

# Medical Negligence: Special Reference To Consumer Protection Act

**Dr. Seema Kashyap**

Assistant Professor,  
University Institute of Legal Studies, Shimla

**Kirti Sharma**

9<sup>th</sup> Semester,  
University Institute of Legal Studies, Shimla

**Abstract:** *In the past era doctors were treated like God, that means a faith and sanctity was attached to them. They were healer of distress of the sufferer and their fees was a mere feeling of gratitude shown towards their good deeds. Being a divine profession, doctors were strictly bound by the ethical codes. Due to the inclusion of the hospitals as an industry there is rush of private financiers and corporate business units with no medical backgrounds. In the wake of this change the medical professional is becoming totally commercialized and a money generating unit.*

*This change in the industrial sector starts reflecting in shifting the image of the doctor from ethical duty bound personality to a business person in the society. Thus, leading to see change in the relationship of doctor and patient, from that of a friend, philosopher and guide to a person who is considered to be a mere service provider. This has led to an increase in the medical malpractice (negligence) suits in the nation.*

## I. INTRODUCTION

A significant problem in our country has caught our eyes i.e. *Medical Negligence* which is with the passage of time increasing. With the development of standard of medical services and awareness among the population, such dissatisfaction among the patients is bound to increase. Due to increased impact of commercialization of the medical sector, the self-regulatory standards in the profession have declined. It is the point at which purely medical judgements leave off, and legal standards begin to operate.

Medical negligence is the overwhelming cause that gives rise to *legal action* against the *doctors* and *hospitals*. As a general rule, performing the practice of medicine with due *care, skill, diligence* and sincerity, it is legally accepted that every injury does not imply negligence, because to make the medical practitioner liable even for justifiable injuries, will be too harsh, and a doctor will not be able to practice his professional properly.

## II. MEANING OF MEDICAL NEGLIGENCE

Negligence is simply a neglect of some care which a person is bound to exercise towards somebody. It has been discussed by Ratanlal and Dhiraglal as “The breach of a 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.”

So, Medical Negligence is simply a neglect of some care which usually a doctor is bound to exercise towards his patient. In this type of negligence special skill is required by the *wrong doer*, i.e. the professional is one, who prefers to have some special skill. Any doctor who has established a relationship of professional attendance with a patient and who has undertaken to bring a reasonable degree of care to his course of treatment, when fails to undergo such degree of care and skill then he may have shown medical negligence.

A professional impliedly *assures* the person dealing with him:

- ✓ that he has the *skill* which he professes to possess,
- ✓ that skill shall be exercised with *reasonable care* and *caution*,

So, the professional can be held *liable* for negligence when he was not possessed of the requisite skill which he profess to hold and when he does not exercise it with reasonable care and caution.

### III. ELEMENTS OF ACTIONABLE MEDICAL NEGLIGENCE

“Actionable negligence” is that which imports the liability of the doer. In order to establish the liability of medical negligence, it must be shown that:

- ✓ The doctor has a duty to take *care* towards the patient;
- ✓ The doctor was in *breach* of that duty;
- ✓ The patient has suffered *damages* as a result of breach of that duty.

#### THE DUTY TO EXERCISE SKILL AND CARE

The duty to exercise skill and care exists when a doctor-patient relationship is established. It is formed as soon as there is formal *acceptance* of a patient by a doctor, or the payment of fee. In case of emergency this relationship is formed as soon as doctor approaches a patient with the object of treating him.

The basic principle relating to the law of medical negligence is Bolam Rule, i.e. “The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not to possess the highest expert skill: it is well established that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art. In case of a medical man, negligence means failure to act in accordance with the standards of reasonable competent medical man at the time. There may be one or more perfectly standards, and if he conforms with one of these proper standards then he is not negligent.” The concept of “reasonable foresight” is used to determined the standard required in a particular case.

*Deviation from normal practice* is not a necessary evidence of negligence. To establish liability on the basis of deviation from normal practice it must be shown that:

- ✓ There is a *usual* and normal practice,
- ✓ The defendant, i.e. physical has *not adopted* it, and
- ✓ The course in fact adopted is one, no professional man of ordinary skill would have taken when acting with ordinary care.

