CONSUMER PROTECTION ACT: MEDICAL NEGLIGENCE

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ABSTRACT

Medical profession and the doctor were given due respect in the olden days. With the increasing commercialization and malpractices, medical profession has lost its respect, dignity and glamour. The deterioration in the standard of patient care is also due to decrease in the quality of medical education, apart from loss of morals and ethics towards the professional duty in medical fraternity. The Consumer Protection Act was passed in 1986 and in 1995, the Supreme Court has given the mandate that medical profession also comes under this act. But for medical practitioners an additional perspective is added through the Bolam test, which is accepted in India also. A doctor is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular field. The fact that medical practitioners are subject to the disciplinary actions of the Medical council of India and State medical councils would not exclude the services rendered by them from the ambit of the consumer protection act as per the apex court. This article discusses about different types of medical cases declared as negligent/not negligent by courts on different principles along with Honourable Supreme Court comments in some medical cases.

KEYWORDS

Consumer, Act, Bolam Test.


INTRODUCTION

Medical profession was given the due respect of “Pavithra” and doctor was considered as equal to god in olden days of before 1990. With the increasing commercialization in medical profession and increase in medical negligence and malpractices, this profession is looked upon with doubt and contempt. The deterioration in the standard of patient care is considered to be due to decrease in the quality of medical education. Moreover, patients have become more aware of their rights and there have been increase in the number of complaints against doctors in the consumer forums. All these have soured the patient-doctor relationship to great extent of even physically abusing the doctors and other medical personnel and damaging the hospitals infrastructure.

The Consumer Protection Act was passed in 24th December, 19861 for the better protection of the interest of consumers and to make provisions for the establishment of consumer councils and other authorities for the settlement of consumer’s dispute and for matters connected therewith. Till 1995, even Indian courts were not clear whether doctors are covered under consumer protection act or not. In a landmark case in 1995, the Supreme Court decision in Indian Medical Association vs VP Shantha,2 medical profession has been brought under the Section 2(1) (a) of Consumer Protection Act, 1986. On 13th November 1995 the Honourable Supreme court of India delivered judgment on application of consumer protection act, 1986 to the medical/dental profession, hospitals, dispensaries, nursing homes and other related services. This act empowers the patient to file lawsuits in case of perceived negligence in consumer courts.

The law is not made to punish all health professionals that cause injury to patients; it is concerned only with negligent acts most of the times. Medical negligence arises from an act of commission or omission by a medical practitioner. A medical practitioner is expected to exercise reasonable skill and knowledge, but not the highest or lowest level of skill and knowledge. The Court held that even though services rendered by medical practitioners are of a personal nature they cannot be treated as contracts of personal service which are excluded from the Consumer Protection Act. They are contracts for service, under which a doctor too can be sued in Consumer Protection Courts.

DEFINITIONS

Consumer: Any person who hires or avails of any services for a consideration which has been paid or promised or partly paid and partly promised under any system of deferred payment and includes any beneficiary of such services other than the person who hires or avails of the services for the consideration paid or promised, or partly paid and partly promised, or under any system of deferred payment, when such services are availed of with the approval of the first mentioned person.3

Service: Means service of any description which is made available to potential users and includes the provision of facilities in connection with banking, financing, insurance, transport, processing, supply of electrical or other energy, boarding or lodging or both, housing construction, entertainment, amusement or the purveying of news or other information, but does not include rendering of any service free of charge or under a contract of personal service.

The Supreme Court observed that all medical services are included other than those that are provided for free service to all patients.3
Medical Negligence
There are three essential components of negligence: 1. The existence of a duty to take care, which is owed by the doctor to the complainant; 2. The failure to attain that standard of care, prescribed by the law, thereby committing the breach of such duty; 3. Damage, which is both causally connected with such breach and recognized by the law, has been suffered by the complainant. This is the ordinary legal meaning of negligence.

But for professionals such as medical practitioners an additional perspective is added through a test known as the Bolam test⁴ which is the accepted test in India. In the case of Bolam vs. Friern Hospital Management Committee, the Queen’s Bench Division of the British Court held: A doctor is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art. The fact that medical practitioners are subject to the disciplinary control of the Medical Council of India and / or State medical Councils would not exclude the services rendered by them from the ambit of the consumer protection act.

