REPERCUSSIONS OF MEDICAL NEGLIGENCE IN INDIA

Legality, Punishment and Remedy!

CONTENTS

Medical profession is considered to be the most noble profession as the doctors' work towards relieving people of their pain and suffering but, of late this profession has been marred by controversies. Doctors and other healthcare givers along with hospitals have become commercial entities and like any other vocation, are entangled in profiteering! This has resulted in dissatisfaction and given rise to mistrust and skepticism among the patients.

WHAT AMOUNTS TO MEDICAL NEGLIGENCE?

With the growing awareness about their rights as a 'patient', the Indians have started initiating legal action against doctors, hospitals and health services in what is termed as medical negligence. Medical negligence laws in India were initially insignificant but have gradually evolved with time.

To make a case of any medical malpractice one must be able to justify four basic points:

1) a doctor owed duty of care;
2) the doctor breached applicable standard of care;
3) patient suffered compensable injury; and,
4) the damage was caused in fact and proximately by the violation of standard conduct.

The liability of proving the above facts lies with the plaintiff. In the case of *Kanhaiya Kumar Singh* v. *Park Medicare & Research Centre*[1] the court made it clear that the plaintiff had to prove negligence and it cannot be presumed. In another case, *Calcutta Medical Research Institute* v.

[1] III (1999) CPJ 9 (NC).

Bimalesh Chatterjee[2] it was stated that the responsibility of establishing deficiency in service or negligence lies with the complainant.

Indian Penal Code & Medical Negligence Laws:

IPC 1860 Sections 52, 80, 81, 83, 88, 90, 91, 92, 304-A, 337 & 338 cover the offences and punishments pertaining to crime related to medical negligence in India. The bare reading of the Sections shows that there isn't much difference regarding an act of crime committed by an individual and that of neglect committed by a professional, while treating a patient. Any rash or negligent act of a medical professional that damages the body of the patient or causes death, shall lead to criminal prosecution of the doctor. For example, if a patient dies due to overdose of anesthesia, then a criminal proceeding can be initiated against the doctor. In such cases the punishment will be in conformity with the provisions of the law.

Section 304-A of the Indian Penal Code of 1860 states that *"whoever causes the death of a person by a rash or negligent act not amounting to culpable homicide shall be punished with imprisonment for a term of two years, or with a fine or with both."*

The realization of the complexity of the profession is of utmost consideration as the doctors have to deal with cases of grave consequences every day and fatalities are part and parcel of the profession.

Therefore, in cases pertaining to medical negligence, a benefit of chances of error is usually applied by the judges. The criminal law mandates a foolproof evidence to establish the culpability of a doctor as it realizes that even after taking highest degree of care and precaution, an error can be committed. As can be ascertained from the judgement in the case of *Kurban Hussein Mohammedali Rangwalla* v. *State of Maharashtra*[3]. The learned judge opined that the death caused by fire cannot be called a rash or negligent act of the concerned doctor as a professional.

Consumer Protection Act, 1986 & Medical Negligence Laws:

With the enforcement of Consumer Protection Act (CPA), 1986, the medical practitioners are held liable for gross negligence or deficiency of services. During the initial years, after the implementation of CPA, clarity was lacking if medical professionals were included in the definition of 'services' as provided under Section 2 (1) (o) or not, but the Supreme Court's judgement in the case of *Indian Medical Association* v. *V. P. Shanta*[4] established it as a 'service' under the Act.

Thus, as per CPA a patient is equivalent to a consumer and shall enjoy all rights bestowed on a consumer whereas, a doctor is like any other service provider and hence, liable to compensate in case of damage or deficiency.

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[2] I (1999) CPJ 13 (NC).
[3] F 1968 SC 829 (12) D 1968 SC1319 (48) R 1972 SC 1150 (8).
[4] 1995 (3) CPR 412: AIR 1996 SC 550: 1995 (3) CPJI: 1995 (6) SCC 651: JT 1995 (8) SC (SC decided on 13.11.1995).