#### BREACH OF THAT DUTY TO TAKE CARE

The breach of duty may be occasioned either by not doing something which a reasonable man would do under similar set of circumstances or, by doing some act which a reasonable man would not do.

#### CONSEQUENTIAL DAMAGE

The damage must be resulted to the defendant in consequence of negligent act which was the direct and *proximate cause* of damage. Sometimes the patient goes for self-medication or goes to quack who offer “miracle” cures.

When the condition detonates, the patient is brought to the doctor. If previous medicines show adverse effects on the patient then the later treatment by the doctor is not the proximate cause of the injury.

#### BURDEN OF PROOF

In medical negligence cases the burden of proof is on the plaintiff. He must, not merely establish the facts of the defendant’s negligence and of his own damage, but must show that the one was the effect of the others.

#### RES IPSA LOQUITUR

It means that things speak for itself. There are certain cases, where the mere fact of the injury or the accident is prima facie evidence of negligence. In these cases the true cause of the accident lies solely within the knowledge of the defendant who caused it. The plaintiff can only prove the accident but the nature of happening is not known to him. So, plaintiff in such type of cases can’t prove the happening of accident. In order to remove this hardship rule of Res Ipsa Loquitur applies. Plaintiff has only to prove accident and the burden of proving the nature of happening of accident is on the defendant.

#### CONDITIONS FOR THE OPERATION OF PRINCIPLE

- ✓ The event or accident must be of a kind which does not happen in ordinary course of things.
- ✓ The event which has caused the accident was within the defendants control.

#### CONSENT

Section 88 of IPC, 1860 provides exemption for acts not intended to cause the death done by consent in good faith for person’s benefit. Section 92 provides for the exemption for the acts done in good faith for the benefit of a person without his consent, though the acts cause harm to a person and that person has not consented to suffer such harm. Medical treatment which is given without consent constitutes trespass to the person.

The basic principle in regard to patient’s consent given by Justice Carozo in the case *Schnoedorff v. Society of New York Hospital*, (1914) 211 NY 125 as “Every human being of adult years and sound mind has a right to determine what should be done with his body, and a surgeon, who performs the operation without his consent, commits an assault for which he is liable in damages.” Consent in the context of a doctor patient relationship means the grant of permission by the patient for an act to be carried out by doctor, such as diagnostic, surgical or therapeutic procedure.

The code of medical ethics laid down by the Medical Council of India by the Central Government under Section 33 of Indian Medical Council Act, 1956 in the chapter relating to disciplinary action which enumerates a list of responsibilities, violation of which will be ‘professional misconduct’ places the following responsibility on the doctor - “Before performing an operation the physical should obtain in writing

the consent from husband or wife, parent or guardian in case of minor, or the patient himself as the case may be.” Express consent in writing is to be obtained:

- ✓ All major diagnostic procedures,
- ✓ General anesthesia,
- ✓ Surgical operations,
- ✓ Intimate examinations,
- ✓ Examination for determining age, potency and virginity, and
- ✓ In all medico-legal cases.

Apex Court in Samira Kohli’s Case sum up the principles as a doctor has to seek and secure the consent of the patient before commencing the treatment. The consent so obtained should be real and valid, which means that the patient should have his consent competency and voluntary and his consent should be on the basis of adequate information concerning the nature of treatment procedure, so that he knows what he is consenting to.

- ✓ The doctor should disclose:
  - nature and procedure of the treatment and its purpose, benefits and effects;
  - alternative if any available;
  - an outline of the substantial risk; and
  - adverse consequences of refusing treatment.
- ✓ Consent given only for a diagnostic treatment can’t be considered as consent for therapeutic treatment. Consent given for a specific treatment procedure will not be valid for conducting some other treatment procedure.
- ✓ The only exception to this rule is where the additional procedure through unauthorized, is necessary in order to save the life or preserve the health of the patient and it would be unreasonable to delay such unauthorized procedure until patient regains consciousness and takes a decision.\
- ✓ The nature and extent of information should be of the extent which is accepted as normal and proper by a body of medical men skilled and experienced in the particular field.

#### IV. COMMON REASONS FOR ALLEGATIONS OF MEDICAL NEGLIGENCE

##### SURGICAL MISHAPS

Common surgical mishaps is the selection of the wrong patient due to mix up over the names, especially after anesthetic has been given and the patient can no longer identify himself. Leaving of swabs, instruments and other foreign bodies in the body cavities. Ultimately surgeon is responsible for the negligence of sister or senior technician.