Protection for Doctors
- Maximum time limit for a claim under this act is two years from the date of occurrence of cause of action. Forums can allow delayed cases also if there is sufficient cause.
- Good medical record maintenance.
- Written evidence of consent of the patient/relative/ attendant to assumption of inherent and special risks in the treatment.
- Inconsistence between notices sent directly or through consumer groups and the complaint made in the court.
- Lack of facilities in rural areas in emergencies
- “Calculated risk” cases. E.g. Multiple Organ Failure cases
- Treatment of patient from other systems of medicine/ doctors simultaneously.
- More than one reason for occurrence of damage.
- Negative history, negative test does not rule out rare possibility of anaphylaxis – Therapeutic Misadventure.
- New machine failures.
- Contributory negligence – negligence of patient also present.
- Improper history and hiding of diseases by patient.
- Installation of audio-visual equipment in hospitals (for evidence in courts).
- Medical indemnity insurance – for protection of professional interests of doctors.
- Exercising reasonable skill and knowledge by doctors.
- Maintaining good rapo with patients/attendants.

DIFFERENT TYPES OF NEGLIGENT CASES DECLARED BY COURTS
Lack of ordinary skill and care as negligent
C. Sivakumar vs. Dr. Jalin Arthur & Anr, 1998 (3) CPR 436(TN SCORC), the complainant, a 23 years old man approached Dr. John for blockage in passage of urine who took him to another clinic for operation. After the operation, there was over bleeding from the penis and ultimately he had to be admitted to JIPMER Hospital. The hospital reported the matter to the police. Here he came to know that his penis had been amputated and only a small stump had been left, and he was passing urine only through an artificial hole made at JIPMER Hospital. He, in the process, had become permanently impotent. A Compensation of eight lakhs was awarded to patient.⁴

Cross Practice Negligence Cases: Doctor who has a qualification in Ayurvedic or Homeopathic medicine will be liable if he prescribes allopathic treatment which causes some harm vide Poonam Verma vs. Ashwin Patel & Ors. (1996) 4 SCC 332. In Dr. Shiv Kumar Gautam vs. Alima, Revision Petition No.586 of 1999, the National Consumer Commission held a homeopath liable for negligence for prescribing allopathic medicines and administering glucose drip and giving injections.⁵

Criminal Liability Vs Civil Liability: As regards criminal liability of medical practitioners, Supreme Court in a recent judgment in the case of Dr. Suresh Gupta vs. Govt. of Delhi curtailed criminal proceedings against medical negligence to incidents of gross negligence. It held that a medical practitioner cannot be held punishable for every mishap or death during medical treatment. No criminal liability should be attached where a patient’s death results from error of judgment or an accident. Mere inadvertence or some degree of want of adequate care and caution might create civil liability but would not suffice to hold him criminally liable.⁶

Respondent Superior Negligence Case: In Spring Meadows Hospital vs. Harjo Aihuwalla the Supreme Court was concerned with the rights of a parent when a child died. The Court observed that even parents were covered under the Act, where a child was treated for 7 days for typhoid. The doctor prescribed “Chloramphenicol injection”, but the unqualified nurse misread it as “chloroquine”. She injected chloroquine 5 mg intravenously; the patient suffered irreversible brain damage. After treatment for a period of 21 days in AIIMS, the child died. The National Consumer Commission concluded that the attending doctor was negligent, as he allowed an unqualified nurse to administer the injection. The Court made the following important observations: Use of wrong drug or wrong gas during the course of anaesthesia will frequently lead to the imposition of liability. A consultant could be negligent where he delegates the responsibility to his junior.⁶

Government Hospitals held by Courts as Negligent: In the case of Sailesh Munja vs. AIIMS, hospital claimed that since the treatment was subsidized by the hospital it would not be covered under the Act. The National Commission rejected this argument and held since the treatment was subsidized and not totally free; the hospital would be covered under the Consumer Protection Act.⁴ In Ranjit Kumar Das vs. ESI Hospital the Complainant’s wife was not given admission to ESI Hospital though the Complainant was registered under the Act. She died and the Complainant was ordered to be paid Rs. 2 lakhs as compensation. It lays down that the ESI hospitals, though government run, are covered under the Consumer protection act.⁶