Let's examine the term 'Consumer' as provided under Section I (d) of the CPA. Consumer is a person who:

- buys any goods for a full or part payment or deferred payment
- the buyer ought to be a consumer and not a reseller
- hiring of any service against consideration shall also fall in the category of Consumer

A patient, as a beneficiary of services for which he or his family member or attendant pay, is also a Consumer. The doctor, in return is the service provider and can be tried in cases of deficiency of services. This clause will not be applicable on those patients who do not pay for the doctor's services, as the bond of seller-consumer is not established.

Section 2 (1) (o) of the CPA gives a comprehensive meaning of the term 'Services' and makes clear that any service rendered or made available to potential users.

The Act establishes inherent rights of a Consumer-

- to be safeguarded against goods and services that are perilous to life and property
- to be briefed about the quality, quantity, purity, price, etc. to safeguard the Consumers from unfair trade practices
- Consumer education and protection
- eligible to seek compensation in cases of exploitation or unfair practice or breach of service

CPA provides a wide net of protection to patients and the consumer jurisdiction can hold a medical practitioner liable even if it is ascertained that he lacks reasonable skill that is regarded as ordinary level of skill in the profession. Thus, along with deficiency of services, a doctor can be charged for incompetency as well.

Civil Law and Medical Negligence Laws:

Under the torts or civil law, the term medical negligence acquires even a broader connotation, including more aspects, as it covers even those professionals who provide free services; who were otherwise exempt in CPA. Thus, it can be safely contented that the tort law begins and carries forward from where the Consumer Protection Act ends.

The civil law ensures that the rights of a patient is safeguarded and if any services provided by a medical practitioner or a hospital does not fall in the category of 'services' as defined in CPA, they can take help under civil provisions to claim compensation for damage due to negligence. These can comprise careless and irresponsible acts such as removal of organs without consent, leaving a mop in the abdomen during surgery, transfusing incorrect blood group, administering wrong drug, etc. that may have harmed or caused damage.

The onus of proof here also lies on the plaintiff, who is required to prove negligence or deficiency that led to harm or injury. The tort law works on the principle that a medical practitioner is bound by 'an implied undertaking' as to he has the required skill and knowledge to render medical advice

as well as treatment. In the case of *State of Haryana* v. *Smt. Santra*[5] the apex court upheld the judgment of the lower and higher courts who had concluded the negligence of the doctor and awarded compensation to Santra Devi for a failed sterilization operation as the breach of care and skill was proved beyond doubt.

LANDMARK JUDGEMENTS:

Covering all provisions criminal, civil as well as consumer rights, there have been numerous judgements that are considered milestones. These judgements have assisted in enhancing the awareness about the real scope of the term 'medical negligence'. Let's examine the salient aspects of few of these outstanding judgements.

#1. *Kunal Saha* v. *Advanced Medical Research Institute (AMRI), Kolkata*[6]:

The Case- US based Indian, Dr. Kunal Saha, filed cases against 3 doctors and AMRI Hospital, Kolkata, holding them responsible for the death of his wife Anuradha Saha. Anuradha, aged 36, was a child psychologist in USA and developed fever and rashes on 7 May, 1998, while holidaying in Kolkata, India. Dr. Sukumar Mukherjee attended on her and administered, Depo Medrol, a steroid with higher dose than what is recommended. The condition of the patient deteriorated, she was shifted to AMRI Hospital on 11 May, where another steroid, Prednisolone, was given in a tapering dose as treatment for allergic vasculitis. Dr. Balram Haldar, a dermatologist and Dr. Abani Roychowdhury, a physician looked after Anuradha. On 12 May she was diagnosed as suffering from a rare skin condition TEN but no substantial change was made in her treatment regimen. On 28 May, 1998, she passed away.

