



Consumer Protection Act and Medical Negligence - A Brief Insight

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ABSTRACT

Public awareness of medical and dental negligence in India is growing. Hospital managements are increasingly facing complaints regarding facilities, standards of professional competence and appropriateness of therapeutic and diagnostic methods. The law is not made to punish all health professionals that cause injury to patients; it is concerned only with negligent acts. Medical negligence arises from an act or omission by a medical/dental practitioner, which no reasonably-competent and careful practitioner would have committed. What is expected of a medical/dental practitioner is a 'reasonably skillful behavior adopting the 'ordinary skills' and practices of the profession with 'ordinary care'. Therefore, both the professions need to update their understanding of the concepts of medical negligence and consumer protection act, and its amendments to be on a legally safer side. In our article, we attempt to outline the salient features of medical negligence and consumer protection act.

Keywords: Medical, Dental, Negligence

INTRODUCTION

Negligence may be defined as breach of 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 reasonable man would not do, actionable negligence consists in the neglect of the use of ordinary care or observing ordinary care and skill toward a person to whom the defendant owes a duty of observing ordinary care and skill.¹

There are three basic Constituents for Negligence-

1. A legal duty to exercise due care on the part of the party complained of towards the party complaining the former's conduct within the scope of duty;
2. Breach of the same duty; and
3. Consequential damages.

This very duty depends upon the foreseeability of the injury it means if at the time of act or omission he may foresee the injury to the plaintiff him liable owes a duty to prevent that injury and failure to that make him liable.¹

Professional Negligence

Profession involves the idea of an occupation requiring purely intellectual skills or of manual

skills controlled by the intellectual skill of the operator, as distinguished from an occupation which is substantially production or sale or arrangement for the production or sale of commodities. According to Rupert M. Jackson and John L. Powell observed in *Indian Medical Association v V.P. Shanta* that occupations which are regarded as professions have 4 characteristics, they are-

1. The nature of the work which is skilled and specialized and a substantial part is mental than manual;
2. To commitment to moral principles which go beyond the general duty of honesty and a wider duty to community which may transcend the duty to a particular client or patient;
3. Professional association which regulates admission and seeks to uphold the standard s of the profession through professional codes on matters of conduct and ethics; and
4. High status in the community.

The Consumer Protection Act, 1986

On 24th December, 1986, the government of India, to safeguard the interest of the consumer, enacted a comprehensive legislation, the 'Consumer Protection Act, 1986' referred to as 'The Act'. It was later modified and the amendments came into effect on March 15, 2003. It was an act to provide better protection of the

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interests of the consumers and for that purpose to make provisions for establishment of consumer councils and other authorities for the settlement of consumers' dispute and for matters connected therewith.¹

Section 2(1)(d)(ii) of the act "Consumer" means any person who hires or avails of any services for a consideration which has been paid or promised or partly paid and partly promised or under any system of deferred payment.

Section 2(1)(o) of the act "Service" means service of any description which is made available to potential users. Health care services will be service, if they are obtained for consideration.

Section 2(1)(o) of the act ...in the event of any deficiency in the performance of such services, the aggrieved party can invoke the remedies provided under the act by filing a complaint before the consumer forum having jurisdiction.²

Who is a 'Consumer'?

Consumer, in the medical and dental profession, is:

1. A patient who pays to get services of doctor /hospital
2. Any person who pays for the patient
3. Legal heirs /representatives of such patients
4. Spouse, parents and children of the patient

The Meaning of the Word 'Service'

On the meaning of the word "service" in relation to the medical profession, the Supreme Court in *Indian Medical Association v. V.P. Shantha & Ors.* (Supra) came to the following conclusions:

1. Service rendered to a patient by a medical practitioner (except where the doctor rendered service free of charge to every patient or under a contract of personal service), by way of consultation, diagnosis and treatment, both medicinal and surgical, would fall within the ambit of "service" as defined in section 2(1) (o) of the Act.
2. The expression "contract of personal service" in section 2(1) (o) of the Act cannot be confined to contracts for employment of domestic servants only, and the said expression would include the employment of a medical officer for the purpose of rendering

medical service to the employer. The service rendered by a medical officer to his employer under the contract of employment would be outside the purview of "service" as defined in section 2(1) (o) of the Act.

