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THE TALEM QUALEM RULE ON LAWS GOVERNING PRE-EXISTING MEDICAL CONDITIONS IN INDIA

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Abstract
The below article analyses the talem qualem rule (also known as "thin-skull" or "egg-shell" rule) in the context of pre-existing medical conditions of litigants on their demands for compensation. This article has examined a number of Indian judicial pronouncements on the talem qualem rule and highlights the important ratios laid down in such judicial pronouncements. The author is a corporate lawyer and is a graduate from Gujarat National Law University.

History of Insurance in India

The history of insurance in India can be traced back to the vedic ages as it finds mention in the writings of Manu (*Manusmrithi*), Yagnavalkya (*Dharmasastra*) and Kautilya (*Arthasastra*). The said writings mention pooling of resources that could be re-distributed in times of calamities such as fire, floods and epidemics. Since ancient time, insurance in India has evolved over time, heavily drawing influence from other countries, England in particular. In 1818, the Oriental Life Insurance Company was set up in Calcutta, ushering the advent of the commercial life insurance business in India. The Indian Life Assurance Companies Act, 1912 was the first statutory measure brought about in India to regulate business of life insurance policies. In 1938, with a view to protecting the interests of the public, the earlier statute on life insurance was consolidated and amended by the Insurance Act, 1938 with comprehensive provisions for effective control over the activities of insurers. Post-independence, in light of allegations of unfair trade practices amongst insurance companies, the Government of India decided to nationalise the insurance business then, by passing an ordinance on January 19, 1956, thereby bringing into existence the Life Insurance Corporation ("**LIC**"), which absorbed 154 Indian and 16 non-Indian insurers as well as 75 provident societies (in total, 245 Indian and foreign insurers in all).[1]

The Government of India set up a committee in 1993 under the chairmanship of R. N. Malhotra (former Governor of the Reserve Bank of India) to propose recommendations for reforms in the insurance sector. Amongst the many recommendations of the R. N. Malhotra's 1994 report was for foreign insurers to be allowed to enter the Indian market *vide* entering into joint ventures with Indian companies. Following the opening of the Indian market to foreign and private company insurers, the Government of India constituted the Insurance Regulatory and Development Authority ("**IRDA**") pursuant to the Insurance Regulatory and Development Authority Act, 1999[2], for regulating and promoting insurance and re-insurance bodies in India, and to also enhance customer satisfaction through increased consumer choice and lower premiums, while

[1] Insurance Regulatory and Development Authority, *History of Insurance in India*, https://www.irdai.gov.in/ADMINCMS/cms/NormalData_Layout.aspx?page=PageNo4&mid=2 (accessed on October 21, 2019)

[2] Insurance Regulatory and Development Authority Act, 1999, No. 41, Acts of Parliament, 1999

ensuring the financial security of the insurance market.[3]

IRDA on Pre-Existing Medical Conditions

The IRDA has in place several mandatory guidelines to ensure that health insurance in India is customer oriented and all health insurance providers ensure coverage for existing and pre-existing diseases ("**PED**"). As per IRDA's recently issued circular dated September 27, 2019 on 'Guidelines on Standardization of Exclusions in Health Insurance Contracts'[4], the definition of PED has now been modified to include:

1. any diseases or ailments that is and/or are diagnosed by a physician 48 months prior to the issuance of the relevant health cover by an insurer;
2. any diseases or ailments for which any type of treatment was recommended by a qualified doctor 48 months prior to the issuance of the relevant policy; and
3. any condition whose symptoms or signs have resulted within 3 months of the issuance of the relevant policy will also classify as a PED.

The aforementioned circular also clearly stipulates to insurance providers that insurance companies can include permanent exclusions only after the due consent of customers are obtained. Further, the IRDA drafting panel has come up with a list of exclusion diseases in chapter IV (*Diseases allowed to be permanently excluded*) of the IRDA September 27, 2019 circular[5], wherein apart from the said list, no other exclusions will be permitted in health insurance policies. Some of the important and major diseases that have been added to this list include Alzheimer's, Parkinson's, AIDS/HIV and morbid obesity. Moreover, all health conditions and illnesses acquired after the issuance of policy will be covered under the policy.