Date of Verdict: 24 October, 2013, Supreme Court

Judges: S.J. Mukhopadhaya, V. Gopala Gowda

The Verdict: The Apex Court's judgement is a landmark in the history of medical negligence cases in India as it awarded the highest compensation to Kunal Saha, the deceased's husband. The National Consumer Disputes Redressal Commission (NCDRC) had awarded Rs 1.7 crore in 2009, against which Kunal moved to Supreme Court. In a 210-page verdict the SC judges pinned the blame on the doctors for their careless and casual approach and increased the compensation amount to Rs 5.96 crore, with a 6% interest from 1998, bringing it to Rs 11 crore.

The Takeaway: A warning as well as a deterrent for the medical community: It was a prolonged fight for Kunal Saha that extended to 15 years; he was not successful to bring the doctors and the hospital to justice in criminality but NCDRC ant the SC both took cognizance of the breach of duty committed by them. The compensation was calculated based on the earning of the deceased and her young age was also a consideration. Her annual net income was multiplied 30 times over presuming that could have been her working years if she would have been alive.

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[5] AIR 2000 SC 3335.

[6] Civil Appeal Nos. 2867 and 2866 of 2012, Original Petition No. 240 of 1999.

#2. *State of Haryana* v. *Smt. Santra*[7]:

The Case- A civil suit for recovery of Rs.2 Lacs was filed by Smt. Santra against the State of Haryana in lieu of medical negligence. Santra, a poor labourer with seven children had approached for her sterilization in 1988. On 04.02.1988 the sterilization operation was performed on her and a certificate confirming the same was issued by the Medical Officer, General Hospital, Gurgaon. Surprisingly, after sometime, she conceived and when she approached the Doctor, it came to light that her operation was not successful. The Lower Court and the District Court both confirmed negligence by the Doctor and awarded a compensation of Rs.54,000 with 12% interest rate from the date of the suit till the payment of compensation.

The State of Haryana appealed in the Supreme Court against the compensation awarded claiming that no element of 'tort' was involved as the loss suffered by Smt. Santra was not compensable through money.

Date of Verdict: 24 April, 2000, Supreme Court

Judges: S.S. Ahmad, D.P. Wadhwa

The Verdict: The Supreme Court observed that Smt. Santra had opted for total sterilization to avoid having any more children. The Supreme Court contended that the callous approach of the Doctor was evident as only the right fallopian tube was operated whereas the left was untouched, leading to the unwanted conception. The unwanted pregnancy resulted in the birth of a female child which obviously burdened the poor family. Taking into account the financial burden of raising a girl child, it awarded full compensation to the Appellant.

The Takeaway: Callousness and gross negligence will attract penalty: The Supreme Court affirmed the 'implied undertaking' for medical profession means to possess a fair degree of competency and skill which was lacking in the particular case. The callous approach of the performing doctor tantamount to gross negligence. The compensation was to be given by the State Govt. for the upbringing of the female child till the age of puberty, thus reducing the economic burden of the family. The economic status of the plaintiff was a major point of consideration for the learned judges and the element of tort was established without doubt.

#3. *Mrs. Aparna Dutta* v. *Apollo Hospitals Enterprises and Others*[8]:

The Case- A suit for compensation of damages was filed by Mrs. Aparna Dutta was filed in Madras High Court against Apollo Hospitals & others for medical negligence. An Indian residing in Saudi Arabia, due to her husband's job, developed some gynecological problem and was advised

[7] 1995 (3) CPR 412: AIR 1996 SC 550: 1995 (3) CPJI: 1995 (6) SCC 651: JT 1995 (8) SC (SC decided on 13.11.1995).

[8] 2002 ACJ 954, AIR 2000 Mad 340, (2000) IIMLJ 772.

to undergo Hysterectomy. She underwent the surgery in Apollo Hospital Madras under a renowned Gynaecologist, Dr Swarna Kumari on 21-6-1991. She started facing abdomen pain right after the operation which the doctor claimed to be fluid collection and nothing serious. The patient was discharged on 13-7-1991, ten days later than planned, due to continued stomach ache.

