

Supreme Court Division Bench
Hon'ble Justice Bala Ram K.C
Hon'ble Justice Mohan Prakash Sitaula
Judgment
Civil Appeal No: 2063-CI-0158 of the year 2063
Sub: Compensation

Dr. Dinesh Bikram Shah, working at Blue Cross Nursing Home situated at Tripureshwor, Kathmandu district, Kathmandu Metropolis Ward no: 11.....1 **Appellant**
Respondent

Vs.

Advocate Bhojraj Ayer, on behalf of Shrijana K.C and Sarita K.C, resident of Kathmandu Metropolis ward no: 14 and also on behalf of Pro-Public1 **Defendant**
Petitioner

Civil Appeal No: 0193 of the year 2063

Case: Compensation

Dilamber Shrestha, Marketing Manager, on behalf of Blue Cross Nursing Home PVT. Ltd, located at Kathmandu district, Kathmandu Metropolis, Kuleshwor Ward no: 11.....1 **Appellant**
Respondent

Vs.

Bhoj raj Ayer, self and on behalf of Pro-Public and also on behalf of Shrijana K.C and Sarita K.C, resident of Kathmandu district, Kathmandu Metropolis, Kuleshwor Ward no: 11.....1 **Defendant**
Petitioner

Initial order delivered by: Compensation Committee, Kathmandu

The Justices delivering verdict at the Appellate Level:

Hon'able Justice Aliakbar Mikrani

Hon'able Justice Janardan Bahadur Khadka

(Court of Appeal, Patan)

The defendant have made an appeal against the verdict delivered by Court of Appeal Patan dated 2063/2/2. The content and order of the writ petitions submitted before this Bench by defendants pursuant to Article 9 of Judicial administration Act, 2048 on separate basis is as follows:

The petitioner Shrijana K.C visited the hospital with her mother on 055/7/28 (October 1998) due to mild pain on her eyes. After the examination of her eye on 28th October, 1st of November and 5th of November 1998, she was referred to Blue Cross Nursing Home in Tripureshwor (Kathmandu). On 8th of November, she had a CT scan of her head. Upon receipt of the report, she was taken to Nepal Eye Hospital on 12th

November 1998. After going through her report she was sent back to Blue Cross Nursing Home to see Dr. Dinesh Bikram Shah. On the same date Dr Shah got the petitioner's T.C.D.C, ESR, RDR tested. Following these tests, the test of calcium on her body was done on the same day. After the report showed 10 as calcium on her body she was advised to take medicine and referred to Medicare Hospital. The petitioner stayed in Medicare Hospital from 2057/7/27 till 2057/8/1. After her discharge, she was again referred back to the Eye Hospital where she was advised to take medicine. The petitioner then went to see Dr Dinesh Bikram Shah on 16th of December 1998. On the same day, Dr. Dinesh Bikram Shah advised her to take Tegrital after she was tested positive for Malaria. Since the intake of Tegrital the petitioner started to gain weight and her body darkened. Bubbles were seen on the petitioner's body. Then when she went to see Dr. Dinesh Bikram Shah he is alleged to have said that he would kill her if she was brought to him again. Following this the petitioner was taken to Kanti Children Hospital and admitted there from on 2055/9/28 till 2055/11/16. On the report prepared by Dr. Laxman Shrestha, it was indicated that the petitioner had suffered due to the intake of Tegrital, and also reported to have suffered from lung tuberculosis (T.B). The discharge summary report prepared at the said hospital also indicated the condition of the petitioner. As due to the negligence of Dr. Dinesh Bikram Shah the petitioner's body was deformed and at the same time she had lost her eye sight it was claimed that Dr. Dinesh Bikram Shah should pay Rs. 18, 73,750 to the victim [by way of compensation].

Responding to the writ petition, Dr. Dinesh Bikram Shah denied to have treated the petitioner. He contended that the petitioner had not consulted him in-between on Tegrital that he had prescribed. He further contended that the petitioner was suffering from Neurocysticercosis and also had a disease called Granulo Matous Uveitis. He also contended that the petitioner had not suffered due to the intake of Tegrital rather the disease mentioned above. So, he deserved to be relieved from the case.

The written reply submitted by the Blue Cross Nursing Home stated that it does not provide the in-door patient service. It further stated that Dr. Dinesh Bikram Shah is not their employee. Therefore, no legal question arises as to why it should pay compensation, and hence should be relieved from the charge.

On 2057/5/5 a letter was sent to Tribhuwan University Teaching Hospital for medical examination of Shrijana K.C. report back to it. The experts examined the physical deformity and the health condition of Shrijan K.C. The report was received on 2057/9/12 vide dispatch No 971.

On 2057/10/26, a letter was sent to Bir Hospital to conduct biopsy in order to determine whether the petitioner suffered due to the consumption of Tegrital or because of some other reasons. The said Hospital vide dispatch no 1877 on 2057/12/8 replied that no biopsy was required. A letter was sent to T.U. Teaching Hospital on 2057/10/26 seeking an expert opinion on the question whether it was necessary and desirable to prescribe Tegrital for treating the petitioner. A letter enclosing the expert opinion was received from the said Hospital on 2058/3/18 and attached to the file.

A letter was written to the Department of Drug Management seeking an expert opinion on the manufacturing process of Tegrital and its possible side effects. The said Department, vide its dispatch number 5386 dated 2057/11/16, replied that the said drug Tegrital contained some side effects. . In case of doubt about the quality, the manufacturing company would be responsible, and if there was any negligence on the part of the doctor at the time of treatment, or in case where he had not informed the patient about its possible side effects then such doctor would be held liable.

Mr. Megh Raj Dulal, on his testimony submitted the likelihood that the petitioner had been affected due to the consumption of medicine prescribed by Dr.Dinesh Bikram Shah.

Likewise, Mr. Ram Bahadur Rimal on his testimony stated that upon taking victim at the emergency ward of Kanti Children Hospital, the doctor asked to stop the consumption of Tegrital. The doctor opined that the victim had been affected due to the intake of Tegrital.

Similarly, Mr. Chandra Bahadur K.C on his testimony stated that on arriving Kanti Children Hospital, the doctor said that the victim was prescribed medicine that was of different disease.

In his written submission Dr. O.K Malla stated that the examination of eye is technical and that after 28th December Shrijana K.C. was not treated at the said Hospital and that during her treatment at the Hospital also she was not given any other medicine than an ointment to put on her eyes.

In the written submission Dr. Laxman Shrestha, stated that the reason for boils all over the body of the patient may be not only due to the intake of Tegrital but other medicine mentioned above as well as due to viral infection.

Responding to the petition, Dr. Dinesh Bikram Shah in his statement contended that he had asked the petitioner child to see him as mentioned in the prescription of 16th December, 1998. However the petitioner did not show up. He further contended that in the discharge ticket prepared by Medicare, it has been found that the petitioner had been asked to see Dr. O.K. Malla and a dermatologist, that he had no idea as to whether the petitioner visited the said doctors or not, that while prescribing medication, he had asked the petitioner to stay in touch, and that the Kanti Children Hospital had prepared two reports on the same date where one of them had been signed by another person with black ink. When the patient visited him, she had been suffering from Granulo Matous Uveitis and the nerve of her right eye had been swelling, and petitioner's brain had been infested with the eggs of tapeworm, that he had treated her about the eggs of tape worm and had time and again asked her to visit an ophthalmologist, that the ticket of Kanti Children Hospital (number 351-44) indicates that she had been refereed by Dr. Ramesh Malla to the said Hospital. She is also found to have been under medication for 5 months for Tuberculosis (T.B).He contended that he had informed the patient about the lesser possibility of regaining the vision of her left eye but there was the possibility of regaining the sight of right eye. Since 059/9/1

the patient Shrijana K.C. had been out of contact, that he had prescribed Tegrital to the victim and that he had cautioned the patient to visit the doctor, health post or the hospital, in case of any kind of reaction caused due to the consumption of the said medicine.

In the written submission Dr. Shiv Shrestha stated that he had prepared the discharge summary but had not written anything with black ink which mentioned that Tegrital had caused such an effect on the patient.

Responding to a letter sent to Kanti Children Hospital asking the identification of an individual who had signed on black ink. Kanti Children Hospital through dispatch no 1037 dated 2058/12/12 stated that no doctor from the said Hospital had added the statement with black ink.

