

JUDICIAL SCRUTINY ON MEDICAL NEGLIGENCE UNDER THE CONSUMER PROTECTION ACT, 1986

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I. Introduction

In the year 1986, India received a 'Magna Carta' in the history of consumerism. It was this year that witnessed the enactment of the Consumer Protection Act. The consumer protection in India is not a post modern thought, it has evolved through centuries. Its roots can be found in *Manu Smriti*. Consumer Protection has had relevance since the existence of consumers in India. *Manu Smriti* lays out a charter of ethics for sellers on how to sell consumer products to consumers. It must be *uberimaefidae*¹ and also states that the *Caveat emptor*². It also specifies the penalties that must be handed out to sellers who are unethical in their actions. *Manu Smriti* prohibits the mixing of one commodity with other. It also mandates proper disclosure of quantity and quality. In itself *Manu Smriti* does not focus on consumer protection but does show the concern of ancient society on consumerism matters. March 15 is celebrated as National Consumer Rights Day marking the day when Bill for Consumer Rights was moved in the US Congress.

Medical profession is one of the oldest professions of the world and is the most humanitarian one. There is no better service than to serve the suffering, wounded and the sick. Aryans embodied the rule that, *Vidyonarayanoharihi* (which means

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1 *Uberimaefidei*, is a Latin phrase meaning "utmost good faith" (literally, "most abundant faith").

2 Under the doctrine of *caveat emptor*, the buyer could not recover from the seller for defects on the property that rendered the property unfit for ordinary purposes. The only exception was if the seller actively concealed latent defects or otherwise made material misrepresentations amounting to fraud.

doctors are equivalent to Lord Vishnu). Since long the medical profession is highly respected, but today a decline in the standard of the medical profession can be attributed to increasing number of litigations against doctors for being negligent narrowing down to “medical negligence”³. Hospital managements are increasingly facing complaints regarding the facilities, standards of professional competence, and the appropriateness of their therapeutic and diagnostic methods. When incidents like these begin to rise, the judiciary plays a vital role to protect the consumer from medical negligence. This article broadly speaks about the medical negligence under Consumer Protection Act, 1986 and how judiciary responds the negligent activities of the doctors.

II. Medical Negligence

Negligence is a breach of a duty caused by omission to do something which a reasonable man guided by those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do. Negligence becomes actionable on account of injury resulting from the act or omission amounting to negligence attributable to the person sued. The essential components of negligence are duty, breach, and resulting damage⁴. The essential ingredient of *mens rea* cannot be excluded from consideration when the charge in a criminal court consists of criminal negligence. Medical negligence defined as, the failure to exercise rational caution and capability during diagnosis and treatment over a patient in accordance to the prevailing standards in force at that point of time. In case of *Bolam v. Friern hospital management committee*,⁵ the test for establishing medical negligence was set. “The doctor is required to exercise the ordinary skill of a competent doctor in his field. He must exercise this skill in accordance with a reasonable body of medical opinion skilled in the area of medicine”⁶. The National Consumer Commission attempted to summarize the medical negligence law in *Dr. Kunal Saha v. Dr. Sukumar Mukherjee*,⁷. Medical profession has been

3 Manjhuri Shahoo, *Judicial Interpretation Of Medical Negligence Under Consumer Protection*, available at <http://www.manjgurishahoo.com> (last visited on June 16.2012).

4 Jacob Mathew v. State of Punjab, 2005(3) ALT (CrI)1 (SC):2005(5) SCJ 601 .

5 (1957) 1 WLR 582.

6 Modi, *Medical Jurisprudence and Toxicology*, 22nd Edn., 1999, Butterworths, New Delhi.

7 This case was decided on June 1, 2006. See *Supra* note 3.

brought under section 2(1) (o) of CPA, 1986 which defines the term services⁸. In *Vasantha P. Nair v. Smt. V.P. Nair*,⁹ the National Commission held a patient to be a 'consumer' and a medical assistance a 'service'. A doctor is held liable for only his acts (other than cases of vicarious liability). Vicarious liability arises in case of government hospitals where though the doctor is responsible, the hospital has to pay the compensation.

III. Medical Negligence in Antagonism to Professional Doctors

The following legal issues have been addressed and responded to by different forums and courts in India. From the time of Lord Denning until now it has been held in several judgments that a charge of professional negligence against the medical professional stood on a different footing from a charge of negligence against the driver of a motor car. The burden of proof is correspondingly greater on the person who alleges negligence against a doctor. It is a known fact that with the best skill in the world, things sometimes go wrong in medical treatment or surgical operation. A doctor was not to be held negligent simply because something went wrong.¹⁰ The National Commission as well as the Apex Court in a catena of decisions has held that the doctor is not liable for negligence because someone else of better skill or knowledge would have prescribed a different treatment or operated in a different way. He is not guilty of negligence if he has acted in accordance with the practice accepted as proper by a reasonable body of medical professionals.¹¹

The Hon'ble Supreme Court in the case of *Dr. LaxmanBalkrishna v. Dr. Triambak*,¹² has held the above view that "all medical negligence cases concern

8 "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, board or lodging or both, [housing construction], entertainment, amusement or the purveying of news or other information, but does not include the rendering of any service free of charge or under a contract of personal service.