The problem persisted and after diagnosis and X-ray in Saudi, it was found that there was a foreign object in the abdomen. A second surgery was performed on Aparna at Royal Commission Medical Centre in Saudi Arabia on 9-12-1991. An abdominal pack, measuring 12" x 12" with 18" string attached to it, was removed which was negligently left during the surgery at Apollo Hospital. Aparna was claiming compensation for mental harassment, physical torture and monetary loss from the Hospital and the concerned doctor.

Date of Verdict: 18 February, 2000, Madras High Court

Judge: I. D. Christian

The Verdict: The learned judge applied the doctrine of 'Res Ipsa Loquitur' and concluded that required caution and care was lacking while treating the patient. Dwelling on the principle of vicarious liability it also held Apollo Hospital guilty. The court disregarded the hospitals plea of the arrangement that existed between the consultant doctor and the management. It awarded Rs 5.8 lakh as compensation along with 12% interest from the date of the plaint till date of decree, and 9% thereafter.

The Takeaway: Hospitals are vicariously liable of negligence: The biggest takeaway of this judgement is the pinning of responsibility on the Hospital too, who generally tend to shirk from it on pretext of employment arrangements with the consultants is not tenable. This verdict made it clear that managements are also responsible for deficiencies of the professionals who work for them. The judge opined that a patient wants due care and treatment and would not in any way know about the financial arrangement between the management and the doctors, so both are equally responsible.

#4. *Pravat Kumar Mukherjee* v. *Ruby General Hospital & Others*[9]:

The Case- A young boy, Sumanta Mukherjee, second year B. Tech student's motorcycle was hit by Calcutta Roadways bus on 14-01-2001 and he was taken to Ruby General hospital which was the nearest hospital. The boy was conscious and showed his insurance card that entitled him to Rs 65,000 in case of an accident. The hospital, after the initial treatment, demanded Rs 15,000 to be deposited and eventually discontinued treatment when money was not deposited. Sumanta was rushed to a govt. hospital but he died on way. His parents approached NCDRC against Ruby Hospital's inhuman behavior.

Date of Verdict: 25 April, 2005, NCDRC

[9] ORIGINAL PETITION NO. 90 OF 2002.

Judges: Justice M. B. Shah, President; Dr P. D. Shenoy, Member

The Verdict: Dwelling on the provisions of Consumer Protection Act, 1986, NCDRC contemplated in detail on the definition of 'Consumer' and 'services' to establish the legality of the case. Taking the widest view of the terms the judgement was pronounced in favor of the appellants and the hospital was ordered to pay a compensation of Rs 10 lakh for negligence and breach of care.

The Takeaway: Human life cannot be put in jeopardy for lack of money: An outstanding judgement in terms of understanding the legalities of CPA. This judgement puts stress on the ethical aspect of the medical profession and also brought out the ugly side of commercialization of healthcare industry. A young life was mercilessly cut short due to unethical approach of the professionals where money was given precedence over humanity.

As a first, the father was considered as a 'consumer' under Section 2 (1) (d) and the rights of a consumer was hence bestowed on him. Widening the concept and connotation of the term 'services' under Section 2 (1) (o), which did not count free services for any liability, Ruby Hospital was held guilty of not providing considerable degree of care and treatment during emergency. Here torts law found an upper hand as the judges quoted medical services to be related to a noble profession, furthermore, one which needs to develop empathy towards sick and grieving.

MEDICAL NEGLIGENCE AND INDIAN SOCIETY:

1,362,615,845 people make India a country that ranks second by population and it is not a complex puzzle to interpret the level of healthcare for Indians. The doctor-population ratio at a pathetic 0.62:1000 tells a miserable story for all Indians seeking medical help and remedies. Almost 40% of the population is hardly able to make two ends meet and evidently is incapable of spend on healthcare.

The public health is catered to by Hospitals, Institutes, Public Health Centers, etc. which are governed by the govt. and are highly subsidized. The poor and needy throng these places and the doctors in these are undoubtedly overburdened by the high flow of patients, resulting in substandard services on all levels- from sanitation to availability of beds to sincerity of the doctors.