The Compensation Committee, Kathmandu vide its decision dated 2060/9/3 held to the effect that the patient who had visited the doctor had been prescribed with medication, but she or her guardian had not been informed on the intake and the reaction that may be caused upon taking Tegrital, that Dr. Dinesh Bikram Shah was employed at the Blue Cross Nursing Home, that it was the duty and responsibility of the said Nursing Home to supervise the activity of the doctor employed by it, that the Blue Cross Nursing Home should have overseen the conduct of all its doctors, and that it is deemed that the said Nursing Home had the liability on the instant matter, and hence Dr. Dinesh Bikram Shah and the Blue Cross Nursing Home are held jointly liable to pay compensation to the victim with the amount of Rs.1, 17,119.94.

Appeals have been separately filed against the said decision of the Compensation Committee, Kathmandu both by the petitioner and the respondent.

Shrijana K.C made a statement pursuant to Number 133 of the chapter "Of Court Management" of the National Code where she stated that the discharge card prepared by Kanti Children Hospital contained the hand writing of Dr. Narayan Nepali who worked at the emergency ward of the said Hospital.

The Court of Appeal, Patan vide its decision dated 2063/2/2 observed that Tegrital was prescribed by Dr. Dinesh Bikram Shah and that it has been substantiated from the record that he had not cautioned the patient regarding the consumption of Tegrital and hence it is deemed that the loss of sight of the eye was caused due to the consumption of Tegrital and the victim had mentally suffered. It is hence the compensation of Rs 1, 17,119/94, towards medical expenses is deemed correct. The actual damage caused to the victim cannot be assessed. Taking the age of the victim and her financial status into consideration and also the fact that the victim had lost her vision and has been physically deformed and that the victim had to undergo mental tension it is held that she should be paid an additional amount of Rs 5,00,000 by way of compensation. And hence, the decision of the Compensation Committee dated 2060/9/3, is partially reversed and Dr. Dinesh Bikram Shah and the Blue Cross Nursing Home are held to be jointly liable to pay Rs. 5, 00,000 to the victim Ms. Shrijana K.C. The

appeal of Dr.Dinesh Bikram Shah and the Blue Cross Nursing Home hence cannot be accepted.

The appeal filed on behalf of Dr. Dinesh Bikram Shah stated that he was not convinced with the verdict delivered by the Court of Appeal, Patan. He contended that the petition submitted is against S. 22 of the Consumer Protection Act, 2054, which provided that the complaint should be filed within 35 days of the incident; that the decision which entertained the complaint beyond 35 days is erroneous; that the report prepared on 2056/4/11 by Dr Laxman Shrestha cannot be taken as creating cause of action for the purpose of limitation, nor can the correspondence of the Department of Drugs Management be considered for that purpose because the said opinion is not based on the reliable literature. The deposition by Dr. Shek Asfak which indicated that Tegrital may have its effect on one person out of 1000 and Tegrital which he prescribed had not affected the victim is based on the assumption of medical science; and therefore the claim of the petitioner that the effect of Tegrital had occurred after 27 days is baseless. As it is found in the examination report prepared by Dr. Laxman Shrestha that Shrijana K.C. had lost her vision, it does not prove that Tegrital had caused the damage. It is revealed in the report prepared by Dr. Laxman Shrestha that the medicines prescribed by the Eye Hospital such as Chphroffaxicylin, Ofaxacyclin, Norfoxacyclin or viral infection might have caused the reaction. The reaction of the Tegrital cannot be concluded from the report prepared by Kanti Children Hospital, as the report has been tampered by adding matter with a different ink and that prior to her visit to him, Shrijana K.C. had been consulting other doctors testifies that she had the problem in the eye and skin. This is revealed from the old medical reports prepared prior to her visit to him. The discharge summary prepared by Kanti Children Hospital indicated that the petitioner had been taking the medications for Tuberculosis and Malaria. In such a situation it is proved that the petitioner was taking other than these medications other than those prescribed by him without consulting him. It can be concluded from this that the petitioner had not been affected by the consumption of Tegrital. Since the Medical Council had given a clean chit on the same matter no further claim can be raised on the same matter. Therefore, the decision of the Court of Appeal Patan date 2063.5.20 which held him liable for the payment of compensation, which was beyond the limitation and without any conclusive proof that the reaction to the petitioner occurred due to the medicine prescribed by me is erroneous, and hence be reversed and the appellat should be acquitted.

The respondent, Blue Cross Nursing Home in its appeal contended that it is not convinced with the verdict delivered by the Court of Appeal, Patan. It submitted that petition was beyond the limitation prescribed by S. 22 of the Consumer Protection Act, 2054 and hence should be quashed. As the Nursing Home has been made liable for negligence of the doctor, it is erroneous. Dr. Dinesh Bikram Shah being a competent doctor is given a room as a tenant at the Nursing Home. He is not their employee. The Nursing Home has nothing to do with the medication prescribed by Dr.Dinesh Bikram Shah. It is not established that Tegrital had caused the damage and that Dr. Dinesh Bikram Shah and The Blue Cross Nursing Home do not share the relation of principle

and agent. Therefore, the verdict delivered by the Court of Appeal against the Nursing Home which made it liable to pay compensation to the victim should be reversed and the appellant discharged of the claim.

This Court by an order dated 2064/12/17 called for the presence of the respondent before the Court.

The case which entered the cause list for hearing before this Bench has been studied. Advocate Bhojraj Bhatta, representing the appellant submitted that the petition had not been filed within the stipulated time frame of limitation, that the victim instead of filing original petition to the Compensation Committee had filed it to the Consumer Protection Forum which is against the law. It has not been proved that Tegrital prescribed by Dr.Dinesh Bikram Shah had caused damage to the victim's eye; that Dr. Dinesh Bikram Shah had prescribed medication after conducting necessary tests including CT scan. The victim can be compensated only in case of the negligence by the doctor, and when no such negligence is committed there is no question of payment of compensation. Hence, the decision of the Court of Appeal Patan, which held my client negligent without evaluating all the facts and evidence, should be reversed and quashed. Advocate Mr Sambhu Thapa, another learned counsel representing the appellant, submitted that there should be no dispute as to the protection of consumer's right. However, it should be established that the service provider had done things that go against section 10 and 22 of the Consumer Protection Act 2054. It has not been substantiated that the method of treatment of the petitioner had to be different from the treatment that Dr.Dinesh Bikram Shah provided to the victim. Since the treatment provided to the victim accords to the victim's disease, there is no negligence involved. The medication prescribed to the victim accords to the disease of the victim. Therefore, the decision of the Court of Appeal, Patan that held the appellant liable despite the absence of objective evidence is erroneous and hence should be reversed.

Learned Advocate Basant Ram Bhandari, representing Dr.Dinesh Bikram Shah submitted that the petitioner had visited the Eye Hospital and had CT scan of her head done, prior to her visit to my client. It is revealed from the reports that the petitioner had been suffering from Neurocysticercosis and eye disease. It has not been established yet that the consumption of Tegrital has affected the petitioner. In order to establish the negligence of the doctor, it is important to ascertain the presence or absence of due care. There is no dispute that the medication prescribed to the victim accorded the disease. Since the negligence on the part of the doctor has not been established there is no question of making him liable for compensation. Since the petition was in breach of the limitation, it is liable to be quashed at the first glance itself. He further contended that the discharge report prepared by the Kanti Children Hospital which indicated the effect of the medication seems to be tempered. As the additional information is written with black ink it cannot be taken as evidence. He argued that Dr. Abbas does not diagnose the disease, rather manufactures medicine, and for that reason his report is not credible. It is believed in medical science that usually the reaction of the medication is seen within 3 days of its consumption. The claim that the reaction was caused after 27 days of the intake of medication is not plausible. It has been found that prior to her

visit to Dr. Dinesh Bikram Shah the petitioner had consulted many other doctors and was taking medication. Since it has been proved that Dr. Dinesh Bikram Shah had prescribed Tegrital to the patient, after undertaking all the pathological tests based on his knowledge and skills, the verdict delivered by the Court of Appeal should be reversed.

Likewise, learned advocate Jyoti Baniya, representing respondent/petitioner made the submission that there is no dispute on the petitioner's visit to Dr. Dinesh Bikram Shah, that the petitioner had lost her eye sight due to the wrong diagnosis and treatment by Dr. Dinesh Bikram Shah; that the report by Dr. Laxman Shrestha indicated that the reaction had been caused due to the consumption of Tegrital, the cause of action begins from that date. Therefore the petition is within the prescribed limitation. He argued that the report of the Department of Drug Management also proved that the intake of Tegrital had caused reaction to the petitioner; that in order to prove medical negligence under the new concept of torts, the service provider should have a duty, he should have breached the same resulting in damage to the petitioner; that all the three elements mentioned above are present in the instant case, it proves medical negligence on the part of Dr. Dinesh Bikram Shah. Since the judgment delivered by the Court of Appeal, Patan was based on the evidence on the case file, and also in line with concepts developed in Medical Jurisprudence and also in concurrence with the principles developed by Indian Supreme Court, it should be upheld.