##### CASUALTY AND ACCIDENT DEPARTMENT

This is the busiest areas of hospital, the urgency and rush can contribute to things going wrong. Failure to diagnose fractures, failure to properly treat head injuries etc. Some other instances are failure to attend, failure of communication etc.

#### DEFENCES AVAILABLE TO A MEDICAL PRACTITIONER

When charged with negligence, the medical practitioner may take any of the following defences:

- ✓ He had owned no duty to the patient, i.e. there is no doctor patient relationship.
- ✓ He had discharged his duty according to standard medical practice.
- ✓ It was an error of judgement.
- ✓ The damages were caused by third party who had treated the patient without his knowledge or consent.
- ✓ It was contributory negligence.
- ✓ The complaint was not lodged within two years from the date of alleged causation of damages.

#### CONTRIBUTORY NEGLIGENCE

It is the absence of care on the part of the patient and his personal attendant that combines with the negligence of the doctor resulting in the damages. Some common instances of such negligence includes:

##### VICARIOUS LIABILITY

Rule of various liability is: ‘A master is liable for any tort which the servant commits in the course of his employment. And the servant is also liable for his act’. The state is vicariously liable for the negligence committed by its officers even if these officers can be sued personally, as the negligent officer is acting in the course of his employment. The employer i.e. state in case of government hospitals shall be held liable for such act, because such employee was acting within the course of his employment.

*LIABILITY OF THE HOSPITAL FOR THE ACTS OF EMPLOYEES:* The liability of hospital authorities extends to the faults of the doctors and other employees. This liability is extended whether their employment is permanent or temporary, causal or paid, whole or part time.

*LIABILITY OF SURGEON FOR THE ACTS OF THE STAFF:* The surgeon is held liable for the negligent act of anesthetist and nurses especially in cases of learning of swabs and instruments is patients body.

#### V. ADJUDICATING AUTHORITIES

There are various adjudicating authorities dealing with medical negligence. Such as:

- ✓ Supreme Court of India
- ✓ High Courts
- ✓ National Commission
- ✓ State Commission
- ✓ Civil Court
- ✓ Medical Councils
- ✓ Lok Adalats

Supreme Court is the highest adjudicating authority to adjudicate cases of medical negligence. Any person who get aggrieved by an order made by consumer forum may prefer an appeal against such order to supreme court within a period of

thirty days from the date of the order. Indian constitution under Article 226 provides the right to move to the High court for the enforcement of infringed rights conferred by the constitution as well as other legislations.

The Consumer Protection Act provides for the three tier system in resolving consumer disputes including the disputes regarding the deficiency in services by medical practitioner. The civil courts shall have jurisdiction to try all suits of civil nature except is expressly or impliedly barred. The Legal services Authorities Act, 1987 provides for the establishment of permanent Lok Adalats for exercising limited jurisdiction in respect of dispute involving services rendered by public utility services which include services in hospitals or dispensaries.

Any medical practitioner who is prosecuted for criminal negligence is tried in a criminal court and in such he is either sentenced or has to compensate accordingly under section 325 G.P.C. In case of Professional Misconduct the complaint can be filed with appropriate medical council, who will hold an inquiry against such medical petitioner and take necessary action against him.

#### LEGISLATIVE PROVISIONS

In India, the right to health care and protection has been recognized since early times. India is a founder member of United Nations, and has, ratified various international conventions promising to secure Health care rights of individuals in society. The Constitution of India, which is the Supreme Law of land, does not expressly deal with the right to health care. But the Preamble, Fundamental Rights, Directive Principles of state Policy have a direct bearing on health care of Indian citizens. Apart from this number of laws have been enacted to protect the health interests of the people. These include:

The Indian Penal Code, 1860, The Fatal Accidents Act, 1855, The Indian Medical Degrees Act, 1916, The Dangerous Drugs Act, 1930, Drugs and Cosmetics Act, 1940, The Dentists Act, 1948, Drugs (Control) Act, 1950, Pharmacy Council of India Regulations, 1952, Prevention of Food Adulteration Act, 1956, The Medical Termination of Pregnancy Act, 1975, The Consumer Protection Act, 1986, The Transplantation of Human Organs Act, 1994 etc.

