sufficient compensation is awarded, consideration must be given to the expenses incurred for medical treatment, the pain and suffering endured; the reduction in the ability to earn a livelihood, as well as the estimated future medical and medication expenses.
28. Looking at the comparative practices, in the case of *V. Krishna Kumar vs. State of Tamil Nadu and Ors.* (2015 Latest Case Law 418 SC), the Supreme Court opined the following: The principle of restitution in integrum provides that a person entitled to damages should, as nearly

as possible, get that sum of money which would put him in the same position as he would have been in if he had not sustained the wrong. (see *Livingstone v. Rawyards Coal Co.*).” An application of this principle is that the aggrieved person should get that sum of money, which would put him in the same position if he had not sustained the wrong. It must necessarily result in compensating the aggrieved person for the financial loss suffered due to the event, the pain and suffering undergone and the liability that he/she would have to incur due to the disability caused by the event.

29. The then prevailing Consumer Protection Act, 2054, provides for compensation on the basis of harm or loss but does not specify any criteria for determining the amount of compensation. However, Clause 52 of the Consumer Protection Act, 2075 lays down detailed guidelines for determining compensation. Clause 52 provides that “While determining the amount of compensation under Clause 51 that a consumer is entitled to receive, the court shall take into account the following factors: (a) the physical or mental suffering or pain endured by the victim and its severity; (b) the estimated expenses for treatment if the harm is treatable; (c) the reduction in the victim’s earning capacity due to physical or mental injury; (d) in the case of permanent physical or mental injury, the age of the victim and his/her family responsibilities; (e) in case of the victim’s death, the number of family members dependent on the victim’s income and the minimum expenses required for their livelihood; (f) any other matters claimed by the victim that appear reasonable and appropriate; and (g) the economic and business condition of the producer, importer, hoarder, seller, or service provider.” Although this provision may not directly apply to the present case, it cannot be held that the criteria introduced in the new Act, after the repeal of the old Act, cannot be taken as developed legal standards for determining the basis of compensation.
30. Similarly, Rule 33 of the Consumer Protection Regulations, 2076, provides that: “While determining the amount of compensation under Clause 52 of the Act, the court shall also take into account as to whether or not the victim has received any amount from insurance made under the prevailing law in respect to the harm or loss, as to whether or not the victim was in a position to receive such amount, and as to whether not the victim has received any services or benefits from any governmental or non-governmental body in respect of the harm or loss.”
31. Clause 19 (1) of the Crime Victim Protection Act, 2075, ensures, as a right, that a victim is entitled to receive compensation under the Act for the harm suffered. Similarly, Clause 31 of the same Act provides that: “While determining the amount of compensation to be provided to the victim, the court may take into account any or all of the following matters: (a) reasonable expenses incurred or likely to be incurred by the victim for medical, psychological, and psychiatric counseling; (b) expenses incurred or likely to be incurred for medication and treatment; (c) unforeseen transportation expenses borne by the victim; (d) expenses incurred for legal representation; (e) loss of personal capacity resulting directly from the offence; (f) economic loss suffered or likely to be suffered by the victim; (g) loss or impairment of earning capacity directly resulting from the offence; (h) adverse effects on the victim’s physical appearance; (i) loss or impairment of physical, intellectual, sexual, or reproductive capacity; (j) mental or emotional harm suffered by the victim; (k) any other appropriate factors based on the nature and impact of the harm; (l) in special circumstances, reasonable expenses incurred by the victim in good faith to protect primary victims from further harm resulting from the offence.” Although the bases for compensation mentioned under this Act specifically apply to

crime victims, it cannot be held that the court is precluded from taking guidance from how the criteria for determining compensation have been legally established in recent times when assessing compensation in other cases.