Similarly, learned advocate Ramesh Parajuli, on behalf of the respondent submitted that according to the code of ethics prepared by Medical Council a doctor should be courteous. The doctor can refuse treating patient on several grounds but none of these grounds were present on the instant case; that the prescription shows that Dr. Dinesh Bikram Shah prescribed Tegrital to the victim, and that the report of the doctors and the literature on the subject indicated that the consumption of Tegrital may cause effect on the eye sight. Hence as it is proved that Dr. Dinesh Bikram Shah had been medically negligent the verdict delivered by the Court of Appeal should be upheld.

In the same way, learned advocate Mr Prakash Mani Sharma, on behalf of Shrijana K.C submitted that according to Modi's Medical Jurisprudence the doctor is held liable for indulging in medical negligence, that except in certain situation the doctor should continuously provide service to the patient and should also keep himself fully updated, and when any damage is caused to the patient by negligent act, he should be liable to pay compensation. The doctor should be aware of the possible side effect of Tegrital, and treat the patient accordingly. Disregarding these facts and prescribing medication for a long term is negligence. The doctor should take due care regarding the possible side effect while prescribing medication. A number of principles have been enunciated by the Supreme Court of India. Nepal is in the process of developing concept of the consumer Jurisprudence, and since the decision of the Court of Appeal is correct, it should be upheld.

Similarly, learned advocates, Ms Rama Pant and Ms Kabita Pandey, on behalf of Shrijana K.C submitted that the report of the Department of Drugs Management department and the literature of medicine indicated that the Tegrital prescribed by Dr.Dinesh Bikram Shah to the victim may cause damage to the eye sight and the skin.No due care and caution had been undertaken by the doctor while prescribing medicine to the victim. So the decision of the Court of Appeal, Patan should be upheld.

Upon hearing both the deliberations made therein by the learned advocates it seems to us that decision has to be made on whether or not the verdict delivered by the Court of Appeal, Patan that awarded the petitioner an amount of Rs.6, 17,119.99 for meeting medical expenses and by way of compensation from the defendants is correct and whether or not the appeal of the respondent should be allowed.

In regard to the decision to be made it is seen that the petitioner, Shrijana K.C had submitted a petition in the Compensation Committee, Kathmandu pursuant to Consumer Protection Act 2054 against Blue Cross Nursing Home and Dr.Dinesh Bikram Shah alleging negligent conduct by them in the treatment of the patient and claiming the payment of compensation.

The petition contends that due to the negligent act performed by Dr.Dinesh Bikram Shah, the victim had lost her eye sight and claims for the award of punishment pursuant to section 10 of the Consumers' Protection Act, 2054, and financial compensation pursuant to sections 22 and 24 of the same Act.

On the charge that the petitioner Srijana K.C. had to bear physical deformity, claim of compensation has been made also for the punishment of imprisonment that would be converted into fine pursuant to No 19 of the Chapter "Of Punishment" of the National Code 2020. It is seen that an amount of Rs.2, 60,000 which the petitioner had to bear as medical expenses and a compensation of amount of Rs. 5, 00,000 for the life-long mental torture that the petitioner will have to bear, has been claimed against the respondents.

Appeals were filed by both the parties against the decision of the District Compensation Committee, which held the respondent Dr Dinesh Bikram Shah liable for the damage caused to the petitioner and asked him to pay by way of compensation an amount of Rs. 1, 17,119 which the petitioner had to bear. The Court of Appeal, Patan while upholding the decision of the District Compensation Committee on medical expenses, also held Dr. Dinesh Bikram Shah and the Blue Cross Nursing Home jointly liable to pay an amount of Rs.5, 00,000 by way of compensation. Appeal has been separately filed by both Dr. Dinesh Bikram Shah and the Blue Cross Nursing Home against the said decision.

Upon the study of the case file, the Bench deems that the decision should be rendered on the following issues?

1. Whether or not the petition has been filed within time limitation?

2. Whether or not the petitioner Shrijana K.C has been affected by the medication prescribed by Dr. Dinesh Bikram Shah? And if yes, can Dr. Dinesh Bikram Shah and the Blue Cross Nursing Home be held responsible? If yes, are they held liable for compensation?
3. What is the degree of responsibility that doctor has to bear while delivering service to the patient? In other words, are the current laws sufficient to address the matters pertaining to the accountability of the doctor towards the patient and the legal relation between the doctor and patient?
4. Given that the right to medical treatment and the right to health are enshrined as fundamental rights, whether or not the provisions of the Consumer Protection Act, 2054 and the Rules 2056, framed under there, are sufficient to address the matter

In regard to the first question on whether or not the petition had been filed within the stipulated time limitation as prescribed in Section 22 of the Consumer Protection Act 2054, as raised by the appellant, S 22 provides following:

In case where the sale or delivery of goods and services against the Act causes damage to the consumer, such consumer or any consumer institution on behalf of such consumer, may file a complaint against the person selling/delivering goods or services in the Compensation Committee claiming compensation within the 35 days of occurrence such damage . Thus, Section 22 fixes the time limitation of 35 days for filing complaint from the date such damage occurs. It is seen that petitioner Shrijana K.C. had visited Dr. Dinesh Bikram Shah many times for treatment. Even though the petitioner had consulted other doctors for eye and other problems, there is no doubt that she was a patient of Dr. Dinesh Bikram Shah as well. While undergoing treatment at the Medicare Hospital the petitioner seems to have been referred by Dr. Dinesh Bikram Shah. This illustrates the significant role that Dr Dinesh Bikram Shah has played during the treatment of the petitioner. It is seen that Dr. Dinesh Bikram Shah had prescribed Tegriral to the petitioner. The prescription dated 2055/9/1 mentioned the expression “to be continued” regarding the consumption of Tegriral. The petitioner continued taking Tegriral with the hope of getting better as per the advice of Dr Dinesh Bikram Shah. After 26/27 days of the consumption of the said medication, the effects on her body and eyes began to surface. Following this, she visited Dr. Laxman Shrestha on 2056/4/11 where he informed that Tegriral had caused such effects on her. On knowing the effect of Tegriral on 2056/4/11, the petition was filed before the Compensation Committee on 2056/4/23.

The Consumer Protection Act 2054, in Section 22 provides for time limitation. It provides that in case where the sale or the delivery of goods and the service against the Act causes damage to the consumer, such consumer or any consumer institution on behalf of such consumer may file a complaint against the person selling/delivering goods or services in the Compensation Committee claiming compensation within the 35 days of the incurring such damage. It needs to be examined what the expression “damage caused” means. The dispute in the instant case relates to the damage caused due to the consumption of medication. Even though the petitioner was taking medication

prescribed by other doctors prior to taking Tegrital prescribed by Dr. Dinesh Bikram Shah, the effects seen on her body do not seem to have occurred due to the consumption of such medications. It is only after the intake of Tegrital such effects are noticed which are also seen in the photos.

It is found that Tegrital showed no reaction in the initial days, but when the dose of the Tegrital got increased then its effects began to aggravate. It is a matter to be taken in judicial notice by the court that the increase in the dose of the medication aggravates its effect. It is also a common knowledge that completion of the course of medication is necessary to get full relief or the intake of the medication should not be stopped without the completion of the course. This means that the medication does not produce instant result rather on the completion of the course.

In the same way, as the intake of Tegrital got increased every passing day then its effects or symptoms seem to have been found. When symptoms such as the boils on the body, darkening of the skin, swelling on the face etc were seen on the body of the petitioner, and when it came to be known that the intake of Tegrital had caused such effects, the petition was filed within 35 days of such knowledge, and hence the petition cannot be said to have been filed beyond the time limitation.

While interpreting limitation provided Section 22, the counting should not start from the day the doctor prescribed medication or from the first day of the intake of medication, rather it should start from the day effects began to surface following the regular intake of medication. While interpreting a legal provision, purposive interpretation should be given. It should not be the one that frustrates meaning. When the effect of the damage came to be known, the same date should be taken into account while determining the cause of action. In matters pertaining to the intake of medication, the interpretation that considers the first intake date for the purpose of counting limitation, as is done in other cases, is absurd interpretation. The gradual effect seen upon the consumption of the medication should be taken as the valid date for the purpose of limitation.

The dispute in the instant case pertains to the damage caused to the victim. For that purpose as the language of Section 22 should be interpreted as per the legislative intention, this Bench cannot accept the contention that the claim of the petitioner is beyond limitation. We hold that the case is within the limitation provided in Section 22 of the said Act.