Despite of these constitutional and statutory provisions ensuring health care, the complaints of medical negligence has not been dealt specifically by any enactment. Though the parliament has enacted the Indian Medical Council Act, 1956 but it has untouched the concept of Medical Negligence so, is governed or covered by the law of torts in general & now by the Consumer Protection Act, 1986.

The liability of medical professionals in India under consumer law is of recent origin. From the last decades, attention has turned to the quality of health services. Consumers attention has turned to the quality of services being provided to them as patients. This Act intended to protect a large body of consumers from exploitation. It provides an alternative system of consumer justice by summary trial.

#### VI. MEDICAL SERVICES UNDER CONSUMER PROTECTION ACT, 1986

The medical services include the service rendered by the hospitals both government and private, nursing homes, health centers, clinics, medical practitioner, chemists, Diagnostic centers, para medical staff and other allied staff. These services have not been expressly and categorically, included or excluded within the definition of 'services' so defined under section 2(1) (0) of the Act, 1986. The supreme court in- Indian Medical Association v. V.P. Santha, held that medical service is a 'service' covered by this Act. In this judgment the supreme court examined the liability of medical professionals and hospitals including the government and charitable hospitals. The court held:

- ✓ Service rendered by a Medical practitioner to a patient by way of consultation, diagnosis or treatment falls under sec. 2 (1) (0).
- ✓ Service rendered free of charge by the practitioner attached to a hospital / nursing home and all medical officers employed in a hospital / nursing home where such services are rendered free of charge to all patients is not a service under the Act.
- ✓ Service rendered in a non-government hospital nursing home where no charge is collected from all patients is not covered by the Act.
- ✓ Service rendered at non-government hospital nursing home where no charges are collected from some and collected from some others, the service rendered falls under section 2 (1) (0) of the Act. The patient obtaining free service is also a consumer under the Act.
- ✓ Service rendered at government hospital / health centre/ dispensary where no charge is levied on any patient is outside the purview of this Act.
- ✓ Service rendered at a government hospital/ health centre/ dispensary where services are rendered on payment of charge to some and rendered free of charge to other persons, fall under section 2 (1) (0) of the Act irrespective of the fact that the service is rendered free of charge to some poor persons. The patient obtaining fee service in such case also is a consumer.
- ✓ In most government hospitals there are separate paying wards where different patients seek admission & the general ward where poor patients are treated free of charge. Both the types of patients are entitled to protection under the Act.

#### AGAINST WHAT CATEGORIES OF MEDICAL SERVICES CAN A COMPLAINT BE BROUGHT UNDER THE CONSUMER PROTECTION ACT.....?

A complaint for deficiency in service / medical negligence can be brought in respect of medical service rendered at a government / non-government hospital, nursing home, clinic diagnostic centre, home visits, nursing-care etc., for where a consideration i.e., charges, fees have been paid. Medical services rendered at a government / non-government hospital, nursing home etc. where charges are required to be paid by some and others are related rendered service free of charge, such services fall within the ambit of this Act. Where,

as part of the conditions of service, the employer bears the expenses of medical treatment of the employee and his family members, the medical services provided to such persons would fall within the ambit of this Act. Where the cost of the medical treatment is borne by an insurance company, such as medical aim insurance. Services provided by railways hospitals, or any other hospital, clinics run by an industrial house or company for the benefit of their employees and members of their families are covered under this Act.

#### WHEN TO MAKE A COMPLAINT AGAINST SUCH MEDICAL SERVICE....?

- ✓ When you feel or are able to prove that the charges levied are wrong which seem to be not related to the services provided, such as medico-legal charges, bed charges when beds facility is non-existent etc., But no complaint can lie for alleged excessive fees regarding consultation, operation, diagnostic tests etc.
- ✓ The Supreme Court in India Medical Associations V. V.P. Shantha has held that a determination about deficiency in medical service has to be made by applying the same test as is applied in an action for damages for negligence. A doctor, when consulted by a patient owes him:
  - a duty of care to undertake the case.
  - a duty of care in deciding the treatment to be given; and
  - a duty of care in the administration of that treatment.
 A breach of any of these duties gives right of action for medical negligence to the patients.