32. In this context, Rule 22 of the National Human Rights Commission (Complaint Proceedings and Determination of Compensation) Regulations, 2069, provides the following regarding the basis for determining compensation: “While making a decision or recommendation to provide compensation to the victim under Rule 18 (2), the Commission shall also take into account the following matters: (a) the physical injuries sustained by the victim and the actual cost of treatment; (b) mental pain and suffering; (c) social dignity; (d) the victim’s physical, mental, and economic condition; (e) the character of the offender; (f) whether the offender has previously been involved in human rights violations; and (g) the economic condition of the offender.” Thus, in the present case, the criteria for determining compensation for medical negligence can be derived by considering the bases for compensation applicable to prior incidents of human rights violations, the provisions of the Crime Victim Protection Act, 2075, the Consumer Protection Act, 2075, and the Consumer Protection Regulations, 2076, as well as the specific conditions set out under Clause 52 of the Consumer Protection Act, 2075 and Rule 33 of the Regulations, including whether such conditions exist or not. By evaluating these sources, the standards for awarding compensation to victims of medical negligence can be appropriately established.
33. A comparative review of judicial practice shows that in cases of medical negligence in India, the Supreme Court in the case of *Balram Prasad vs. Kunal Saha*, (2014) ISCC 384 has provided guidance on the determination of adequate compensation. In that case, the petitioner, Dr. Kunal Saha, filed a claim before the National Consumer Disputes Redressal Commission seeking compensation for the death of his wife, Anuradha Sahas, allegedly caused by the negligence of AMRI Hospital and the doctors involved in her treatment. When the matter reached the Supreme Court of India on appeal, it was observed that although the National Consumer Dispute Redressal Commission had acknowledged that the death of the petitioner’s wife resulted from the negligence of the hospital and doctors, the Commission had failed to consider the specified criteria for determining compensation, and therefore, had not provided just compensation in full measure. In that case, the judgment further notes that, among other factors, both the deceased, Anuradha Sahas, and her husband, Dr. Kunal Sahas, were residents and citizens of the United States and therefore, the standard of living and income in the United States should be taken into account while determining the amount of compensation.
34. Similarly, the Supreme Court of India in the case of *V. Krishnakumar vs. State of Tamil Nadu & Ors* [2015 Latest Case law 418 SC] has outlined the bases for determining compensation in cases of medical negligence. These include: (a) Past Medical Expenses, (b) Future Medical Expenses, (c) Apportioning for Inflation, and (d) Apportionment of Liability. In other words, the court held that actual compensation must be determined based on past medical expenses, future medical expenses, the effect of inflation, and the allocation of liability.
35. In view of the aforementioned comparative international interpretations, as well as the provisions and standards of our own legal system, it is evident that in cases of medical negligence and recklessness, compensation to the victim must be provided in a just and adequate manner. Moreover, while determining the amount of compensation, the

following factors should be taken into consideration: (a) The physical, mental, and psychological suffering endured by the victim and the severity thereof; (b) Past medical expenses and future medical expenses; (c) The unexpected transportation expenses borne by the victim; (d) The legal expenses incurred by the victim; (e) The economic loss suffered or likely to be suffered by the victim and their family; (f) The reduction in the victim's earning capacity due to physical or mental impairment; (g) The adverse impact on the victim's physical appearance or aesthetic condition; (h) The physical, mental, intellectual, and emotional damage sustained by the victim; (i) In the case of death resulting from irreparable harm, the number of family members dependent on the deceased's income, the minimum expenses required for their livelihood, and the mental anguish suffered; (j) The age of the victim and their family responsibilities in relation to the extent of mental suffering; (k) Other appropriate grounds based on the nature and impact of the damage; and (l) Any other reasonable and relevant claims made by the victim that are found to be justified and appropriate. Therefore, it is necessary to consider these definitive bases and standards in light of the existing circumstances of the concerned case to arrive at a fair determination of appropriate compensation. In this context, taking into account the comparative international interpretations regarding the determination of compensation as cited in various cases above, as well as the relevant provisions and standards of our legal system, it appears that in the present case, due to the negligent administration of the wrong medicine during the treatment of the eight-month-old patient, the victim's physical and mental health suffered severe consequences. As a result, the child has become chronically ill, with a lifelong condition requiring constant dependence on others for survival. Accordingly, considering the condition of the victim, Alok Baral, and the extent of the harm suffered, it is deemed necessary to determine a fair and just amount of compensation appropriate to the circumstances of this case.