Now turning to the second question, there is no doubt that Shrijana K. C was victimized as a result of the consumption of the medicine. The statement of Dr. Dinesh Bikram Shah and the evidence submitted for his defense indicates that the petitioner had been suffering from skin and eye disease. She had been taking medicine after visiting several other doctors prior to her visit to him. It is claimed that the drug named Tegrital prescribed by him was based on the correct diagnosis, it had not caused damage to her. The defense filed by Dr. Dinesh Bikram Shah stated that the discharge report of the Kanti Children Hospital submitted by the petitioner indicated that the petitioner had been taking medication for malarial parasite, that her parents were giving

medicine to her whatever they wished to, that the damage was caused due to the consumption of medicine for eye and skin, the petitioner had not suffered due to the medicine prescribed by him.

The nature of this case is different from the traditional criminal or civil cases. The cases on the effect of medication will not have traditional evidence such as eye witness, crime scene report or *Sarjamin* report on the record. During the medical treatment at the public hospital, private hospital or in the clinic or wherever, if despite the careful delivery of the service by the physician and the operation performed by the surgeon, in case fails causing death of the patient or does not cure the disease then the physician, surgeon or the Hospital cannot be held liable for medical negligence. The death of the patient or unsuccessful treatment of the doctor alone does not amount to negligence. The hospital and the doctor does not provide guarantee to the success of treatment. The doctor diligently provides treatment based on his study, knowledge, skills, experience and the resources available. If the patient visits the doctor in time, the latter can try his best to treat and cure the patient. However, medical profession does not guarantee the cure of the disease. The success of the treatment depends on factors such as the type and stage of the disease, the age of the patient, timely treatment, available resources and abidance of the patient to the instruction of the doctor. For this reason, the death of the patient or to the lack of cure of the patient does not lead per se to medical negligence. In cases relating to medical negligence, the Compensation Committee should not be influenced by mere allegations that the doctor was negligent or did not adopt due care or had wrongly diagnosed or wrongly treated the patient. It should find out to whether or not the doctor has been in fact negligent or adopted due care. In situations where the doctor has been providing service based on his experience, skill, knowledge, hard work, study, and despite all that if the treatment fails, the doctor cannot be said to be negligent.

The relation between the doctor and patient is a very sensitive relation. The doctor tries his level best to diagnose the patient's disease and save his/her life. It is the duty of the doctor, and a principle recognized by all. The doctor does not possess any bad feeling, bad conduct or bad intention against the patient. Any patient who accuses that the doctor was negligent should prove the charge of negligence against such doctor. In cases of medical negligence, the court should presume the doctor innocent until the guilt is proved. If the Court holds doctors guilty for frivolous charges such as that the patient had died, or the treatment had adversely affected the patient, doctors will shy away from taking risk on the treatment of the patient, be more focused on protecting themselves and stay away from services that might affect them. In such cases of medical negligence, the body that hears the complaint or the Court should take the details of the prescription, the postmortem report where available, all the pathological reports and the expert opinion to prove whether there exists carelessness, recklessness and negligence on the part of the doctor. A doctor is said to be motivated to provide service and not have any ill intention against the patient except to cure him/her.

In this regard, decision of the Court of Appeal, England in *Roe v Minister of Health*[1954]20.B 66(1954) W.L.R 915 and (1954)2 All E.R. 131] a case pertaining to action by patients against hospital anesthetist in respect of personal injury will be instructive. In this case, two patients (plaintiff) were admitted in the hospital for a minor surgical operation, but after the surgery both the patients were paralyzed. One of them had the problem of cartilage in the knee while the other was a patient of Hydrocele. Both the patients were given spinal anesthesia by Dr.Graham. The name of the spinal anesthetic was Nupercaine. Nupercaine was a liquid contained in glass ampoules. In order to use this, the doctor would have to insert the syringe, take out the Nurpercaine and inject the same in the patient's spine. The ampoule containing Nupercaine would be sealed with Tube Glass and while using it the Glass Top would have to be sealed off.

There was a chance that the sealing off of the glass ampoule, may lead to contamination of the Nupercaine ampoule which in turn may contaminate the syringe, and then the needle of the syringe, and ultimately cause infection to the patient. Taking note of this possibility another doctor working in the hospital kept the Nupercaine ampoule in a disinfectant named phenol. The disinfectant was in the form of liquid called carbolic acid. Thus, the sole purpose of keeping the ampoule in the disinfectant was to protect the patient from getting infected.

It so happened that nobody paid attention on the possible danger that may have occurred while keeping Nupercaine in the disinfectant. What had happened was that on opening ampoule that contained Nupercaine a small crack in the ampoule invisible with an eye, had occurred. On keeping ampoule in the liquid disinfectant, the disinfectant oozed inside the ampoule without anybody's notice. Unaware of this, when Dr.Graham injected Nupercaine it happened to be a contaminated Nupercaine which contained disinfectant. A case of negligence was filed against Dr. Graham, all the officers and staffs of the hospital. And in this case, the following two questions were raised.

- 1) Why was the disinfectant phenol not colored ?
- 2) The crack made on ampoule.

In this case it was argued that if the disinfectant had been coloured, the seeping of the disinfectant inside the Nupercaine would have been detected. Therefore, not coloring the disinfectant was claimed to be a negligent act and not paying attention over the crack on the ampoule was another. However, Lord Denning confirming the decision of the lower court that had acquitted Dr. Graham, staffs of the hospital observed, "If the anesthetists had foreseen that the ampoules might get cracked with cracks that could not be detected on inspection they would no doubt have dyed the phenol a deep blue; and this would have exposed the contamination. But I do not think that their failure to foresee this was negligence. It is so easy to be wise after the event and to condemn as negligence that which was only a misadventure. We ought always to be on our guard against it, especially in cases against hospitals and doctors. Medical science had conferred great benefits on mankind, but these benefits are attended by considerable risks. Every surgical operation is attended by risks. We cannot take the

benefits without taking the risks. Doctors, like the rest of us, have to learn by experience, and experience often teaches in a hard way. Something goes wrong and shows up a weakness, and then it is put right. That is just what happened here. Dr. Graham sought to escape the danger of infection by disinfecting the ampoule. In escaping that known danger he unfortunately ran into another danger. He did not know that there could be undetectable cracks, but it was not negligent for him not to know it at that time. We must not look at the 1947 accident with 1954 spectacles". Thus, Dr. Graham was fully acquitted from the charge of negligence.

Now, in the instant case the main question before us is whether the effect on the petitioner have been caused due to the consumption of Tegrital prescribed by Dr. Dinesh Bikram Shah or was the effect caused due to the consumption of the other medication during her treatment by other doctors prior to her examination by him. According to Dr. Dinesh Bikram Shah the petitioner had not been affected due to the intake of Tegrital prescribed by him, due to the medication of skin and eye that she had consumed prior to her visit to him.

As regard to that it is found that the victim Shrijana K.C visited the Eye Hospital on 2055-7-11 (28th October, 1998). It is found that after her visit to the said hospital on 1st November, 1998 and 5th November 1998, she was referred to the Blue Cross Nursing Home. Upon being examined at the Blue Cross Nursing Home she was asked to undergo the CT scan of her head which she did at the said Nursing Home. On receipt of the report, the petitioner visited Nepal Eye Hospital whereupon the said Hospital referred her to Dr. Dinesh Bikram Shah again.

It is found from the record that on 12th November, 1998 Dr. Dinesh Bikram Shah had prescribed medication and referred the petitioner to Medicare National Hospital. The petitioner was admitted to the Medicare National Hospital from 2055/7/27 till 2055/8/1. Medicare National Hospital diagnosed her as suffering from neurocysticercosis. Following her admission at the Medicare National hospital also Dr. Dinesh Bikram Shah had recommended petitioner for Elisa test for cysticercosis anti-body. The test was done at the Blue Cross Nursing Home. It is known from paragraph 10 of the complaint filed by the petitioner at the District Compensation Committee that on being discharged from Medicare National Hospital, the discharge sheet mentioned the medication that she needed to take, and her consultant was named as Dr. Dinesh Bikram Shah.

On being discharged the Medicare National Hospital had referred her to Doctor O.K. Malla. Dr O.K Malla got petitioner's blood tested at Siddhartha Pathology, and then she was referred to Nepal Eye Hospital once again. After one month of her discharge from Medicare National Hospital, the petitioner visited Dr. Dinesh Bikram Shah. In between the petitioner did not take any medicine.

After one month of petitioner's discharge from the Medicare National Hospital, she visited Dr. Dinesh Bikram Shah. Then M.P investigation was conducted, and when the report showed the presence of Malaria parasite Dr. Dinesh Bikram Shah prescribed Tegrital (carbanazepine) 100mg. It is said that following the consumption of Tegrital,

the victim's skin got darkened, she felt pain on her eyes and was losing her eye sight. The petitioner also got wounds on her body from where pus began to ooze out and she also had black spots all over the body. The face and appearance of the petitioner got changed and deformed. This is also verified from the photos enclosed on the record.