The better-to-do people are majorly dependent on the private players who have captured the healthcare space, making it a highly profitable business. From swanky premises to latest equipments, from most renowned doctors to state-of-the-art operation theatres; these come at a high price.

Culturally, India as a country had always had a wonderful doctor-patient relationship and doctors were revered and respected as they were looked upon as saviors, next only to God. But with time things have changed drastically! A society in which everything has been commercialized, healthcare couldn't remain untouched.

During past few years India has witnessed a spurt in medical negligence cases and the reason for this are manifold;

#1. Blatant commercialization: India's population has forced the govt. to open up the healthcare sector to private players. The affordability of middle and upper class has seen that such private organizations reap huge profit. These establishments work on the same pattern as any other business, from advertising to setting targets; somehow resulting in a disconnect of the trust factor between a doctor and its patient.

There have been numerous instances where reckless negligence has been faced by a patient even after paying hefty amount. As in the case of Mrs. Aparna Dutta vs. Apollo Hospitals & others[10] an abdominal pack was negligently left by the doctor during surgery.

#2. Growing awareness and empowerment: In the past decade, the general environment in the country has changed greatly, as people have gained awareness about their rights as a patient. Citizen activists have taken up cases of neglect and deficiency in services and the same have gained unmatched media coverage, thus resulting in educating the people.

#3. Legal options: Different legal options available to Indians in the form of criminal and civil options has empowered the citizens greatly. The provisions under criminal law are time taking and difficult to prove in most cases but the provisions under torts and specially in Consumer Rights Act, 1986, has come as a blessing to those who have suffered any medical negligence.

By a rough estimate, almost 50 lakh Indians lose their lives to medical negligence; in comparison, the rate of litigation and subsequent compensation is negligible. Supreme Court and the National Consumer Disputes Redressal Commission have come up with landmark judgements in many cases. They have widened the connotation of the term negligence and have awarded compensation to the aggrieved based on the damage. They have penalized not only the errant doctors but also the manipulative hospitals and their managements. The warning bells are rung by them from time to time so that the medical professionals work according to the ethics prescribed for them.

#4. Deterioration in the skills of professionals: Commercialization of the profession has inadvertently resulted in worsening standards, people buy seats in medical colleges in order to continue a family legacy or to earn handsomely. Incapable candidates with poor skills naturally give substandard care.

#5. Lack of ethics: Commercialization has led to blindly going for monetary gains and in the process, professional ethics has taken a backseat. The most 'noble' profession has lost its nobility and therefore, cases of negligence have risen.

Comparative spend of India & other countries on healthcare:

The Indian govt. had allocated less than 4% of its GDP on total expenditure on health in the Union Budget of 2018. By comparing this to some of the best healthcare providing countries, we can assess the gap in spending and hence, the quality of services. Last year, UK spent 9.7% of its GDP on healthcare whereas America devoted 17.2% towards healthcare, making it the biggest spender on healthcare in the world. Switzerland shelled out 12% whereas Sweden is not left far behind at 11%; and the statistics are an indication that developed countries take public health seriously. But

[10] 2002 ACJ 954, AIR 2000 Mad 340, (2000) IIMLJ 772.

apart from these, there are small, developing nations like UAE, Oman, Saudi Arabia, etc. that have worked well on improving their public health system.

Constraints on Indian Govt.

Healthcare in India, especially public health, is at a low and necessitates a vision and a mission to benefit all. The govt. is bogged down by numerous problems like working towards the basic needs of the poor and needy, basic amenities for all like water, education, electricity, roads, etc. In balancing all the provisions for, healthcare allocation is usually much below than what's needed. The stark reality is that it has thrown up lots of problems for the citizens; even the private health providers give substandard services.

Way ahead:

The strengthening of the public health system in every sphere is the need of the hour. From basic infrastructure to sanitation, to hiring best professionals, buying latest equipment and most importantly bringing down the ratio of doctor patient to a level where everyone can seek health benefits.