36. Since each instance of medical negligence must be assessed based on the proportionality between the degree of negligence and the extent of harm caused to the victim, in determining appropriate compensation in the present case, the following factors must be taken into account: the medical expenses already incurred or likely to be incurred in the future for treatment; the cost of medicines and related care; the economic condition of the victim and the extent of economic loss suffered; the physical, mental, emotional, and life-related suffering endured by the victim and their family; the minimum expenses required for their livelihood; the legal expenses borne by the victim; the damage caused due to the irreversible nature of the victim's condition; the age of the victim and the family responsibilities related to their care; and the financial and professional standing of the service-providing hospital. Accordingly, these factors must be duly considered while determining just and reasonable compensation in this case.
37. Now, regarding the fourth issue as to whether or not the judgment rendered by the High Court, Patan, sustainable, and as to whether not the defendants' grounds for appeal are sustainable. Upon consideration, it is found that in the case of Prof. Dr. Buland Thapa vs. Sushma Thapa (Nepal Law Reporter 2074, No 5, Decision No. 9814), the following principle was laid down: "In circumstances where a medical practitioner has provided improper service or has acted negligently, thereby causing harm or loss to a consumer, the right to compensation is a legal entitlement of the aggrieved consumer. Moreover, the adverse perception toward medical services resulting from negligence or wrongful treatment by certain medical practitioners

cannot be overlooked. Provided, any medical practitioner, through negligence or improper service, causes damage to a consumer, there exist legal provisions for recovery of compensation, as previously recognized under consumer rights laws, and a new Consumer Protection Act has also been promulgated accordingly. Therefore, any claim for compensation made under the said Consumer Protection Act must be viewed and adjudicated in a just and reasonable manner.” In the present case, it is evident that due to the negligence of Kanti Children’s Hospital, the health of the eight-month-old infant, Alok Baral, suffered severe consequences, resulting in the child becoming chronically ill. Consequently, the physical, mental, and economic suffering endured by the child’s family constitutes a valid claim for compensation under the provisions of the Consumer Protection Act, and the claim for compensation made against Kanti Children’s Hospital is therefore found to be in accordance with the law.

38. Every medical practitioner has a duty to accurately diagnose the illness of the patient under their care and to prescribe appropriate medication or perform necessary surgical procedures accordingly. Before commencing any treatment, the physician must inform the patient in detail about the potential effects, possible risks, and necessary precautions related to the recommended treatment. Only after providing such information and obtaining the patient’s informed consent, the medical procedures or course of treatment should be initiated and this is a principle and practice that has long been recognized and observed¹⁶. It is observed that the course of treatment provided to the victim, infant Alok Baral, at Kanti Children’s Hospital was ambiguous, that no informed consent appears to have been obtained, and that extreme negligence occurred when a medication intended for another patient was administered to him. As a consequence of such conduct, the child experienced difficulty in breathing, involuntary passage of stool and urine, and other symptoms which, as noted in Dr. Aayushma Regmi’s report, which corresponds to the side effects of *Inj. Montaz IV*. During treatment, the child had to be given pump and CPR, after which only 77% of the heart function was restored, indicating that the said medication had caused severe adverse effects on the child. Therefore, due to medical negligence, such conduct gives rise to tortious liability, and it is evident that compensation must be paid under the Consumer Protection Law as a consequence of this negligent act.
39. The hospital and the doctors both have a legal duty to treat patients with due diligence, utilizing all available instruments and technologies to the extent possible. Every patient possesses the right against medical negligence and in cases where medical negligence is proven, the right to adequate compensation is also recognized under the Consumer Protection Act. In the present case, due to the negligent services of the hospital, the minor Alok Baral suffered irreparable physical impairment and permanent damage to various organs of his body. Although the Consumer Protection Act, 2054, did not expressly specify the criteria for determining compensation, it is evident that the determination of compensation in this case must be based on the developed principles of compensation recognized within the Nepali legal system, the criteria set forth in Clause 52 of the prevailing Consumer Protection Act, 2075, and the standards established through various judicial precedents concerning the assessment of compensation.