Dr. Dinesh Bikram Shah maintains that since the petitioner had consulted different doctors for other diseases prior to her visit to him, she was not affected due to the consumption of Tegrital prescribed by him. Even though the petitioner had taken medical treatment at Nepal Eye Hospital that she had been admitted in Medicare National Hospital. It is known that Dr. Dinesh Bikram Shah was a key person involved in the treatment of the petitioner except at the Eye Hospital. It is also found from the records that the petitioner was continuously under the care of Dr. Dinesh Bikram Shah, even during her visit to the doctors at the Medicare National Hospital or elsewhere.

Prior to the treatment, doctor usually takes medical history of the patient. It is a common practice or a professional principle of the doctor to acquire the details of the medications that the petitioner had taken under the prescription of other doctors and the knowledge of the disease diagnosed by those doctors. Shrijana K.C, being the patient of Dr. Dinesh Bikram Shah, if she had taken any medication earlier, he should have taken that into account while prescribing medicine. This is not a matter that the patient generally hides from the doctor. The doctor should make a written note of such matters prior to prescribing medication. Even though the petitioner had visited Medicare Hospital beside the Eye Hospital, it is on the referral of Dr. Dinesh Bikram Shah. Dr. Dinesh Bikram Shah maintains that the petitioner had visited other doctors and taken medicine for other diseases, but it is not seen from the record that other doctors have prescribed medicine which might have such effect on her. It is found that on 2055/8/1 Medicare Hospital had prescribed Aciloc, Albendazole and Mucaine to her. As Dr. Dinesh Bikram Shah has not maintained that these drugs can cause reaction, no further discussion deems necessary on this matter.

It is found that the said effects have surfaced after 27 days of the consumption of Tegrital prescribed by Dr. Dinesh Bikram Shah. The letter of the Department of Drug Management dated 2057/11/16 states that the consumption of Tegrital may have the effect of darkening the skin, poor eye sight, the boils may also show up on the body. In the course of taking expert opinion when District Administration Office, Kathmandu, requested, Dr. A.K. Jha, skin specialist associated with the T.U. Teaching Hospital opined "Shrijana K.C was examined by me few months back diagnosed as a case of drug eruption due to Tegrital which is a common presentation with Tegretol. Anybody may have drug eruption with Tegrital post inflammatory hypopigmented area are seen which required biopsy for histopathology to exclude other pathology". It seems that Dr. O.K. Malla who was referred for the treatment of eye had not prescribed any medication. From the statement made by Dr. Laxman Shrestha it seems that when the petitioner visited the Kanti Children Hospital, her both the eyes were swollen; she was not in a position to see; she had wounds all over her body and her situation was critical.

Paragraph 10 of the complaint states that the petitioner was examined at the Medicare National Hospital, she had been prescribed some medication. But Tegrital or

other drugs which may have such effect do not seem to have been prescribed. From all these it is inferred that despite the petitioner's treatment by other doctors, none of their medication had caused damage to the petitioner. It seems that at the time of discharge from Medicare National Hospital, the petitioner was prescribed Aciloc, Alnedazole, Mucaine Gel, that the said drug would not have the kind of effect that she was having, that the petitioner had not consumed any other medications besides Tegrital, the letter of the Department of Drugs Management and statement of other doctors substantiating that the consumption of Tegrital have the effect of darkening the body, weakening eye sight and causing boils in the skin, it conclusively proves that the effect on the petitioner was due to Tegrital prescribed by Dr. Dinesh Bikram Shah.

It is found that the District Compensation Committee, before reaching conclusion in this case, had taken expert opinion of doctors and institutions for determining whether the claim and complaint of the petitioner is correct or not and whether Dr. Dinesh Bikram Shah had been negligent or made mistakes. In this context the authoritative institution in the realm of drug science, the Department of Drug Management, comes out to be an important institution. The opinion of the said Department and the literature produced by the company producing Tegrital seem similar.

The report provided by the Department of Drug Management suggested that the possible effects on the intake of Tegrital are blurring of the eye sight, dizziness, loss of balance while walking, sight problems and boils in the skin. When these symptoms are seen the patient should immediately visit the doctor. The literature published by the manufacturer of the Tegrital also mentions that "If signs and symptoms suggestive of severe skin reactions (e.g. Steven Johnson syndrome) appear, Tegrital should be withdrawn at once.

The disease gets cured if it is rightly diagnosed, and if the medication prescribed by an expert physician is rightly consumed. Therefore, it is mentioned in all the covers of the medication that it is "to be used only under the supervision of registered medical practitioner". While warning that the drug should be prescribed looking at the condition of the patient, it provides the dosage, composition and possible side effect of the product in the literature, and thus warns the doctor.

Medicine cures people. However, if the dose is not correct it may not do so. In some cases due to various reasons the drug may even cause damage. It is known from the literature of Tegrital and the opinion shared by expert, pharmacist and doctors consulted by the court. It is found that Dr. Dinesh Bikram Shah had prescribed Tegrital to the petitioner to be continuously consumed. It is also found that when the intake of medicine increased it began to show effect on her. Dr. Dinesh Bikram Shah does not seem to have informed or warned the petitioner on the possible effects of Tegrital or advised her to consult the doctor or to stop the medication in case of reaction. To this extent we hold Dr. Dinesh Bikram Shah as negligent.

Since the petitioner was not keeping well and as she was also ignorant about the drug, despite the medicine showing adverse effect on her, she seems to be continuously taking medicine with the hope of being cured. As a result the petitioner

seems to have gotten her admitted to the hospital only when the effect got seriously aggravated. The fact that the drug may have adverse effect is a matter to be taken into judicial notice by the court.

For the fear of possible damage that may be caused due to the consumption of wrong dosage of medication and different other reasons, several drugs cannot be purchased over the counter without the prescription of the doctor. It is written on the package of every drug that "It is dangerous to take the medicine except under medical supervision" and on the use of dosage "doses as prescribed by the physician" is mentioned. In the same way the literature of the medication provides the details of its effects. The literature by the manufacturer is meant for the doctor and not for the patient. Dr. Dinesh Bikram Shah should have explained to the petitioner about the disease she had, informed her about the intake of medicine and the possible effects that may be caused due to the intake of medicine which seems to be absent.

It seems that Tegrital is the commonly used brand name of Carbamazepine. The Drug Information for the Health Care Professionals published by the USPDI in 1999, mentions about the precaution to be taken. It mentions that Tegrital may cause allergic reaction known as Stevens-Johnson syndrome causing blurred vision, rash on skin and itching. In order to avoid such reaction, it is mentioned that "Side effects may be minimized by initiating therapy with low doses which should be increased gradually at weekly intervals until an adequate response is obtained. Administering carbamazepine with meals and giving the total daily dosage in 3 or 4 divided doses may also minimize side effects". However, Dr. Dinesh Bikram Shah had failed to provide necessary instruction on the use of medication to the petitioner.

In regard to the doses of the medication, the Five- Members Committee formed as directed by the Court of Appeal, Patan opined that in the initial stage of the treatment to reduce the side effect of carbamazepine brand named as Tegrital, the patient is called after a week of the start of the treatment and in case of the side effect seen or failing to control the disease, the patient is advised to come back immediately. Later the time period is extended and the patient is advised to visit after a long gap. Further, timely health check should be carried out and the heart, kidney, liver and the blood test should be done to find out possible effect on the patient as per the necessity and available facilities. The same is mentioned by Novratis its literature titled as "prescribing information". It is seen that doctor had not maintained minimum caution while prescribing Tegrital.

Regarding medical negligence, the principle laid down in *R v Beteman* by the English Court seems to be significant here. In that case, it is held that "if a person holds himself out as possessing special skill and knowledge by or on behalf of a patient he owes a duty to the patient to use due caution in undertaking the treatment. If he accepts the responsibility and undertakes the treatment and the patient submits to his direction and treatment accordingly he owes a duty to the patient to use diligence, care, knowledge, skill and caution in administering the treatment".

Likewise, the Supreme Court of India in the case of *Dr. Laxman Balkrishna Joshi Vs Dr. Timba Balu Godbole and Others* (AIR 1996 SC 128) observed that “the duties which a doctor owes to his patient are clear. A person who holds himself out ready to give medical advice and treatment impliedly undertakes that he is possessed of skill and knowledge for the purpose. Such a person when consulted by a patient owes him certain duties, viz., a duty of care in deciding whether to undertake the case, a duty of care in deciding what treatment to give or a duty of care in the administration of that treatment. A breach of any of those duties gives a right of action for negligence to the patient. The practitioner must bring to his task a reasonable degree of skill and knowledge and must exercise a reasonable degree of care. Neither the very highest nor a very low degree of care and competence judged in the light of the particular circumstances of each case is what the law requires: The doctor no doubt has discretion in choosing treatment which he proposes to give to the patient and such discretion is relatively ampler in cases of emergency.