Non Conduct of Necessary Pre-op Tests Declared as Negligent
National Commission in Dr. Kaligoundon vs. N. Thangamuthu case, complainant’s wife had gynecological problems in terms of excessive bleeding. She was operated upon and her uterus was removed. After this, she complained of giddiness and vomiting and died. The cause of death was opined as renal failure and septicaemia. The National Commission found the
Bad Machinery Cases held by Court as Negligent: Sarwat Ali Khan vs. Prof. R. Gogi and others, in the National Consumer Commission: the facts were that out of 52 cataract operations performed between 26th and 28th September, 1995 in an eye hospital 14 persons lost their vision in the operated eye. An enquiry revealed that in the operation theatre two autoclaves were not working properly. This equipment is absolutely necessary to carry out sterilization of instruments, cotton, pads, linen, etc., and the damage occurred because of its absence in working condition. The doctors were held liable.7

Insisting for Money Causing Death in Emergencies Declared as Negligent
Treat patients in emergency as this falls under “Right to Life” – Article 21 of constitution. No payment and no treatment may not help doctors in courts in emergency cases. Indian courts have held that in emergencies neither government nor even private doctors can insist on payment of money before dealing with the patient. In Pravat Kumar Mukerjee vs. Ruby General Hospital, the National Consumer Commission was concerned with the case of a young student whose motorcycle was dashed by a bus in Calcutta. He was brought to the Respondent hospital but the treatment was not continued as Rs.15,000 were not immediately paid. The boy died. The Petitioner was awarded a compensation of ten lakhs. The National Commission held that though a doctor was not bound to treat each and every patient, in emergencies the doctor was bound to treat the patient and could not insist on delaying treatment until the fees were paid.8

Fact Speaking itself is Negligence – Res ipsa Loquitur
For instance, doctor would be liable if leaves a surgical gauze inside the patient after an operation vide Achutrao Haribhau Khodwa & others vs. State of Maharashtra & others, AIR 1996 SC 2377 or operates on the wrong part of the body, and Criminally liable if he operates on someone for removing an organ for illegitimate trade.9

DIFFERENT TYPES OF NON - NEG LiGENT CASES DECLARED BY COURTS
Tarun Kumar Pramanik vs. Dr. Kunal Chakraborty & Ors, 1995(2) CPR 545 (WE SCDRC)
The complainant alleged that during operation for left inguinal hernia his left testis was removed negligently and without consent and on account of this he suffered and has become handicapped. The State Commission on the basis of evidence placed on record, and opinion of expert witness held that the removal of testis was done to avoid gangrenous infection; operation was done with reasonable care and skill and had not resulted in any handicap and told that the doctor was not negligent.4 The courts have clearly held that no legal procedures can take priority over providing lifesaving treatment for the patient. If such procedures are required by the law, then that law must be amended.

Suffering or Death - the result of negligence or not?
The Bombay High Court held that in a claim against medical negligence it was not sufficient to show that the patient suffered in some way. It has to be proven that the suffering or death of the patient was the result of negligence on the part of the doctor. In Philips India Ltd. vs. Kunju Punnu in the Bombay High Court, the patient approached the resident doctor of the company complaining of a digestive problem and was treated. After a week he returned, this time complaining of fever, cold and headache. Within five days he was brought in with high fever and was kept in the company’s dispensary for observation. In the evening when the doctor found red pigmentation on his body he advised pathological tests and was taken to a specialist, treated him for bacteraemia. Later it was discovered that the deceased was suffering from smallpox that eventually caused his death. Now the issue before the court was whether the doctor was negligent as he failed to diagnose smallpox.6

In the instant case there was no evidence to show that when the patient was taken to the company doctor and any other doctor of ordinary skill and competence could have diagnosed the disease of the patient as smallpox or treated him for smallpox. There was no epidemic of smallpox at that time to induce the defendant doctor from carrying on test for the same. On the other hand, expert evidence showed that fulminating smallpox could have occurred within 24 or 36 hours with no outward manifestations at all and that appearances were very indefinite with no findings on which to base a certain diagnosis. Thus, the defendant doctor was held to be not negligent. The court held that a mistaken diagnosis was not necessarily negligent diagnosis.

A practitioner can be liable if his diagnosis is so palpably wrong as to prove negligence, in other words, if his mistake is of such a nature as to imply an absence of reasonable skill and care on his part regarding being had to the ordinary levels of skills in the profession.