9 I (1991) CPJ 685.

10 S V Joga Rao, 25.3 Symposium 361-37 (2009).

11 A. S. DEOSKAR, *Medical Jurisprudence Toxicology and Forensic Science for Court Room with Case Laws* 337 (All India Reporter, 2010).

12 AIR 1969 SC at pg 128.

various questions of fact, when we say burden of proving negligence lies on the Complainant, it means he has the task of convincing the court that his version of the facts is the correct one". In the case of Indian Medical Association v. Santha,¹³ the Apex Court has decided that the skill of a medical practitioner differs from doctor to doctor and it is incumbent upon the complainant to prove that a doctor was negligent in the line of treatment that resulted in the loss of life of the patient. Therefore, a judge can find a doctor guilty only when it is proven that he has fallen short of the standard of reasonable medical care. The complainant is to prove the negligence or deficiency in service by adducing expert evidence or opinion and this fact is to be proved beyond all reasonable doubts. Mere allegation of negligence will be of no help to the complainant¹⁴.

In Smt. Vimlesh Dixit v. Dr. R.K. Singhal,¹⁵ the court held that, only the report of the Chief Medical Officer has been produced wherein it said that the patient is a case of post-traumatic wrist drop. It is not said that it is due to any operation or the negligence of the doctor. The mere allegation will not make out a case of negligence, unless it is proved by reliable evidence and is supported by expert evidence. It is true that the operation has been performed. It is also true that the complainant has many expenses but unless the negligence of the doctor is proved, she is not entitled for any compensation. In Dr. Kamta Prasad Singh v. Nagina Prasad,¹⁶ the forum has decided from this yardstick, post-operative infection or shortening of the leg was not due to any negligence or deficiency in service on the part of the opposite party appellant. Deficiency in service thus cannot be fastened on the opposite party.

IV. Proof of Medical Negligence

The principle of *Res ipsa loquitur*¹⁷ has not been generally followed by the Consumer Courts in India including the National Commission or even by the Apex Court in deciding the case under CPA.¹⁸ It has been held in different judgments by the National Commission and by the Supreme Court that a charge

13 1995 (6) SCC at pg 651.

14 Smt. Savitri Singh v. Dr. Ranbir PD. Singh, I (2004) CPJ 25 (Bihar).

15 I (2004) CPJ 123 (Uttaranchal).

16 III (2000) CPJ 283 (WB).

17 *Res ipsa loquitur* is a legal Latin phrase which translates to "the thing speaks for itself."

18 *Supra* note 3.

of professional negligence against a doctor stood on a different footing from a charge of negligence against a driver of a vehicle. The burden of proof is correspondingly greater on the person who alleges negligence against a doctor. It is a known fact that even when a doctor with the best skills is involved, things sometimes go wrong during medical treatment or in a surgery. A doctor is not to be held negligent simply because something went wrong.¹⁹ Simply because the patient's eyesight was not restored satisfactorily, this account alone is not grounds for holding the doctor guilty of negligence and deficient in his duty. It is settled law that it is for the complainant to prove the negligence or deficiency in service by adducing expert evidence or opinion and this fact is to be proved beyond all reasonable doubt.

Mere allegation of negligence will be of no help to the complainant²⁰. An allegation of medical negligence is a serious issue and it is for the person who sets up the case to prove negligence based on material on record or by way of evidence. The complaint of medical negligence was dismissed because the applicant failed to establish and prove any instance of medical negligence.²¹ Merely because the operation did not succeed, the doctor cannot be said to be negligent and the appeal of the doctor was allowed.²² In another case, an X-ray report indicated a small opacity that similar to an opaque shadow that becomes visible for many causes other than a calculus.²³ It could not be assumed that a stone existed in the right kidney that had not been operated upon. Under the circumstances, the judges did not think that any case of negligence has been made by the Complainant. This petition was, therefore, allowed.²⁴

V. Role of Expert Evidence on Medical Negligence

The medico-legal expert is not a detective. He may use his knowledge and intelligence to help the police to solve a crime and his role should be to furnish the police with specific information on matters of which he has specialized knowledge. All medical negligence cases concern various questions of fact, when we say burden of proving negligence lies on the complainant, it means

19 *Supra* note 9.

20 *Dr. Akhil Kumar Jain v. Lallan Prasad*, II (2004) CPJ at pg 504.