3. Service rendered at a government hospital / health centre / dispensary or at non-government hospital / nursing home where no charge whatsoever is made from any person availing the service and all patients (rich and poor) are given free service, is outside the purview of the expression "service" as defined in section 2(1) (o) of the Act. The payment of a token amount for registration purpose only at the hospital/nursing home would not alter the position.
4. Service rendered at a non-government hospital / nursing home where charges are required to be paid by the person availing such services falls within the purview of the expression "service" as defined in section 2(1) (o) of the Act.
5. Service rendered at a government hospital / health centre / dispensary or at a non-government nursing home where charges are required to be paid by persons who are in a position to pay and persons who cannot afford to pay are rendered service free of charge would fall within the ambit of the expression "service" as defined in section 2(1) (o) of the Act irrespective of the fact that the service is rendered free of charge to persons who are not in a position to pay for such services. Free service, by such doctors and hospitals would also be "service" and the recipient a "consumer" under the Act.
6. Service rendered by a medical or hospital / nursing home cannot be regarded as service rendered free of charge, if the persons availing the service has taken an insurance policy for medical care where under the policy charges for consultation diagnosis and medical treatment are borne by the insurance company and such service would fall within the ambit of 'service' as defined in section 2(1) (o) of the Act.
7. Similarly, where as a part of the conditions of service, the employer bears the expenses of medical treatment of an employee and his family member dependent on him, the service rendered to such an employee and his family members by a medical practitioner or a



hospital / nursing home would not be free of charge and would constitute "service" under section 2(1) (o) of the Act.

The foremost question which comes to the mind of the doctors is that why does the medical profession need to be included in the consumer protection act? This necessity arose because the existing laws of the land which provide for action in cases of medical negligence under the Law of Tort and Indian Penal Code, have some well documented problems. These include the following:

1. Delay, which, in medical negligence cases, tends to be greater.
2. The cost of bringing an action, which is notoriously high in relation to the sums recovered in damages.
3. Limited access to the courts.
4. Success depends on proof of both negligence and causation (which can be particularly difficult in cases of medical negligence).

Hence necessity to provide for an alternate system which would be easily accessible, speed and cheap, gave birth to the Consumer Protection Act. This Act was made applicable to the doctors because there are no provisions in the Indian Medical Council Act, 1956; or the dentists act 1948,

1. To entertain any complaint from the patient.
2. To take action against the Medical Practitioner in case any negligence has been committed.
3. To award any compensation, etc. in case the negligence is proved.

The reasons why medical services had to be included under the Consumer Protection Act (CPA) are –

1. Increasing knowledge of one's rights as a patient.
2. Doctors and hospitals are no longer held in high esteem as they were held before.
3. No cost is involved if a complaint is filed in the District Forum or State/ National Commission under the CPA, since a patient can make out his case and argue it himself and
4. A complaint is decided within a short span of three to four months under the CPA, while it

usually takes years in the civil and criminal courts.

Who is Liable to Consumer Protection Act

1. Doctors with independent practice rendering only free services.
2. Private hospitals charging all.
3. All hospitals having free as well as paying patients, they are liable to both.
4. Doctors or hospitals paid by an insurance firm for treatment of a client or an employer for the treatment of an employee.

Who is not liable to Consumer Protection Act

1. Doctors in hospitals, which do not charge their patients.
2. Hospitals offering free services to all patients.

Victims of medical negligence, considering action against an erring doctor, have three options.

1. Compensatory mode - Seek financial compensation before the Consumer Disputes Redressal Forum or before Civil Courts
2. Punitive/Deterrent mode - Lodge a criminal complaint against the doctor.
3. Corrective/ Deterrent mode - Complaint to the State Medical Council demanding that the doctor's license be revoked. Jurisdiction of Civil Court was never disputed but its scope was limited for damages only.