Based on the above mentioned reasons, we hold that Dr. Dinesh Bikram Shah had prescribed Tegrital to the petitioner, but had not advised that in case of any adverse effect on the intake of medication for longer period, she should stop taking medicine and go to hospital immediately or visit him immediately. And hence, while undertaking treatment, he does not seem to have adopted due and reasonable care. Hence this act is regarded as negligent.

In the instant case the contention of Dr. Dinesh Bikram Shah that he had not been negligent that the damage was caused to the petitioner due to the treatment elsewhere, it needs to be determined here whose causation or “Causation Novus interveniens” is involved. A person causes a result which is an element of an offence when-

- a. he does an act which makes a more than negligible contribution to its occurrence or
- b. he omits to do an act which might prevent its occurrence and which he is under a duty to do according to the law relating to the offence.

A person does not cause a result where after he does such an act or makes such an omission an act or event occurs-

- a. which is the immediate and sufficient cause of result
- b. which he did not foresee and,
- c. which could not in the circumstances reasonably have been foreseen

The causation is a subject matter of both law and fact. In order to charge someone for negligence, carelessness or recklessness, it is necessary to find out the causation of the event. In the present case Dr. Dinesh Bikram Shah has contended that it is not Tegrital rather the treatment that she had undertaken for the problem of eye and for tuberculosis, prior to her visit to him, which had caused such effect.

In order to say that the effect was caused due to the treatment at other places and the medication taken there, the effect of the treatment elsewhere and the consumption of medication should have the sine qua non effect. It is proved from the note of the Department of Drug Management, the testimony of the Pharmacist and the literature of the Tegrital that the causation in the present case is intake of Tegrital for a long period of time and not the treatment and the consumption of the medication elsewhere. Therefore, the necessary element for causation for instance can be explained thus: a person does some act which gives rise to some effect or element of crime, or where somebody had the duty to prevent or alert, but he fails to do so, and the failure contributes to such act, or where the person had a duty to take due care and caution but he fails to do so, he is said to have caused the incident.

Thus, the causation in this case seems to be the consumption of Tegrital for a long period and not the treatment of eyes or T.B which she had undertaken. The petitioner should have been warned, cautioned, and alerted in time about the effect of long spanning consumption of Tegrital. And as absence of the same has caused effect on her, the causation of the effect seems the treatment of the petitioner undertaken by Dr Dinesh Bikram Shah, and not the treatment elsewhere. Hence, Dr Dinesh Bikram Shah cannot be exonerated from the allegation of negligence.

Now in this regard, it also needs to be examined whether or not the Blue Cross Nursing Home from where Dr. Dinesh Bikram Shah treated the petitioner should be held liable. On this, it seems to us that there are two respondents in the present case: one is Dr. Dinesh Bikram Shah who provided the treatment and the other is the Blue Cross Nursing Home. With regard to Dr. Dinesh Bikram Shah, it is already discussed therein above. It is found from the written submission of Blue Cross Nursing Home that it owes no obligation. According to it the responsibility lay with Dr. Dinesh Bikram Shah. However, it is found that the respondent Blue Cross Nursing Home is an organization established and registered according to law. The objective of the Blue Cross Nursing Home, as found in its MoU (Memorandum of understanding) and the Regulation, is the treatment of the patients. It is also found that respondent Dr. Dinesh Bikram Shah had been providing treatment to the patient from the Blue Cross Nursing Home. It is clearly seen from the memorandum of understanding and the regulation that the establishment of the Nursing Home was for providing treatment to the patients. It is seen that the clinic has been delivering the service through the doctors. In such circumstances the Nursing Home cannot be exonerated by claiming that it had no obligation in the case. The Blue Cross Nursing Home which is formed under law with the main objective to deliver treatment to the patients cannot stay away from the responsibility. Hence the verdict delivered by the Court of Appeal, Patan against the respondent, Nursing Home is held as correct.

Upon examination of S 2(a) and 2(e) of the Consumer Protection Act, 2054, which provide definition of different terminologies, it is seen that section 2(a) defines "consumer" as any person who uses any consumable thing or service. The patient also falls within the person who uses services. Similarly section 2(e) defines the term "service" as meaning as any kind of service, labor, facilities and the advice delivered

with or without taking consideration or fee. Therefore, the service delivered by the doctor, hospital or the Nursing Home falls within the definition of “service” as provided by the Act. In this context sections 6(1) (a) and (d) of the Consumer Protection Act, 2054 also seem important. Article 6(1) (a) guarantees the right to be protected from the delivery of the service that may cause harm to life or health, and section 6(1) (d) provides the right recourse. Likewise, section 24 provides for compensation. The same section has the provision for compensation based on the harm caused.

It has been contended that due to the consumption of Tegrital the petitioner, Shrijana K.C has sustained black spots on her body, lost sight of her left eye which has caused her physical and mental suffering. It is corroborated from the photos of the petitioner that were taken during her treatment at the Kanti Children Hospital. Had Dr Dinesh Bikram provided information on possible reaction that may surface due to long spanning intake of Tegrital to the petitioner and her guardian, and alerted them on what to do if symptoms were seen, the petitioner would not have sustained damage. Since at this tender age the petitioner has lost her eye sight, which is an important and sensitive organ of the body, due to the lack of information on the possible damage that may be caused on the consumption of the Tegrital for a long time, to that extent Dr. Dinesh Bikram Shah is held liable for negligence. The eye is one of the important organs of the human body which preserves the enjoyment of right to life and makes it worth. In order to have the right to life, the right to livelihood is essential. Despite the capacity and qualification to exercise the right to livelihood, the absence of eye sight makes it impossible to enjoy and exercise the right to life and the right to livelihood. The petitioner is facing the same today. In the absence of eye sight human being is forced to live with the assistance of others. Similarly, in the absence of eye sight one is deprived of the fundamental right and basic human right to receive education, develop his/her personality and take up new occupation as a career. On account of being physically unfit one may come across a situation of being disqualified from occupation to be gained through competition. On these grounds, and taking note of the expenses incurred in the treatment and also the physical and mental torture, we uphold the decision delivered by the Court of Appeal, Patan dated 2063/2/2 that made the Blue Cross Nursing Home and Dr.Dinesh Bikram Shah jointly liable to pay Rs. 6,17,119/94. The appeal of Dr.Dinesh Bikram Shah where he contended that he had not caused any damage to the petitioner and hence should be exonerated from the charge is rejected.

Now, looking into how the compensation should be paid the Blue Cross Nursing Home is a legal person established to deliver treatment. Due to the goodwill of the Nursing Home patients come for treatment. It is known from the prescription that Dr. Dinesh Bikram Shah not only provided service on a personal basis but also as a part of Blue Cross Nursing Home. In such situation Blue Cross Nursing Home cannot be exonerated from the liability resulted. Similar to the situation where in case of harm to the patient by negligent conduct of the doctors working in public hospitals the hospital is held liable under tort, the private Nursing Home is also held equally liable for the payment of compensation.

As to the third question raised above, it is necessary to dwell on the relation between the doctor and patient. A doctor gets the right to treat the patient on the basis of his qualification, skill, knowledge and experience following his graduation from the medical college, and after passing through the licensing examination where necessary. The ethics and code of conduct of the doctor calls upon him to provide medical treatment to the patient to the best interest of the patient. A small negligence of the doctor may take away the life of the patient. Even where the patient does not die, the negligence may cause effect on some part of the body. Thus, the doctor bears some responsibility towards the patient. On the other, the patient also has some duties. It is her/his duty to follow the instructions of the doctor and take medication timely and to provide all the information about the disease, the medications taken, and the treatment of the disease already undergone.

There are two assumptions in the doctor-patient relationship. According to the first assumption, by virtue of his education and his/her calling a doctor is committed towards the treatment of the patient. On the basis of his/her education, profession, knowledge, skills a doctor provides treatment in the best interest of the patient. Therefore, as he/she always keeps in mind the best interest of the patient, for some time it was said that he/she should not be required to inform patient about the disease and the treatment. According to old belief, the doctor undertakes the treatment of the diagnosed disease with honesty and diligence. Whatever the doctor does is for the benefit of the patient. Thus, according to the old belief the doctor-patient relation is based on the professional standard of care.