#### WHEN NOT TO MAKE A COMPLAINT UNDER THE CONSUMER PROTECTION ACT.....?

A complaint can / should not be made in the following cases:

- ✓ Service availed of at a non-governmental hospital / nursing home or at a government hospital / health care/ dispensary, where no charge what over is made from any person availing of the service and all patients are given free service. However, a negligence occurring in such free medical services is actionable under the law of tort in a civil court and in case of negligence causing damage or death in a government hospital, under certain circumstances a writ can be filed under article 21 of the constitution for breach of life right. A writ lies even in a case when an emergency / accident is not attended to or admission is denied as it amounts to breach of right of life.
- ✓ The question about expenses (excessive fee) of doctor is not a consumer dispute.
- ✓ For the breach of medical ethics. However, the National Commission in a number of cases has awarded compensation on breach of medical ethics by the doctors / hospitals.
- ✓ Where there is no evidence, documents, receipts etc. whatsoever. No affidavits to support your complaint.
- ✓ Where case has already been filed / decided in a civil court for same cause of action.

#### WHO CAN FILE A COMPLAINT...?

A complaint can be made by:

- ✓ A consumer for himself and / or for his beneficiary including parents / guardians for minors, and children for parents etc.
- ✓ Legal heirs or legal representatives of the deceased consumer.
- ✓ Any voluntary consumer association registered under the Consumer Protection Act or any other law for the time being in force.
- ✓ The central or state government.
- ✓ Class action complaints- One or more consumers, where there are numerous consumers having the same interests.

#### IS THERE ANY COURT FEE...?

Every complaint is required to be accompanied with such amount of fee as may be prescribed by the rules. In terms of rule 9A of the consumer protection rules, 1987, the following fees have been prescribed for filing a complaint.

#### DISTRICT FORUM

S.No.	Value of goods or services and compensation claimed	Amount of fee payable
1	Upto one lakh rupees	Rs. 100
2	Upto one lakh and above but less than five lakhs	Rs. 200
3	Upto five lakhs and above but less than ten	Rs. 400
4	Ten lakh and above but not exceeding twenty lakh rupees	Rs. 500

Table 1

The complaint may also be asked to pay appropriate fees for conducting the tests by the appropriate laboratory.

Is the complaint required to be admitted by the consumer forum / commission...?

As per amended section 13 (3) of the Act, 1986 the consumer forum / commission, on receipt of complaint, shall allow the complaint to be proceeded with (i.e., admitted) or reject it by an order. However, such rejection will not be made unless the complainant is given an opportunity of being heard. The decision about rejection or admission will ordinarily be given within a period of 21 days.

If the complaint is barred by time, the consumer forum is bound to dismiss the same unless the consumer makes out a case for condonation of delay under section 21 A (12) of the Act.

#### VII. ROLE OF H.P. CONSUMER DISPUTE REDRESSAL COMMISSION IN ADJUDICATION OF MEDICAL NEGLIGENCE CASES

The study of role of H.P. consumer dispute redressal commission has following findings such as: In comparison to other cases like Banking, Insurance etc., the number of complaints of medical negligence are very low.

The reason for such low complaints can be lack of awareness among the people that medical service is a service which can be taken under the purview of consumer protection Act, 1986.

**INSTITUTION, DISPOSAL AND PENDENCY OF MEDICAL NEGLIGENCE CASES IN H.P. CONSUMER DISPUTE REDRESSAL COMMISSION**

S.No.	Date	Total No. of Cases Filed since Inception	Total No. of Cases Disposed since Inception	Total No. of Cases Pending since Inception
1	30.06.2008	51	30	21
2	30.09.2008	54	30	24
3	31.12.2008	54	31	23
4	31.03.2009	57	31	26
5	30.06.2009	57	32	25
6	30.09.2009	62	37	25
7	31.12.2009	63	38	25
8	31.03.2010	66	40	26
9	30.06.2010	70	41	29
10	30.09.2010	60	41	29

Source: Data from H.P. State Consumer Dispute Redressal Commission.

Table 2

This table elaborately discuss the figures of the institution, disposal and pendency of medical negligence cases.

