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REVIEW ARTICLE

MEDICAL NEGLIGENCE: IN THE EYES OF CONSUMER LAW

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ABSTRACT

The doctor patient relationship is a very delicate one which stands on mutual trust. Unfortunately in recent days the standard of medical practice is declining. Until 1986 the number of cases filed on doctors were less but after the emergence of the Consumer Protection Act in 1986 the consumer awareness has been increased with rising expectations and medical negligence has been included under the purview of this act. Especially in recent times the number of cases filed on doctors has increased and it is necessary to know the basics of medical negligence.

Key words:

Doctor Patient Relationship,
Mutual Trust, Consumer Protection Act,
Medical Negligence.

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INTRODUCTION

Public awareness of medical negligence in India is growing. Hospital managements are increasingly facing complaints regarding the facilities, standards of professional competence, and the appropriateness of their therapeutic and diagnostic methods. After the Consumer Protection Act, 1986, has come into force some patients have filed legal cases against doctors, have established that the doctors were negligent in their medical service, and have claimed and received compensation. As a result, a number of legal decisions have been made on what constitutes negligence and what is required to prove it (Murthy *et al.*, 2007).

Negligence is the breach in duty caused by the 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. (Gita Ganguly Mukherjee *et al.*, 2008). Negligence means either subjectively a careless state of mind or objectively a careless conduct. It is not an absolute term but is a relative one; is rather a comparative term. In determining whether negligence exist in a particular case, all the attending and surrounding facts and circumstances have to be taken into account.

Components of negligence – (Bag, 2011)

- The existence of a duty to take care, which is owed by the defendant to the complainant, (ie doctor to the patient)

- Failure to attain the standard level of care, prescribed by the law, thereby committing a breach of such duty.
- Such breach in duty should cause injuries.
- Such injuries should cause consequential damages which are evident.

To prove the above mentioned components of negligence under Consumer Protection Act there should be a doctor patient relationship, for that the patient should be a consumer and must have availed services from the doctor.

Then who is a consumer?

Any person who hires or avails services for a consideration which has been paid or promised or partly paid and partly promised or under any system of deferred payment includes any other beneficiary services (Joga Rao, 2009). Service rendered to any person at a Government hospital/ health centre/ dispensary or even a private setup where no charge whatsoever is made from any person availing the services and all patients (rich & poor) are given free service is outside the purview of the expression service. The payment of a token amount for registration purpose only at the hospital/ nursing home would not alter the position. Such patients cannot be called consumers. So it is clear that doctors are not liable for their services individually or vicariously if they do not charge fees and there should be contract between the patient and the treating doctor either by paying his fees or by providing any other beneficiary service, which the patient should be in a position to prove it. Even if the patient has paid certain token amount as OPD registration fees and not as charges for

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availing the treatment he/she cannot become a consumer (Gita Ganguly Mukherjee *et al.*, 2008).

Medical negligence: civil or criminal wrong

The question as to whether Medical Negligence is a Civil wrong or Criminal offence has been a question that has been mooted in legal circles for long. For civil liability, the simple lack of care is enough but in Criminal Law, a very high degree of neglect which goes beyond a matter of compensation is required to be proved. For criminal liability there should be rashness and recklessness in the act and has to be proved beyond reasonable doubt. But the burden of proof lies completely on the complainant in proving negligence of the doctor (Murthy *et al.*, 2007; Bag 2011).

Jurisdiction of various consumer courts (Joga Rao, 2009)

District Consumer Forum – For compensation upto 20 lakhs
State Consumer Forum – For compensation > 20 lakhs to < 1 crore
National Consumer forum – For compensation > 1 crore

Who decides the cases in these consumer courts?

The cases in the consumer courts are not always decided by doctors. The composition of the Consumer Courts will usually have

- (a) A person who is, or has been, or is qualified to be a District Judge, High Court Judge or a Supreme Court Judge who shall be its President;
- (b) Two other members, who shall be persons of ability, integrity and standing, and have adequate knowledge or experience of, or have shown capacity in dealing with, problems relating to economics, law, commerce, accountancy, industry, public affairs or administration, one of whom shall be a woman.

Just by filing a case against a doctor, a notice will not be issued against him unless there is Res ipsa Loquitur and there is proved Prima Fascia by Expert evidence. So to decide negligence on part of the doctor an expert evidence is asked. The role of the expert medical evidence is to inform the judge so as to guide him to the correct conclusions. It is for the judge to guess the weight and usefulness of such assistance as to reach his own conclusions (Bag, 2011). So the role of expert evidence plays a very important role in deciding negligence in a case.

How the amount of compensation assessed?

The compensation paid for personal injuries is neither punishment nor reward. The principle on which damages for negligence are assessed is that they are to be regarded as compensation for an injury sustained and not as punishment for a wrong inflicted. The sole basis of awarding compensation to the dependents of the deceased is that on account of culpable negligence or default of the offender, a valuable life that was the source of livelihood to the claimants is cut short. The abrupt termination of life results in loss to the dependants. The determination of the amount of compensation is basically a net balance of the loss and gain to the survivors or the

dependants. The basic figure of annual dependency has to be determined after excluding the amount which the deceased was spending on himself. The principle of working out the suitable multiplier with which annual dependency be multiplied and capital amount arrived at appears to be the only just and reasonable method because the same takes into consideration not only the age of the victim but also the ages of the dependants and all uncertainties of life. The multiplier of 16 is commonly used by our High Courts and Supreme Court if the deceased is in his twenties similarly a multiplier of 15 has been used if his age is over thirty (Bag 2011).

Why is the number of medical negligence claims rising?

- Growing knowledge
- Better access to justice
- Speedy remedy
- Relative inexpensiveness in filing a case

In some cases Medical claims are genuine but most of them are false and frivolous creating nuisance and headache but the main reason behind this is that Doctors get to spend less & less time with their patients and lack of adequate communication with them which has increased patient dissatisfaction.

Conclusion

A simple lack of care, an error of judgment or an accident, is not a proof of negligence on the part of the medical professional. So long as a doctor follows a practice acceptable to the medical profession of that day, he cannot be held liable for negligence merely because a better alternative course or method of treatment was available or simply because a more skilled doctor would not have chosen to follow or resort to that practice or procedure which the accused followed. So by being a doctor what can save us from being sued?

A healthy rapport with patients, with their families & fellow doctors. Respect towards the patients, relatives and their feelings, an attitude of care & concern with humanistic approach, treatment when indicated and maintaining good records which is complete, accurate, legible, relevant, timely & generously informative and by avoiding the facts which speak for themselves and by obtaining a legally valid consent before any treatment litigation can be prevented. We are in a democratic country and we cannot prevent any person from filing a case on us but in practice if we follow 'reasonable skill & care in diagnosis & treatment', 'proper documentation' & 'legally valid consent' we can definitely save our skin under the court of law.

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