Based on the professional standard of care, it was held that the doctor was said to have the right to provide treatment in the best interest of the patient where the consent of the patient would not be necessary. This is mentioned in page 137 of the University of Pittsburg Law Review 1977 where it is stated “*Under the standard care doctrine earlier decisions seemed to perpetuate medical paternalism by giving the profession sweeping authority to decide unilaterally what is in the patient’s best interest*”

But Since the 1960s, some change has been witnessed in the mode of treatment based on the professional standard of care. Where doctor provides service based on his knowledge and skills, the patient is also entitled to know the kind of disease he/she has, the treatment he/she has to undergo, the result of the treatment and the result of no treatment. All these informations should be availed to the patient. The doctor should provide all the above mentioned information to the patient prior to providing medical service. Since the 1960s, the doctor-patient relation based on professional standard of care has been replaced by the “informed consent theory”. With the advent of this theory, the doctors have been made more accountable towards the patient, and at the same time patient is said to have the right to know about the disease that he/she has and the treatment he/she is undergoing.

It is the belief in Anglo-American law, that every individual is master of his own body. So he/she makes decision on his/her own. The patient’s consent is required

for treatment. The doctor is not held liable if he/she provides information to the patient on his/her disease, treatment, alternative, the pros and cons of the treatment. In this regard, it is relevant to have a look on the provisions in the chapter “Of Medical Treatment” of the National Code: Number 1 of the Chapter “Of Medical Treatment” of the National Code contains the following provisions:

“When conducting surgery and also prescribing medicine following examination of risky and serious illness, doctors or *vaidhyas* who have studied the subject and obtained license after passing the exam, may conduct surgery, apply or prescribe medicine. Persons skilled in the examination of disease, prescribing medicine or those who are doing so by experience, may treat simple wounds, do dressing of minor wound or give medicine even though they do not possess license.”

Number 2 of the Chapter “Of Medical Treatment” provides: “Where it is necessary to conduct surgery, open or remove any part of body, the doctors or *vaidhyas* holding license, may do so with the consent of the patient if he/she is conscious and in a position to give consent, and where the patient is a child or unconscious, with the consent of the guardian. Where any surgery is required of a person who does not have any guardian, the doctor or *vaidhya* may do so to the best interest of the patient even where consent is absent.”

On examination of Number 1 of the National Code, it is found that ‘major and risky’ surgery could be undertaken only by registered medical practitioner. The second clause of No 1 above which mentions that “ Persons skilled in the examination of disease, prescribing medicine or those who are doing so by experience, may treat simple wounds, do dressing of minor wound or give medicine even though they do not possess license” approves the treatment of minor diseases by experienced persons. For such minor cases treatment by doctors is not mandatory. With regard to the physician the relation between doctor-patient provided in the said provision of No 1, is based on professional standard of care. In this, it does not seem necessary to provide information about patient’s disease or take his/her consent for the treatment. This provision only requires that the doctor with requisite qualification should do so. It grants automatic permission. Therefore, it seems to us that this provision is based on professional standard of care.

The provision in No 2 of the Chapter “Of Medical Treatment” is a provision relating to surgical operation. It requires that while conducting surgery the consent of the guardian or representative should be taken. But where such person does not have any representative, operation may be conducted without consent, to the best interest of such person. Thus, the provision of No 2 enacted in those olden days seems based on informed consent theory.

Number 3 of the Chapter on “Of Medical Treatment” also seems important in this regard. This is a provision on negligence. The expressions given in Number 3 which states “ in the event of death, where appropriate dose has been given incurs no liability” and expression such as “in case wrong medicine is given or wrong dosage is prescribed or where wrong surgery is done” etc indicate that where the doctor prescribes

wrong medicine, or where he/she is negligent or careless or reckless, he/she is accountable to the patient.

It has been stated in Modi's Medical Jurisprudence and Toxicology (21st edition, page 515) that "It is now recognized that the patient has the right to full information in layman's terms concerning his diagnosis, treatment and prognosis. He should also be informed about alternative treatments and possible complications.

Here, it should be noted that the provision in No 2 of the Chapter on "Of Medical Treatment" of the National Code which requires consent of the patient prior to conducting any surgical operation should be regarded as "informed consent" of the olden days. Further, it may be pertinent here to refer to some established principles of other countries as well. In this regard, towards the end of 1950 in America, it was enunciated in *Salgo vs Leland Stanford Jr University, Board of Trustees* [154 Cal APP 2d 560(1957)] that the doctor patient relation should be based on informed consent.

In 1977 the University of Pittsburg Law Review, referring to the court suggested that "a physician is obligated not only to disclose what he intends to do but to supply information which addresses the question of whether he should do it. This was a marked divergence from the general rule of 'professional standard of care' in determining what must be disclosed. Under the standard earlier decisions seemed to perpetuate medical paternalism by giving the profession sweeping authority to decide unilaterally what is in the patient's best interest".

Regarding informed consent it was said in *Marlin v Stratton* [515 2d1366/ Okl 1973] that "consent to medical treatment to be effective should stem from an understanding decision based on adequate information about the treatment, available alternatives and the collateral risks. The requirement labeled 'informed consent' is legally speaking as essentially as a physician's care and skill in the performance therapy. The doctrine imposes a duty on a physician or surgeon to inform a patient of his options and the attendant risks.

With regard to doctor-patient relation under the informed consent theory it was held by the Supreme Court of Oklahoma [(1979) 606 p.554] that in order to prove negligence the followings should be present:

- a. defendant physician failed to inform him/her of a material risk before securing his/her consent to the proposed treatment.
- b. if he/she had been informed of the risks he/she would not have consented to the treatment.
- c. The adverse consequences that were not made known did in fact occur and he/she was injured as a result of submitting to the treatment.

It is illustrated from the decision mentioned above that the principle of professional standard of care has now been replaced by the principle of informed consent.

Except for the provision of the Chapter “Of Medical Treatment” no law seems to be in place nor any principle laid down on the doctor- patient relation as to how it should be regulated. The provision of the Chapter “Of Medical Treatment” of the National Code holds the doctor criminally liable to a certain extent if he/she is found to be careless in treatment. However, as to the doctor-patient relation or the right of the patient to be informed of the disease, or the duty of the doctor towards the patient, no provision seems to be in place. As the “act of treatment” for the purpose of the Consumer Protection Act is included in the “service”, we hold that if it is proved that the doctor has been negligent or reckless while undertaking the treatment of the patient he/she can be punished and asked to pay compensation under the tortious liability and also face criminal prosecution. No provision exists in the Consumer Protection Act with regard to the doctor-patient relation, or the duty of the doctor towards the patient or vice versa. There is also no definition of medical negligence. In the same way, the law of Nepal or the Case law does not provide or explain anything on the doctor-patient relation or on what amounts to negligence during the treatment of the patient.

The provision in the Chapter “Of Medical Treatment” of the National Code criminalized negligent act of the doctor during the treatment of the patient, but did not lay down anything regarding the duty of the doctor towards the patient or compensate the action that caused physical damage to the patient. A patient may sometimes die due to negligence or carelessness knowingly or unknowingly committed by the doctor. Where there is no negligence or carelessness on his/her part, the patient has died due to delay in pursuing treatment, or old age or due to chronic disease, or wrong treatment at the wrong place attributed to the patient, in such situation the matter is beyond the control of the doctor and he/she has no role. A patient may die even when the doctor carefully treats him. In such situation the doctor cannot be held liable. Sometimes even where there is negligent or careless or reckless treatment or surgery, the patient, instead of being cured, may have other effects and die. Since few years back, there is increased tendency of filing lawsuits against doctors and the hospitals. The present provision in the Chapter “Of Medical Treatment” of the National Code, cannot cope up with the challenges and need of today. The other law, i.e. the Consumer Protection Act 2054, seems to be basically focused on the quality of other goods and services and competition therein rather than the medical service. Therefore, there is a need to introduce a modern self-contained Act that governs doctor-patient relation.

While on the one hand it is found that failure in treatment results due to factors even as increase of population, lack of treatment facility, lack of timely visit to doctor, on the other it also cannot be denied that the patient may die due to factors such as the lack of life saving drugs, instruments or unavailability of medication on time and the negligence of the doctor. Owing to these various reasons both genuine and fake law suits may be filed. Since few years the death of the patient has not only resulted in the law suits against doctor, but also vandalism at the hospital. This may be taken into judicial notice by this Court.