Sterilization Operation by a Surgeon - Not negligent
In State of Haryana and others vs. Raj Rani (2005) it was held that if a child is born to a woman even after she had undergone a sterilization operation by a surgeon, the doctor was not liable because there cannot be a 100% certainty that no child will be born after a sterilization operation.10 The Court followed the earlier view of another three Judge Bench in State of Punjab vs. Shiv Ram & others (2005). These decisions will be deemed to have overruled the two Judge Bench decision in State of Haryana and Others vs. Smt. Santra AIR 2000 SC 1808 in which it was held that if a child is born after the sterilization operation the surgeon will be liable for negligence.11

Honourable Supreme Court Judgements
A private criminal complaint should not be entertained unless the complainant has produced prima facie evidence in the court in the form of a credible opinion given by another competent doctor to support the charge of rashness or negligence. The investigating officer, before proceeding against a doctor, should obtain an independent medical opinion preferably from a doctor in government service qualified in that branch of medical practice. The accused doctor should not be arrested in a routine manner unless his arrest is necessary for further investigation or for collecting evidence or unless the investigating officer feels satisfied that the doctor will abscond.6

The Supreme Court in the Jacob Mathew’s case was to hold that the ingredients of criminal negligence were more rigorous.
than those of civil negligence. In addition to the ingredients of civil negligence for establishing criminal negligence. It shall have to be found that the rashness was of such a degree as to amount to taking a hazard knowing that the hazard was of such a degree that injury was most likely imminent. Where negligence is an essential ingredient of the offense the negligence to be established by the prosecution must be culpable or gross and not the negligence merely based upon an error of judgment. Criminal negligence is the gross and culpable neglect or failure to exercise that reasonable and proper care and precaution to guard against injury.6

A medical practitioner is not liable to be held negligent simply because things went wrong from mischance or misadventure or through an error of judgment in choosing one reasonable course of treatment in preference to another. He would be liable only where his conduct fell below that of the standards of a reasonably competent practitioner in his field.6 Noting that frivolous complaints against doctors have increased by leaps and bounds, the Supreme Court on Tuesday 17th February 2009 held that the police cannot arrest doctors over complaints of medical negligence without prima facie evidence. The apex court also restrained courts, including consumer fora, from issuing notices to doctors for alleged medical negligence without seeking an opinion from experts. A bench of Justices Marlandeya Katju & R M Lodha ruled that courts must first refer complaints of medical negligence to a competent doctor or a panel of experts in the field before issuing notice to the allegedly negligent doctor. "This is necessary to avoid harassment to doctors who may not be ultimately found to be negligent". We further warn the police officials not to arrest or harass doctors unless the facts clearly come within the parameter laid down in Jacob Mathew's case, otherwise the policemen will themselves have to face legal action," the apex court said.10

Two different Opinions Vs Negligence

It is not enough to show that there is a body of competent professional opinion which considers that the decision of the accused professional was a wrong decision, provided there also exists a body of professional opinion, equally competent, which supports the decision as reasonable in the circumstances. As Lord Clyde stated in Hunter vs. Hanley 1955 SLT 213: "In the realm of diagnosis & treatment there is ample scope for genuine difference of opinion & one man clearly is not negligent merely because his conclusion differs from that of other professionals. The true test for establishing negligence in diagnosis or treatment on the part of a doctor is whether he has been proved to be guilty of such failure as no doctor of ordinary skill would be guilty of if acting with ordinary care".10

Role of law of Torts

Under civil laws, at a point where the Consumer Protection Act ends, the law of torts takes over and protects the interests of patients even if medical professionals provide free services. In cases where the services offered by the doctor or hospital do not fall in the ambit of 'service' as defined in the Consumer Protection Act, patients can take recourse to the law relating to negligence under the law of torts and successfully claim compensation. The onus is on the patient to prove that the doctor was negligent and that the injury was a consequence of the doctor's negligence. Such cases of negligence may include Transfusion of blood of incorrect blood groups, Removal of organs without taking consent, operating on a patient without giving anaesthesia, administering wrong medicine resulting in injury etc.11

CONCLUSION

In cases of negligence, no uniform standard can emerge, as practice of medicine is extremely case specific just like that of law. The courts repeatedly held that a doctor is liable only if the line of treatment prescribed by him was not a recognized method altogether. Many cases have been rejected by the Courts on the basis that medical experts had not testified in support of the Complainants. While it is not essential that medical experts testify in all cases, this becomes important in complex medical negligence cases.

REFERENCES