The private players will have to be reigned in by making them liable in all cases as well as capping the profit margin of them. Specific guidelines for all should be issued by the govt.

Impact of Medical negligence cases on Doctors:

Doctors are biggest human asset of any society and they should be dealt with the prestige and respect that they deserve; a few adverse cases must not mar the reputation of the community at large. The medical fraternity is apprehensive of overzealous activism in cases of medical negligence.

The doctors feel that since their profession has been covered under 'services' in CPA, 1986, there has been a spurt in frivolous cases against them. This is so, because filing a case under CPA is extremely simple, less time consuming as well as the money involvement is negligible.

They have a very legitimate grievance as they are in a profession in which every day, they deal with critical cases and in spite their best efforts, skill and knowledge, fatalities occur. In emotional sense, the near and dear ones almost always feel that there could always have been a better option or treatment.

These factors are responsible in seeing an increase in cases against medical professionals and services.

MY OPINION: A CITIZEN'S PERSPECTIVE!

Doctors have invariably been treated with great respect in our country as they hold a place of high reverence. They are saviors, healers and good Samaritans who ensure our and our near and dear one's well-being. The connect of doctor-patient is one which calls for faith and trust; but in modern times it has come under great stress.

The commercialization of the profession has eroded the sanctity of the profession and cases like *Kunal Saha* v. *AMRI*[11], has proven that best of doctors can also breach their duty resulting to fatal negligence. The judgements in such cases have pinned doctors and hospitals of callousness and huge compensation has been awarded.

The main crux of the matter is that every single human life is valuable and hence, it becomes unsaid duty of a doctor to protect it to best of his abilities. In the case of *Pravat Kumar Mukherjee* v. *Ruby General Hospital & others*[12], the inhuman approach of the doctors and hospital irked the court greatly. Money should not be given priority over life and this message was given loud and clear by the court.

The doctor's fraternity should not feel threatened by the litigations against them as the courts and judges have reiterated time and again that trivial or minor complaints will not hold ground. More so in most legal cases the appellant has to bear the burden of proof and if it is inconclusive, then the judgement inadvertently is in favor of the doctor. In the case of *Dr. Suresh Gupta* v. *Govt. of N.C.T. of Delhi & Another*[13] the Supreme Court categorically stated that every erroneous judgement of a doctor cannot be termed as culpable negligence. Doctors cannot be punished as a criminal for all professional mishaps as it would lead to serious disservice to the society.

In another case, *Jacob Mathew* v. *State of Punjab*[14], the Supreme Court asked the central govt. to frame guidelines so as to save the doctors from any undue harassment due to legal cases.

Thus, it is clear that a stand is taken against doctors only when there is clenching proof of gross negligence; and these must become examples as to deter others from breaching the trust of the patients. The doctors' community itself should come forward and expose cases of misconduct or negligence, instead of trying to hide the misdeeds of their fellow men.

REMEDIAL MEASURES FOR THE DOCTORS:

A community which is already bound by an oath to serve humanity at large, needs no sermon. All they need to do is to be true to their calling; they should maintain an ethical approach and serve best to their abilities.

The Indian Medical Association has also come up with dos and don'ts for the doctors that would help them in acting responsibility. The society at large is always respectful towards a doctor who has served selflessly but the doctors need to see humans as equals, without any distinction of rich or poor.

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[11] Civil Appeal Nos. 2867 and 2866 of 2012, Original Petition No. 240 of 1999.
[12] ORIGINAL PETITION NO. 90 OF 2002.

[13] Criminal Appeal No. 778 of 2004.

[14] Criminal Appeal Nos 144-145 of 2004.

It is a profession which is related to new inventions, innovative techniques, unconventional methods, advanced theories, inventive materials and futuristic approach- hence, restrictions, like cases at every juncture, will act as a deterrent, leaving a negative impact on the society!

"It is the duty of the doctor to prolong life and it is not his duty to prolong the act of dying"

- ***Surbhi Aggarwal***
(Founder & CEO, School of Legal Education)
Thankyou