**DISPOSAL RATE OF MEDICAL CASES**

S.No.	Date	Disposal rate of medical cases filed since inception (% age)
1	30.06.2008	58.82
2	30.09.2008	55.55
3	31.12.2008	57.40
4	31.03.2009	54.38
5	30.06.2009	56.14
6	30.09.2009	59.67
7	31.12.2009	60.31
8	31.03.2010	60.60
9	30.06.2010	58.57
10	30.09.2010	58.57

Source: Data from H.P. State Consumer Dispute Redressal Commission.

Table 3

This table shows the disposal rate of the Medical Negligence case in terms of percentage.

**MEDICAL NEGLIGENCE CASES IN THE DISTRICT FORUM, SHIMLA**

S.No.	Date	Total No. of Cases Filed since Inception	Total No. of Cases Disposed since Inception	Total No. of Cases Pending since Inception
1	30.06.2008	111	54	57
2	30.09.2008	112	65	47
3	31.12.2008	112	89	23
4	31.03.2009	114	92	22
5	30.06.2009	115	93	22
6	30.09.2009	118	96	23
7	31.12.2009	119	97	22
8	31.03.2010	121	97	24
9	30.06.2010	128	100	28
10	30.09.2010	132	102	30

Source: Data from H.P. State Consumer Dispute Redressal Commission.

Table 4

**VIII. CASE LAWS ON MEDICAL NEGLIGENCE**

**PRAVAT KUMAR MUKHERGEE V. RUBY GENERAL HOSPITAL, 2005 (2) CPJ 35.**

It was held that there was gross negligence and deficiency in service of the hospital. Recovery of fee can wait, but not the death nor treatment for trying to save life. In the name of the deceased Rs 10 Lakh was awarded as compensation.

**PARMARTH MISSION HOSPITAL V. YUDH VIR CHAUHAN**

Death of a young woman of 27 years, due to medical negligence, leaving behind her two minor children as also her husband, thus depriving them of the care and company of a mother and spouse. Compensation of Rs 50,000 and litigation cost of Rs 10,000 as awarded by state commission enhanced to Rs 4 Lac and Rs 10,000 respectively by National Commission looking to the invaluable loss fear the children and spouse of the deceased.

**FAKEER CHAND V. MANISH SHRIVASTAVA**

Operation performed in lye camp free of cost without obtaining any charges from any of the patients led to loss of vision. Held that complainant is not a consumer within the meaning of sec. 2 (1) (0) of the Act and was rightly dismissed.

**C. SIVA KUMAR V. JOHN ARTHUR**

Held that compensation of Rs 8,00,00 was awarded as the penis was totally damaged and dead. The complainant was not able to pass urine in the normal way. He could not marry which is certainly the loss and trauma he is going to suffer.

**N.K. KOHLI V. BAGAG NURSING HOME**

The opposite party filed a preliminary objection stating that the complainant, husband of the deceased had no locus standi to file the complaint he being a second category of heirs to the deceased. Finding that the complainant was a beneficiary of the service hired by him on payment of consideration by himself, the commission rejected the contention.

KUNAL SAHA V. SUKUMAR MUKHRJEE

It was held that even interference by the patient or attendant in the treatment being given by the defendant doctor was held to be contributory negligence resulting in reduction of compensation to the extent of 10 per cent.

PARMANAND KATARA V. UNION OF INDIA

Supreme Court observed that:

- ✓ There are no provisions in IPC, CrPC, Motor Vehicles Act, Etc., which prevent doctors from promptly attending seriously injured persons and accident cases before the arrival of police.
- ✓ The treating of the patient would not wait for the arrival of the police or completing the legal authorities.
- ✓ All government hospitals, medical institutions should be asked to provide immediate medical aid to all the cases.

SUNIL THAKUR V. GORACHAND GOSWAMS

It was a case of mismatched blood transfusion negligence was held so, compensation of Rs 5,38,000 and Rs 10,000 as cost was paid.

VINEET MEHROTRA (DR.) V. GIRIGESH MANI TRIPATHI

Payment only towards rent for part-paying room in government hospital. Nothing has been paid for the services by doctor. So, no-negligence.

MAHAVEER PRASAD V. STATE OF RAJASTHAN

Held that a person getting service free of charge from government hospitals not a consumer as defined under the Act.