Procedures for lodging a Complaint

The redressal agency has a three-tier structure-

1. District level: at this forum person can claim for compensation towards damage upto a maximum limit of Rs: 5 lakh. A district judge and 2 other members chair this of which one of whom shall be a woman.
2. State level: At this level the claim for compensation is enhanced to Rs: 5 – 20 lakhs & high court judge & 2 other members chair it.
3. National level: Here the compensation claimed is more than 20 lakhs. This forum constitutes of a Supreme Court judge, 4 other members.



Provision for Appeal

Within 30 days from the date of decision, appeal can be filed in the higher commission-

1. Appeal against district forum, before state commission.
2. Appeal against state commission, before national commission.
3. Against national commission, before Supreme Court.

Preventive Steps Against Litigation

Can be summarized into Do's and Don'ts which all surgeons must keep in mind

Do's for Doctors

1. Mention age & sex of the patient. In a pediatric prescription, weight of the patient must also be mentioned.
2. If, after completing the examination, the patient / attendant feels that something has been left out or wants something to be re-examined, oblige him.
3. Always face the patient. Maintain eye contact that is comfortable to the patient. Some patients tolerate very little eye contact. Learn to observe out of the corner of your eyes.
4. In case you have been distracted / inattentive during the history taking, ask the patient / attendant to start all over again. He will never mind it. As far as possible, consultations should not be interrupted for non-urgent calls.
5. Mention "diagnosis under review" or "quote; under evaluation" until the diagnosis is finally settled.
6. If the patient / attendants are erring on any count make a note of it or seek written refusal.
7. Record history of drug-allergy.
8. Write names of drugs clearly. Use correct dosages and mention clearly method & interval of administration and mention side effects.
9. Prescribe with caution during pregnancy / lactation.
10. Adjust doses in case of a child / elderly patient and in renal or hepatic disorders.

11. Mention where the patient should contact in case of your non-availability / emergency.
12. Update your knowledge and skill from time to time. Many doctors tend to deteriorate in their knowledge, skills & attitude, over a period of time. Not only do they make any attempt to update themselves, but also they slip downwards.
13. Always obtain a legally valid consent before undertaking a surgical / diagnostic procedure.
14. Routinely advice X-rays in injury to bones & joints and related diseases of bones / joints.
15. Always rule out pregnancy before subjecting the uterus to X-ray.
16. Always read reports carefully & interpret the results of tests / X-rays properly and make a note of it. In case of any doubt, recheck with the lab / diagnostic centre.
17. In all instances of swab cases & "instrument cases", the surgeon incharge is generally held directly or vicariously liable for negligence. The surgeon incharge must therefore personally ensure that such mishaps do not occur.
18. The period for the responsibility of the surgeon extends to and includes the post-operative care. He must, therefore, ensure proper post-operative care to the patient.
19. In case of death of a patient occurring while undergoing surgery / diagnostic procedure, the higher hospital authorities / police authorities must be informed without loss of time. In such cases, autopsy/post-mortem is mandatory.
20. In case the hospital / clinic claim to provide 24-hour emergency service, availability of necessary equipment in working order and competent staff within reasonable time is mandatory.

Don'ts for Doctors

1. Don't prescribe without examining the patient.
2. Never examine a female patient without the presence of female nurse / attendant.
3. Don't insist on the patient to tell the history of illness or be examined in presence of others. He has a right to privacy and confidentiality.