21 *Mam Chand v. Dr. GS Mangat of Mangat Hospital*, I (2004) CPJ 79 (NC).

22 *Dr. (Smt) Kumud Garg v. Raja Bhatia*, I (2004) CPJ 369.

23 *Supra* note 9.

24 *Dr. Harkanwaljit Singh Saini v. Gurbax Singh*, I (2003) CPJ 153 (NC).

he has the task of convincing the court that his version of the facts is the correct one. No expert opinion has been produced by the complainant to contradict the report of the Board of Doctors. The appeal of the Complainant was dismissed with costs as no expert opinion has been produced by him.²⁵ The Commission cannot constitute itself into an expert body and contradict the statement of the doctor unless there is something contrary on the record by way of an expert opinion or there is any medical treatise on which reliance could be based²⁶. In this case there was a false allegation of urinary stone not being removed as shown by a shadow in the x-ray. The burden of proving the negligent act or wrong diagnosis was on the complainant and the appeal was dismissed in another case of alleged medical negligence as no expert evidence was produced.²⁷

In *Sardool Singh v. Muni Lal Chopra*,²⁸ it was not a case of apparent negligence on the part of the surgeon in conducting the operation, but about the quality of the plate used for fixing the bone. The court held that, the complainant has not produced any expert witnesses to prove that there was any fault in the performance of the operations. The District Forum rightly held that the complainant had failed to prove his case. This expert evidence is useful for come to a positive finding in National Commission as well as Apex court²⁹. The complainant has failed to discharge the onus to prove negligence or deficiency in service³⁰ due to lack of expert evidence.

VI. Medical Profession under the Criminal Law

The criminal law has invariably placed the medical professionals on a pedestal different from ordinary mortals. The Indian Penal Code enacted as far back as in the year 1860 sets out a few vocal examples. Section 88³¹ in the

25 *Amar Singh v. Frances Newton Hospital*, I (2001) CPJ 8.

26 *Dr.Karkanwaljit Singh Saini v. Gurbax Singh*, I (2003) CPJ 153 (NC).

27 *Ns Sahota v.New Ruby Hospital*, II (2000) CPJ 345.

28 *zl* (1999) CPJ 64 (Punjab)

29 *Dr.Manjit Singh Sandhu v. Uday Kant Thakur*, III (2002) CPJ 242

30 *Jai Prakash Saini v. Director, Rajiv Gandhi Cancer Institute and Research Centre*, I (2003) CPJ 305 (Delhi).

31 Sec 88 of IPC: "Act not intended to cause death, done by consent in good faith for person's benefit. Nothing which is not intended to cause death, is an offence by reason of any harm which it may cause, or be intended by the doer to cause, or be known by the sore to be likely to cause, to any person for whose benefit it is done in good faith, and who has given a consent, whether express or implied, to suffer that harm, or to take the risk or that harm".

Chapter on General exceptions provides exemption for acts not intended to cause death, done by consent in good faith for the benefit of the patient. Section 92³² provides for exemption in good faith for the benefit of a person without his consent though the acts cause harm, to a person has not consented to suffer such harm. Sections 52³³, 80, 81, 83, 88, 90, 91, 92, 304-A³⁴, 336³⁵, 337³⁶ and 338³⁷ all cover the acts of medical malpractices. It is well known that a doctor owes a duty of care to his patient. This duty can either be a contractual duty or a duty arising out of tort law. In some cases, however, though a doctor-patient relationship is not established, the courts have imposed a duty upon the doctor. In the words of the Supreme Court "every doctor, at the governmental hospital or elsewhere, has a professional obligation to extend his services with due expertise for protecting life". These cases are however, clearly restricted to situations where there is danger to the life of the person. Impliedly, therefore, in other circumstances the doctor does not owe a duty.

VII. Reasonable Care and Protection

The practitioner must bring to his task a reasonable degree of skill and knowledge, and must exercise a reasonable degree of care. Failure to use due

- 32 Sec 92 of IPC: "Act done in good faith for benefit of a person without consent.- Nothing is an offence by reason of any harm which it may cause to a person for whose benefit it is done in good faith, even without that person's consent , if the circumstances are such that it is impossible for that person to signify consent, or if that person is incapable of giving consent, and has no guardian or other person in lawful charge of him from whom it is possible to obtain consent in time for the thing to be done with benefit."
- 33 Sec 52 of IPC, "Good faith"- Nothing is said to be done or believed in "good faith" which is done or believed without due care and attention.
- 34 Sec 304A 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".
- 35 Sec 336 of IPC, "Act endangering life or personal safety of others. Whoever does any act so rashly or negligently as to endanger human life or the personal safety of others, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to two hundred and fifty rupees, or with both".
- 36 Sec 337 of IPC, "Causing hurt by act endangering life or personal safety of others. Whoever causes hurt to any person by doing any act so rashly or negligently as to endanger human life, or the personal safety of others, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to five hundred rupees, or with both".
- 37 Sec 338 of IPC, "Causing grievous hurt by act endangering life or personal safety of others Whoever causes grievous hurt to any person to doing any act so rashly or negligently as to endanger human life, or the personal safety of others, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine which may extend to one thousand rupees, or with both".