DHANMANI DEVI V. SUDHA KUMARI

A poor patient getting treatment in a charitable institution free of charge also a consumer within the meaning of consumer protection Act.

KAMLA BAI PANDEY V. P.C. DWIVEDI

Eye surgery in government hospital for taken amount paid towards registration fee, not a consideration for hiring services and the complainant is not a consumer for the purpose of the Act.

RAMASWAROOP V.S. DIOAN

Eye surgery in government hospital for taken amount paid towards registration fee, not a consideration for hiring services and the complainant is not a consumer for the purpose of the Act.

RAMSWAROOP V. S. DIOAN

Services rendered on payment of charges to some and also free of charge to others falls within the ambit of services under the Act irrespective of the fact that the services are rendered to persons who do not pay. So, free service here would be treated as service and the recipient a consumer.

## IX. SUGGESTIONS

- ✓ There is no independent legislation which deals with the adjudication of medical negligence cases. It is necessary to make unified comprehensive legislation for medical negligence which is uniformly enforceable all over the country. This legislation must contain provisions regarding the regulation of better clinical management which will help reduce injury caused due to medical negligence. It should also contain the provisions regarding the prohibition of experimentation of new techniques on patients.
- ✓ Since very few complaints of medical negligence have been reported under the consumer protection Act. Government should take necessary steps to sensitize people about the fact that medical services are covered under services in consumer protection Act. Even consumer forums are not playing an active role to awaken the masses. They should not wait and see but they should move to different place and hold lok adalats; other camps, so that justice should reach the masses.
- ✓ The doctrine of charitable immunity which is excluded from the purview of consumer protection Act should be included. For this purpose the definition of services needs to be amended.

## X. FREE MEDICAL SERVICES

The medical treatment awaited by a patient in a government hospital, is not for a consideration. So, it is suggested that an amendment be issued to the act to delete the provision of "consideration", in regard to government health and medical services.

If the patient, who avails of the services of the government hospitals, is covered by an Insurance policy, then the patient becomes a beneficiary of the service of the government hospitals. Because of this the service termed here can't be said to be "free".

Payment for Special Wards should be considered under the Act as a consideration. The person paying here should be termed as a "consumer".

- ✓ Redressal agencies are constituted of judges, president and members which have only legal knowledge of medical negligence cases. So, an independent redressal body should be constituted for the adjudication which should include members from medical background also.
- ✓ In order to ensure the freedom of medical practitioner, before entertaining the complaints of medical negligence a preliminary inquiry should be conducted to ascertain the truthfulness of allegation.

Entertainment of malicious complaint against doctors curtails their freedom to profess the profession. Any person who maliciously complaints against the doctor should be punished severely.

- ✓ The practice of giving prescription without actual examination is one of major cause of these cases. So, it should be curtailed.
- ✓ Another major causes of such cases is that doctors used to diagnose the patient only by giving treatment on the basis of symptoms without adequate tests. So, this should not be done.
- ✓ Lack of adequate knowledge about the latest medical techniques also give rise to incidents of medical negligence. So, government should formulate a system of continued medical education in order to make doctors aware of recent developments in their respective fields.
- ✓ Drug trials involve a lot of risk to patient life and health. So, a doctor should not experiment unless necessary.
- ✓ Post-Operative Infections also leads to such cases, so, guidelines of Medical Council of India regarding sterilization should be study observed.
- ✓ The Discovery rule should be applied in India. It came from West Virginia. In the case Moran v. Grace hospital Inc. a piece of sponge had been left in the wound during a surgical operation but its presence in the body didn't come to light until 10 years later. The court objected & rejected the contention of limitation.
- ✓ S.C. immer guidelines to the private hospitals to inform the relatives or friend of patient, who spend hour outside the intermine can and critical care units, raving no idea as to what treatment was being administrated to their loved one.
- ✓ Information regarding what kind of treatment is given should be provided to the patient's family. But, there is also a fault on the part of the patients that they don't ask anything regarding the treatment. When asked them also doctors do not provide the information

#### XI. CONCLUSION

Medical negligence is a neglect on the part of medical practitioners. Every system of medicine suffers from certain short comings since each system is to be handled by human agency, it is subject to imperfection, but at the same time it does not exonerate the human agencies from their share inability of causing harm. Basic principle of medicine is "preum non nocere" but it is violated on a large scale. The date clearly shows that the consumer i.e. patients do not have adequate knowledge about their rights. So, awareness should be provided with the help of the enactment specially on medical negligence.