One the most important developments under this circular has been the restriction on health insurance providers in India to exclude from policies ailments contracted due to:

1. hazardous activity;
2. artificial life maintenance;
3. treatment of mental illness;
4. age-related degeneration;
5. internal congenital diseases;
6. behavioural and neurodevelopment disorders;
7. puberty and menopause-related disorder; and
8. genetic related diseases and disorders.[6]

All provisions of IRDA's aforesaid circular dated September 27, 2019, shall be applicable to all insurance products (including both individual and group health

[3] Insurance Regulatory and Development Authority, *History of Insurance in India*, https://www.irdai.gov.in/ADMINCMS/cms/NormalData_Layout.aspx?page=PageNo4&mid=2 (accessed on October 21, 2019)

[4] Insurance Regulatory and Development Authority, *Guidelines on Standardization of Exclusions in Health Insurance Contracts*, circular dated September 27, 2019 (https://www.irdai.gov.in/ADMINCMS/cms/whatsNew_Layout.aspx?page=PageNo3916&flag=1)

[5] Ibid., Chapter IV (*Diseases allowed to be permanently excluded*), pages 10-14

[6] Ibid., Chapter II (*Exclusions not allowed in health insurance policies*), page 5

covers) purchased by customers on or after October 01, 2019. Furthermore, if any insurance provider currently has a medical insurance in the market that is not in compliance with the September 27, 2019 circular, the same has to be mandatorily discontinued and withdrawn before October 01, 2020.

<u>*Talem Qualem* Rule on Pre-Existing Medical Conditions</u>

Talem Qualem means the "*wrongdoer takes his victim as he finds him*" and was explained in the famous South African case of *Smit* v. *Abrahams*[7]. It means that a defendant cannot use any pre-existing medical condition as an excuse to avoid liability for the entire claim of the insurance consumer. The following line of cases demonstrate how courts in India have always been in favour of analysing medical claims in the context of the rule on *Talem qualem*:

1. ***Jubeda Kom Moulasab* v. *Kansoor Group***[8]

   In this case, the claimant's husband died pursuant to injuries sustained in an accident, which was aggravated as a result of his pre-existing infection of pneumonia. The respondent insurance company resisted liability on the grounds of the prevalence of the pre-existing condition of pneumonia. However, the court granted compensation to the claimant basis the rule of *Talem qualem* stating that:

   "*11. Thus, it is obvious that the injuries sustained were mostly regarding the lungs and the ribs and….it is so obvious that these injuries and the state of his health aggravated pneumonia, making it fatal….*

   12. It is settled law that a wrongdoer must take his victim Talem qualem, which means that ***<u>the wrongdoer must take his victim as he finds him</u>*** *(per Lord Parker C.J. inn (1961) 3 All E.R. 1161). In this case, the statement of the doctor is that Moulasab was suffering from pneumonia and it is to this victim of pneumonia that injuries were inflicted in the accident which in the normal course of events aggravated and resulted in the death of Moulasab.*"

   Ratio – The wrongdoer must take his victim *Talem qualem*. It is obvious that the injuries sustained were mostly regarding the lungs and ribs and it is so obvious that these injuries and the state of his health aggravated pneumonia making it fatal.

2. ***Jaipur Golden Gas Victims Association* v. *Union of India***[9]

   A godown, owned by the respondents, storing a consignment of rodent killing pesticides caught fire. In order to put out the fire, the fire brigade officials poured water which reacted with the pesticides emitting highly poisonous phosphine gas making 35 people in that particular vicinity unwell. 2 of the claimants were already suffering from pulmonary tuberculosis which got aggravated by the phosphine, causing them to die a week within the accident. The court here elaborated on the *Talem qualem* or the egg-shell rule:

[7] *Smit* v. *Abrahams*, 1994 (4) South African Appellate Division (1 A)

[8] *Jubeda Kom Moulasab* v. *Kansoor Group*, 1980 SCC Kar 32 (Division Bench)

[9] *Jaipur Golden Gas Victims Association* v. *Union of India*, 2009 SCC Del 3357 (Division Bench)

"*..'EGG-SHELL SKULL' RULE (YOU TAKE YOUR VICTIM AS THEY CAME) APPLIES*

76. It is further an established principle of law that a party in breach has to take his victim talem qualem, which means that if it was reasonable to foresee some injury, however slight, to the claimant, assuming him to be a normal person, then the ***infringing party is answerable for the full extent of the injury which the claimant had sustained owing to some peculiar susceptibility****.*

77. In Marconato v. Franklin reported in [1974] 6 W.W.R. 676 (B.C.S.C) while on the road, Franklin (defendant) crashed into Marconato, causing her to incur some mild physical injuries. But Marconato had some paranoid tendencies and the accident caused her to develop a debilitating syndrome of psychological problems. Thin skull rule was applied and that means you take your victim as they come. Although the damage is remote and not reasonably foreseeable, the accident operated on the plaintiff's pre-existing condition and the defendant must pay damages for all the consequences of her negligence. This doctrine only applies when the claimant's pre-existing hypersensitivity is triggered into inflicting the injury complained of, or an existing injury is aggravated by the infringing party's act. A clear example of the hypersensitivity type of case is that of persons suffering from haemophilia or "egg-shell" skulls. MacKinnon L.J. said that "one who is guilty of negligence to another must put up with idiosyncrasies for his victim that increase the likelihood or extent of damage to him: it is no answer to a claim for a fractured skull that its owner had an unusually fragile one. See: Owens v. Liverpool Corporation (1939) 1KB. 394 at 400-401."