skill in diagnosis with the result that wrong treatment is given is negligence³⁸. In medical negligence cases, it is for the patient to establish his case against the medical professional and not for the medical professional to prove that he acted with sufficient care and skill³⁹. The National commission has also taken the same view observing that a mishap during operation cannot be said to be deficiency or negligence in medical services⁴⁰. Negligence has to be established and cannot be presumed.⁴¹ Both the lower forum have held that there is no evidence brought on record by the complainant to show that there was any negligence by the respondent while implanting the lens in the eye of the complainant resulting in a persistent problem in the left eye⁴².

In the case of, *Nirmalendu Paul v. Dr. P.K. Bakshi*,⁴³ the forum held that there is hardly any cogent material to substantiate the allegation contained in the petition of complainant. Hence, the complainant has failed to prove the allegations against the opposite parties. Again, the National Commission in *Sethuraman Subramaniamyer v. Triveni Nursing Home*,⁴⁴ held that expert opinion in medical negligence played an effective role. In another case it apprehended that, the absence of such evidence regarding the cause of death and absence of any expert medical evidence, the complainants have failed to prove negligence on the part of the opposite parties⁴⁵. As per the law, a defendant charged with negligence can clear himself if he shows that he acted in accordance with the general and approved practice. It is not required in the discharge of his duty of care that he should use the highest degree of skill, since this may never be acquired. Even a deviation from normal professional practice is not necessary in all cases evident of negligence⁴⁶. In the case of *Martin F. D'Souza v. Mohd.*

38 Halsbury's Laws of England, 36- (Vol.30, 4th Edn.).

39 Refer to the decision of the Madhya Pradesh High Court in the case of *Smt. Sudha Gupta v. State of M.P.* 1999 (2) MPLJ 259.

40 *Marble City Hospital and Research Centre v. V.R. Soni*, II (2004) CPJ 102 (MP)

41 Refer to the decision of the National Commission in the case of *Kanhiya Kumar Singh v. Park Medicare and Research Centre*, III (1999) CPJ 9 (NC) - (2000) NCJ (NC) 12. A similar view has been taken by the MRTTP Commission in the case of *P.K. Pandey vs. Safai Nursing Home*, I (1999) CPJ 65 (MRTTP) - 2000 NCJ (MRTTP) 268. Refer to the National Commission's decision in *Vaqqar Mohammed Khan. v. Dr. S. K. Tandon*, II (2000) CPJ 169.

42 *Inderjeet Singh v. Dr.Jagdeep Singh*, III (2004) CPJ 20 (NC)

43 III (2000) CPJ 79.

44 1998 CTJ 7.

45 *Surinder Kumar (Laddi) v. Dr. Santosh Menon*, III (2000) CPJ 517

46 *Rajinder Singh v. Batra Hospital and Medical Research Centre and Anr*, III (2000) CPJ 558.

Ishfaq,⁴⁷ the Supreme Court of India quite explicitly addresses the concerns of medical professionals regarding the adjudicatory process that is to be adopted by courts and forums in cases of alleged medical negligence filed against doctors. This case was over ruled by *V. Kishan Rao v. Nikhil Super Speciality Hospital*⁴⁸ & a *Srimannarayana v. DasariSanlalumari & Others*⁴⁹

VIII. Conclusion

Therefore, though it is necessary to expose the errant practices being undertaken by doctors, at the same time it is in the interest of the patients to also protect the rights of the doctors and to understand the risks involved while the doctors are dealing with complicated cases. Doctors should be more careful to perform their duties though only on account of gross lack of competency or gross inattention, or wanton indifferences to the patient's safety, should proceedings be initiated against a doctor. Under CPA, consumer dispute can be remedied only with compensation. Moreover, the procedural aspect is too lengthy which is why the consumer forum should dispose cases in a speedy manner. A healthy medical environment can create a great society and therefore, it is strongly recommended that the services provided at the government hospitals should be brought within the ambit of the services under the Consumers Protection Act (CPA), 1986, in order to ensure the accountability and promote sense of responsibility among the personnel who are employed in these hospitals to look after the welfare of general public and restore the faith of general public in these institutions.

47 *Martin F. D'Souza v. Mohd. Ishfaq*, 2009 (2) SCC 40.

48 (*Arising out of SLP(C) No.15084/2009*)Supreme Court of India. 8 March 2010.

49 2013(1)SCALE 606