¹⁶ Tort Law (Principles and Practices) Dr. Narayan Ghimire pg. 89

40. Regarding the obligation of medical practitioners to provide adequate and appropriate compensation, the circumstances of each case affect the victim and their family differently. In this instance, due to gross negligence, the eight-month-old child was administered an overdose of incorrect medication, resulting in the child being unable to move his legs, deaf, with damaged optic nerves leading to blindness, and forced to live a state of unconsciousness and immobility. As a consequence of such medical negligence, it is evident that the infant will endure lifelong physical and mental suffering. The damage to the physical and intellectual capacity of the victim child, and the resulting mental, emotional, and life-related suffering endured by the child's family, are evident. Moreover, the family's impoverished economic condition, dependent on daily wages, combined with the medical expenses, cost of medicines, unforeseen transportation costs, and other related expenditures incurred during the child's treatment at the hospital, has imposed a significant economic loss and mental burden on the family. Similarly, in a family of four, where the parents have been earning their livelihood through daily wage labor, the physical and mental disability of the child, Alok Baral, has compelled the mother to dedicate day and night care to the ailing child. Consequently, in addition to regular hardship, the family has suffered a loss of earning. Furthermore, legal expenses incurred and the ongoing mental and emotional distresses are also predominant. Therefore, while determining the amount of compensation to be provided for the damage suffered by the victim child in the present case, the following factors and standards must be taken into account: medical expenses, transportation costs, and other unforeseen expenditures already incurred or likely to be incurred in the future by the victim and the victim's family; legal expenses; economic condition of the family; loss of income according to their standard of living of the family; physical and mental impairment suffered by the victim; irreparable and untreatable physical or mental damage; age of the victim and the family filial responsibilities towards the child; financial and commercial position of the service-providing hospital. Considering all these parameters, it is evident that the amount of compensation mentioned in the decision of the High Court, Patan is far lower than what would be just, given the level of negligence, the condition of the victim and the family, and the proportional liability of the hospital and therefore, the decision of the High Court, Patan cannot be deemed to be justifiable.

41. Therefore, based on the above-discussed grounds, evidence, and reasons, it has been established that due to the medical negligence of Kanti Children's Hospital, the health of the eight-month-old child, Alok Baral, suffered serious and permanent harm. Consequently, the decision rendered by the initial Compensation Committee, Kathmandu, ordering Kanti Children's Hospital to pay a lump-sum compensation of NPR 1,500,000 to the victim's father, the appellant Dhruva Kumar Biswakarma, is found to have been partially upheld by the High Court, Patan, through its judgment dated 2076/02/10 (24 May, 2019). However, since the amount of compensation determined by the High Court is insufficient in proportion to the proven negligence and the resulting harm, the judgment is partly reversed, and it is hereby held that Kanti Children's Hospital shall pay a lump-sum compensation of NPR 3,000,000 (Thirty Lakhs) to the victim as compensation. The decision of the High Court, Patan is thus set aside, but the appellant's claim seeking NPR 5,463,753 as lump-sum compensation along with 10% interest until full payment is not fully sustainable. The remaining matters shall be addressed as per the details stated hereafter.

Particulars

1. In accordance with the findings set forth above, the judgment rendered by the High Court, Patan on 2076/02/10 (24 May, 2019) is hereby partly reversed, and it is held that the father of the victim child, Alok Baral, the appellant, Mr. Dhruva Kumar Biswakarma shall receive a lump-sum compensation of NPR 3,000,000 (Thirty Lakhs) from the respondent, Kanti Children's Hospital, Maharajgunj, Kathmandu. Accordingly, a certified copy of this judgment shall be sent to the Kanti Children's Hospital, Maharajgunj, Kathmandu, instructing the hospital to pay the said amount to the appellant, Dhruva Kumar Biswakarma. A copy of the same shall also be forwarded to the District Compensation Committee, Kathmandu, for necessary implementation.
- 2 It is hereby directed to provide copies to the concerned parties and enter the decision into the electronic record system and deregister the case from the registry and accordingly submit the case file to the Record Section

Justice Hari Prasad Phyal

Concurring with the above Opinion

Justice Til Prasad Shrestha

Bench Officer: Anu Yakami/Laxmi Rana

Computer: Amir Ratna Maharjan

Dated: Year 2079 Month of Magh Date 25 Day 4

(Corresponding to Year 2023 of the Month of February Date 8 Day 4)