4. Don't prescribe a drug or indulge in a procedure if you cannot justify its indication.
5. Don't prescribe or administer a drug which is banned, e.g. Analgin, Oxyphenbutazone etc.
6. Don't over-prescribe or under-prescribe any drug.
7. Don't prescribe multiple drugs. Such prescription may be due to inability to form a correct diagnosis or other causes. Possibilities of drug interactions increase with polypharmacy.
8. Don't do anything beyond your level of competence. Competence of doctors, nursing staff is defined by their qualification, training, experience and competence of a hospital/nursing home is defined, in addition to the competence of its doctors and nursing staff by the availability of various equipments in working order and back-up support, e.g. handling of cases of accident/emergency, severe reaction to drugs, anesthesia, etc. and availability of resuscitative equipment., etc.
9. Don't refuse if the patient/attendant wants to leave against medical advice. It is their right. Document this properly.
10. Never avoid a call for help from a nurse on duty at night. In all probability, a genuine emergency may be there.
11. Don't refuse the patient's right to know about diagnosis & treatment of his illness.
12. Don't refuse the patient's right to examine and receive an explanation about your bill regardless of the source of payment; whether it is reimbursed by the government or by his employer/insurance company.
13. Don't refuse the patient's right to know about the hospital rules & regulations.
14. Don't dump hospital garbage including used disposables in the open. It should be properly incinerated / destroyed to prevent spread of disease or reuse by unscrupulous persons.
15. Don't refuse first-aid/medical care to accidents & emergency cases even if it is a medico-legal case.

Consent

Another major & important thing to do for a doctor is to obtain proper consent of a patient or

attendant or relative. The term consent is defined as "when two or more persons agree upon the same thing in the same sense they are said to consent" (as per section 13 of Indian Contract Act, 1872)-

Types of Consent

1. Implied consent = It is most common variety of consent in both general practice & hospital practice. Patient comes to doctor for an ailment implies that he is agreeable to medical examination in general sense. Examples are inspection, palpitation, percussion, auscultation.
2. Express Consent = Anything other than implied consent is expressed consent. It may be either oral or written. It is obtained for relative minor examinations or therapeutic procedures, in the presence of a disinterested third party. It includes all major diagnostic procedure, general anesthesia, etc for surgical operation.
3. Informed consent = The concept of informed consent has come to the fore in recent years. All information must be explained in comprehensible non medical terms preferably in local languages about the c) Diagnosis d) Nature of treatment e) Risks involved f) Prospects of success.
4. Proxy Consent / Substitute Consent = All the above types of consent can take the shape of proxy consent. It includes consents of Parent for child, close relatives for mentally unsound or unconscious patients etc. When child suffers damage due to negligence of the hospital, nurse & doctor, it is held that child & parent can claim compensation under Consumer Protection Act.

How Consent Should be Obtained

The person obtaining the consent should see that-

1. The patient understands in simple language what the medical treatment is, its purpose & why it is being proposed.
2. The patient should understand its principal benefits, risks & alternatives.
3. The patient should understand, in broad terms, what the consequences would be of not receiving the proposed treatment.



4. Retain the information long enough to make an effective decision.
5. Make a free choice.

Who Can Give Consent?

For the purpose of clinical examination, diagnosis & treatment consent can be given by any person who is conscious, mentally sound & is of & above 12 yrs of age (section 88 & 90 of the IPC 1860). However under section 11, those people who are & above 18 years of age are competent to enter into a contract.

Right to refuse consent= A competent adult has a right to refuse treatment even if others, including medical practitioners, believe that the refusal is neither in his best interest nor reasonable.

When Consent is not Valid?

Consent given under fear, fraud or misrepresentation of facts, or by a person who is ignorant of the implications of the consent or who is under 12 years of age is invalid. (Section 90 IPC)

After a Medical Mishap the following things Should be Done

1. Complete patients record & recheck the written notes.
2. Be frank enough & inform clearly of the mishap.
3. After these initial responses the doctor should contact some other doctor or protection organization to seek advice.

CONCLUSION

The relationship between doctor and patient is based on trust and confidence. Doctors should be clear while taking the cases, they must decide whether to undertake the case they must decide what treatment to give, and they must take care in the administration of that treatment.^{3,4} A breach of any of these duties gives the patient a right to act for negligence. Therefore, both the dental and medical professions need to update their understanding on consumer protection act and its amendments to be on a legally safer side.^{5,6} This article attempts to merely outline in brief the current concepts in consumer protection act and medical negligence. The reader is referred to other standard textbooks and relevant literature regarding details of the same.

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