It has been rightly narrated "Legislation can't by itself normally solve the deep rooted, social problems, one has to approach them in other ways too, but legislation is necessary and essential, so that it may give that push & that educative factor as well as the legal sanctions behind it which it help public opinion to be given a certain shape." (Jawahar Lal Nehru).

#### REFERENCES

- [1] P.M. Bakshi, "Law and Medicine", 97 (1987).
- [2] Law of Torts, Ratanlal & Dhirag lal, Twenty Fourth Edition, edited by J. G.P. Singh, pp. 441-442.
- [3] Vincent Powell-Smith and Paul Barber, Tort Notebook, pp. 35.
- [4] Keith Simpson, Tylor's principles and practice of medical jurisprudence, 55 (12<sup>th</sup> Edn. 1965).
- [5] Martin F. D'Souza v. Mohd. Ishfaq, (2009) 3 SCC 6.
- [6] Jacob Mathew v. State of Punjab
- [7] Rattan Lal & Dhiraj Lal, The Law of Torts, 441 (2<sup>nd</sup> Edn. 2005).
- [8] *Id.* at 78.
- [9] Bolam v. Frien Hospital Management Committee, (1957) 2 All 118; The Bolam rule get recognition in Jacob Mathew v. State of Punjab (2005) 6 SCC 1.
- [10] State of Punjab v. Shiv Ram
- [11] Poonam Verma v. Ashwin Patel, (1996) 4 SCC 332 at para 16.
- [12] M.N. Shukla, The Law of Torts, 216 (13<sup>th</sup> Edn.).
- [13] R.F.V. Heiston, Salmond on the law of Torts, 140 (7<sup>th</sup> Edn).
- [14] Jackson and Powell, "Professional Negligence", 123 (5<sup>th</sup> Edn, 2002).
- [15] Y.V. Raw, Law relating to Medical Negligence, 93 (2<sup>nd</sup> Edn, 2010).
- [16] Samira Kohli v. Dr. Prabha Manchaude and others, 2008 (1) CPJ 56 (SC).
- [17] S. Thamil Selvi v. Dr. Sooriya Kala & another (2007) CP7 216 (NC).
- [18] *Supra* note 16 at para 32.
- [19] Suresh Gupta v. Govt. of NCT of Delhi & another, (2004) 6 SCC 423.
- [20] Professor Bernard Knight, Lox's Medical Jurisprudence and Toxicology 108 (7<sup>th</sup> Edn).
- [21] *Id.* at 108.
- [22] P.S. Atchuthen Pillai, Law of Tort, 388 (8<sup>th</sup> Edn), 2002.
- [23] Achrutraq H. Khodwa v. State of Maharashtra, AIR 1996 SC 2381 at para 11.
- [24] Article 32 (3), The Constitution of India.
- [25] Sec. 23, The Consumer Protection Act, 1986.
- [26] V. Balakrishna Eradi, Consumer Protection Jurisprudence, 85 (2005).
- [27] Section 9, Civil Procedure Code.
- [28] Section 22B, legal services Authorities Act, 1987.
- [29] Section 4. Cr. P.C.
- [30] AIR 1996 SC 550.
- [31] AIR 1995 (8) JT 119.
- [32] Paschim Baga Khet Mazdoor samity v. State of West Bengal, 1996 (4) SC 260.
- [33] Basugit Gangopadhyaya (Dr.) v. Agayendu Nag, 2010 CTJ149; Ksturi Medical Research Centre Pvt. Ltd. v. Agayender Nag, 2009 (4) CPJ 272.
- [34] See sections 11 and 14 of consumer Protection Act, 1986 in Appendix VIII.
- [35] See section 12 (2) of the Act, 1986 Appendix VIII.
- [36] As amended by the Consumer Protection (Amendment) Act, 2002, w. e. f. 15.3.2003.



[37]VN Shrikhande v. Anita Sena Fernandes, AIR 2011 Sc 212.

[38]Accident / Emergency are- Denial of treatment amounts to gross negligence.

IJIRAS