Ratio – Keeping in view the medical record of the deceased and the fact that their pulmonary tuberculosis got aggravated due to inhalation of phosphine gas and they died at a premature age, the relevant claimants were entitled to full compensation.

3. ***National Insurance Company Limited* v. *Pooja Verma*[10]**

Three persons on a scooter met with an accident wherein two of them died on the spot and another died of renal failure after a month of treatment. The insurance company resisted liability claiming that the third claimant didn't die as a result of the accident. The court rejected that contention stating that:

"*If between death and the accident, there had been no other intervening factor and a situation regressed gradually to result in death, I would take the most proximate cause for the death as the accident injury itself. It is a well-established theory in tort called talem qualem rule, also known as the egg-shell skull rule that one is required to take the victim as one finds him (see: Dalian v. White and Sons (1901) 2 R.B. 669; Bourhill v. Young (1943) A.C.C. 92 (H.C.). In other words, it is to the effect that the Court has to take the quality of health of the person as it is and cannot conjecture that death could have been due to any other reason. Even in a case where the person has*

[10] *National Insurance Company Limited* v. *Pooja Verma*, 2010 SCC P&H 8936

a propensity for ill-health but ultimately it was the accident that precipitated the death, then it should be taken that he died only due to the accident."

Ratio – The Court has to take the quality of health of the person as it is and cannot conjecture that death could have been due to any other reason. Even in a case where the person has a propensity for ill-health but ultimately it was the accident that precipated the death, then it should be taken that he died only due to the accident.

4. ***Balaram Prasad* v. *Kunal Saha*[11]**

The National Consumer Disputes Redressal Commission ("**NCDRC**") had determined the compensation to be paid for medical negligence for INR 1,72,87,500 out of which 10% was deducted on account of contributory negligence by the claimant and INR 1,55,58,750 was given to the claimant.

The respondents highlighted the number of antibiotics which were said to have been administered by the claimant to his deceased wife while she was in AMRI contending that the said antibiotics were necessary. It was, however, observed by the Supreme Court of India that by admission of the claimant, the antibiotics were necessary for her treatment and therefore, NCDRC erred in holding that the claimant contributed to the negligence resulting in his wife's death. The Supreme Court cited the judgement in the case of *Malay Kumar Ganguly* v. *Sukumar Mukherjee*, (2009) 9 SCC 221 wherein it was observed that:

"*123. To conclude, it will be pertinent to note that even if we agree that there was interference by Kunal Saha during the treatment, it in no way diminishes the primary responsibility and default on part of the defendants. In spite of a possibility of him playing an overanxious role during the medical proceedings, the breach of duty to take basic standard of medical care on the part of the defendants is not diluted. To that extent, contributory negligence is not pertinent. It may, however, have some role to play for the purpose of damages.*

(Emphasis laid by this court) A careful reading of the above paragraphs together from the decision of Malay Kumar Ganguly's case would go to show that the claimant, though overanxious, did to the patient what was necessary as a part of the treatment. The National Commission erred in reading in isolation the statement of this Court that the claimant's action may have played some role for the purpose of damage."

Ratio – Just and fair compensation needs to be calculated on the basis of *restitutio in integrum* i.e., the victim needs to be put in the position that he/she was in prior to the injury. Assuming interference by claimant during the treatment, it in no way diminishes the primary responsibility and default in duty on part of the defendants.

Conclusion

Thus, in light of IRDA's efforts to ensure that pre-existing medical conditions are mandatorily covered within the framework of insurance policies provided by insurers and court rulings emphasising on the rule of *talem qualem*, the scope for denying insurance claims for pre-existing medical conditions

[11] *Balaram Prasad* v. *Kunal Saha*, (2014) 1 SCC 384

has now been restricted. Recently, even before IRDA's September 27, 2019 circular on PED, the NCDRC, in a revision plea filed by Reliance Life Insurance Co. Limited against the Maharashtra State Commission's order dismissing an appeal challenging a district forum's direction to pay INR 1,12,500 to the husband of one of its policy holders who died of diabetic ketoacidosis, held that even if the insured person was suffering from a disease and did not know about it nor was taking any treatment for the same, the claim cannot be denied by an insurance company.

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