In England, in the case of *Kay v Ayrshire & Arran* (1987)2 ALL ER 471 it was held that “until fairly recently British people displayed a decent distaste for suing the

people who were trying to cure them. While one can sympathize with the parental grief which turns to grievance and fuels hopeless vendetta through the courts.” It is wise to hesitate in filing a case against the person who made great effort in saving the life of the patient and despite which the patient died. But now Journal New LJ [(1995 p 1669)] states that “claims against doctors and hospitals are increasing very fast; litigation is expected to cost 200 million Pound Sterling a year now, a four fold increase in four years”

The act of delivering service by the doctor, hospital or the nursing home is regarded as service. The doctor treats the patient focusing on the best interest of the patient. There is no doubt on this, but the negligence of the doctor is also not acceptable. Similarly, the patient also possesses the duty to disclose all the diseases he/she has to the doctor and follow instructions of the doctor while taking medication. If the patient fails to disclose everything to the doctor, or does not follow the instructions, or does not visit the doctor or hospital in time, or visits only after the disease turns chronic or visits wrong doctor or hospital first and comes to the concerned doctor or hospital only after his/her condition worsens, in such cases the doctor or the hospital cannot be held liable. In cases where the patient is brought late or taken to other places first and then brought to the concerned doctor or hospital late, and even after all the efforts, the treatment fails and the patient dies, in such cases if the doctor or the hospital is held liable a situation will be created where the doctors will not be interested to offer treatment to the patient. In such cases if the doctor is alleged to be negligent and the doctor and the hospitals made to compensate, the death of the patient with chronic disease, may turn to be a source of income to the family. The doctors and the hospital will try to stay away from unnecessary hassles than trying to save the life of the patient. The Court should not give such interpretation of medical negligence that may create such situation.

Provisions are found to have been made in the Chapter on “Of Medical Treatment” of the National Code on matters such as doctor-patient relation, the treatment of the patient, qualification of the doctor, the extent of information to be given to the patient while treating patient, conditions where treatment requires prior consent of the patient etc. However, the provision in the National Code does not seem sufficient in the changed and developed context of today.

As it is necessary to enact a self-contained Act which incorporates the doctor patient relation based on informed consent, the four issues raised in this decision and other matters, let a letter be sent to the Ministry of Health enclosing this decision, drawing its attention to introduce a comprehensive and self-contained Act.

As discussed above the doctor-patient relation should be based on the principle of informed consent. Since this Court has observed only today that the treatment procedure should be based on the principle of informed consent, this principle will not be applicable in the pending cases of medical negligence at whatever level. It will have prospective effect and operation. This principle will come into operation only after the Legislature enacts law relating to this or after the government endorses the report submitted by the Committee formed pursuant to the order issued by the Court today,

Now turning to the fourth question, Section 23 of the Consumer Protection Act, 2054 provides for the Compensation Committee. The Committee is chaired by the Chief District Officer. The other members are: Government Prosecutor of the concerned district, Medical Officer, representative of district consumer institution, representative of Chamber of Commerce and the officer appointed by the government. The Committee pursuant to Section 24 vested with the power to carry out investigation on the complaint filed in and to make decision. Section 23(2) provides that the procedure to be followed by the Compensation Committee shall be as provided indicating thereby that it shall be as prescribed in the Rule as defined in Section 2(4)(n) of the Act. The Consumer Protection Rules have been issued pursuant to the power given to section 30 of the Act.

For the purpose of Section 23 of the Act, Rule 46 seems enacted. Taking note that the Committee formed pursuant to Section 23 is a Multi-Membered Body, the Rule 46 provides that the decision of the majority prevails in case the Committee fails to evolve consensus. The Consumer Protection Act, 2054 covers almost all the matters concerning goods and services. Amongst these, medical negligence is one issue. While looking at the composition of the Committee on the issue of medical negligence, it seems to us that majority members do not have knowledge of medical science. The members seem to be coming from the administrative profession. It is essential that the persons hearing the dispute should have knowledge of the discipline pertaining to the dispute.

The Consumer Protection Act 2054 has been in operation since quite long. As the number of hospitals and nursing homes have significantly increased, and as the service provided by the hospitals and doctors falls under the term “service” provided in the Act, litigations on medical negligence have been filed. New problems have surfaced due to reasons such as the increase in population, pollution and the like. The citizens’ right to health and the right to medical treatment both are guaranteed as fundamental rights of the citizens. It is the legal duty of both the hospital and the doctor to treat patient with due diligence using available instruments. Every patient should have the right against medical negligence, and in proven case of medical negligence there should be a right to adequate compensation. Therefore, in response to the changed scenario, and in order to make the doctor and the hospital accountable for causing damage to the patient due to the negligence, and to exonerate the doctors of the charge of negligence where, despite all the efforts, the patient dies due to circumstances beyond the control of the doctor, and in order to deliver justice based on evidence substantiated by expert opinion, the following order is hereby issued in the name of Ministry of Health.

1. The Consumer Protection Act 2054 in section 23 provides for filing petition in the Compensation Committee and the Committee, following the examination of the petition, decides the matter pursuant to Section 24 of the Act, and where it agrees with the contention awards compensation

Section 23 of the Act provides for a Six-member-Committee including the Member- Secretary. The work to be carried out by the Committee is purely technical

and related to medical science. The work to be undertaken pursuant to Section 23 is also a judicial work. However, as provided in sub-section 1, the president and other five members seem non-medical professionals. While dispensing justice, the persons should work with judicial mind independently, impartially and competently, and give decision based on evidence including expert opinion. The work of the Committee formed pursuant to Section 23 is purely judicial work to be carried out with judicial mind and based on evidence. The procedure to be followed by the Committee formed pursuant to Section 23 is as prescribed in subsection 2. As subsection 2(n) (4) (I) provides that it shall be “as prescribed”, the procedure is laid down in the Rule. For the purpose of Section 23(2) of the Act, the procedure to be followed by the Compensation Committee is laid down in Rule 46 of the Consumer Protection Regulation 2056. Looking at the objective of Section 23(2) of the Act, it seems to us that as Section 23(1) provides for a Six-Member- Committee, it is not a provision pertaining to the exercise of jurisdiction. The provision on Section 23(2) pertains to the procedure to be followed in the processing of the case.

It is seen that Rule 46, instead of providing for the procedure to be followed, has provided for jurisdiction of the Committee. The evidence on the claim of medical negligence pertain to medical science and hence technical subject. The decision of the Committee constituted under Section 23 should be based on expert opinion, pathological report and other scientific evidence. The testimony of the lay witness, who is not an expert, cannot be good evidence in a lawsuit pertaining to medical negligence. Hence, for the purpose of taking expert opinion as necessary, an order is hereby issued in the name of Ministry of Health and Population to constitute a Committee mentioned below and to publish the same in the gazette.

The doctor appointed by Nepal Medical Council.....	1
The doctor appointed by private hospital.....	1
The doctor appointed by public hospital.....	1
Pharmacist from the Drugs Management Department.....	1
The doctor appointed by foreign missionary hospital.....	1
Representative from the Consumers.....	1

Until the new law is promulgated by the Legislature, in the pending law suits and other possible law suits on medical negligence, the Committee constituted under Section 23 shall take the expert opinion from the Committee as and when necessary.

2. As of now we hold the notion that the doctor treats the patient looking at his/her best interest. The service delivered by the doctor with good intention is based on professional standard of care. But now we hold that the relation between doctor and patient should be based on the informed consent.
3. In order to establish the said system based on informed consent it is hereby ordered that the Ministry of Health shall form an expert committee as mentioned below:

Concerned Doctor from the Ministry of Health.....	1
Doctor from the Government hospital.....	1
Doctor from Non-governmental, private hospital.....	1
Doctor from the foreign Missionary Hospital based in Nepal.....	1
Doctor from Nepal Medical Council.....	1

The Committee shall submit recommendation regarding information to be given to the patient about the disease, treatment, and consequences of treatment/or non-treatment as far as possible in printed form, and acknowledgement of the information as far as possible in the printed form. The Committee will suggest on the development of the treatment system based on universally acceptable informed consent. The Committee shall be formed within three months of the receipt of the copy of the decision. The Nepal Government shall categorize the hospitals within two years and gradually implement the system.

This decision will have no implication on the dispute pending in any forum against the doctor or hospital before the date of this decision.

During the hearing of this case and following the completion of the hearing, communiqué and opinions have been published in the print and electronic media which might influence the decision. This Court takes exception to such expressions by the parties in a dispute before independent judiciary which is governed by the rule of law. The disputants are cautioned about not repeating such matters in the future. Let a copy of the decision which contains the directives in the name of the Ministry of Health and Population be sent to the said Ministry. Let the registration be struck off and the file be sent to the concerned section as per the Rule.

S/d
Bala Ram K.C
Justice

I concur.

S/d
Mohan Prakash Sitaula
Justice

Bench Officer: Narayan Regmi

Computer: Sudeep Pangyani

The decision is delivered on Sunday, 29th day of the Month of Kartik of the year 2066 of the Vikram Era.