

## MEDICAL NEGLIGENCE LIABILITY UNDER THE CONSUMER PROTECTION ACT: A JUDICIAL APPROACH

Dr. Jyoti Dharm\*

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### Introduction

Medical profession is highly respected in the society in the society. Doctors in private practice or in hospital services try their best to treat patients with due care and diligence. Even then there are many medical negligence claims which come before consumer Courts and also before criminal and civil Courts. Now it has been covered under the Consumer Protection Act 1986.

In earlier civilizations, medical negligence was considered more as a crime rather than as a tort. The early tribal or communal law depended on local practice and custom for controlling the actions of the members of the medical profession.<sup>25</sup>

In the earliest Indian medical literature, the word '*mithya*' which means false, illusive, incorrect, wrong and improper, has been used to describe the negligent medical treatment. In *Sushruta Samhita* stated that the physicians who act improperly are liable to punishment and the quantum of penalty varies according to the status of the victims.<sup>26</sup>

However, the damages for medical negligence varied on the basis of the severity of injury or loss of life. *Yajnavalkya Smriti*<sup>27</sup> mentions 1000 *pana* as the highest penalty for medical negligence.

### Negligence under Law of Tort

Negligence as a tort is the breach of duty caused by the omission to do something which a reasonable man, under a given set of circumstances, would or doing some act, which a prudent and

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\* Assistant Professor, New Law College, Bharati Vidyapeeth Deemed University, Pune, Maharashtra, India.

<sup>25</sup> Modi's Medical Jurisprudence and Toxicology, Lexis Nexis Butterworth's Publication, Twenty-third Edition.

<sup>26</sup> Mahalwar KPS, Medical Negligence and Law, New Delhi, p.33.

<sup>27</sup> Yajnavalkya Smiriti, 1936, VL 4<sup>th</sup> edn., Bombay.

reasonable man would not do.<sup>28</sup> This definition incorporates the following interrelated, yet independent constituents:-

1. A legal duty to exercise reasonable skill, knowledge and care;
2. A breach of that duty; and
3. Consequential damages arising from such breach<sup>29</sup>

The test for determining the negligence of a medical professional was first given by McNair J. in *Bolam's case*<sup>30</sup> to be 'the standard of the ordinary skilled man exercising and professing to have that special skill'.

The English view is that a doctor is not guilty of negligence if he has acted in accordance with the practice accepted as proper by a responsible body of medical men. But what amounts to reasonable conduct should only be decided upon by the court, based on the views of the experts in the field. As to what other medical professionals do in similar situations, will be a material consideration to be weighed by the court. The view in *Bolam's case* was accepted in India in the landmark case of *Suresh Gupta v. Govt. of NCT of Delhi and Anr.*<sup>31</sup> However, that case got referred to a larger bench of the Supreme Court and finally in *Jacob Mathew v. State of Punjab*,<sup>32</sup> and *Shiv Ram v. State of Punjab*<sup>33</sup> the *Bolam* test was approved.

### Consumer Protection Act and Medical Profession

The Consumer Protection Act, 1986 in India has opened a new quasi-judicial, cheap and convenient system of redress for the consumer of goods and services. The Act in section 2(1) (d) define who is consumer and in section 2 (1) (o) define what is service. The definition of service is not an exhaustive one, so if health service is not specifically mentioned in the provision it has been interpreted that the provision includes such services, inspite of existence of professional regulatory bodies.

The Supreme Court in *Indian Medical Association v. Shantha*<sup>34</sup> has been the first case in which the court has included health

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<sup>28</sup> *Poonam Verma v. Ashvini Patel & Ors.*, (AIR 1996 SC 2111).

<sup>29</sup> <http://www.desikanoon.co.in/2012/08/judicial-interpretation-of-medical.html>.

<sup>30</sup> (1957) 2 All ER 118.

<sup>31</sup> (2004) 6 SCC 422.

<sup>32</sup> (2005) 6 SCC 1.

<sup>33</sup> AIR 2005 SC 3280.

<sup>34</sup> 1995 (6) SCC 651.

services in the definition of services under the Consumer Protection Act:

1. Medical Services are treated as in ambit of "services" under Section 2(1) (o) of the Act.
  - It is not contract of personal service as there is absence of master servant relationship.
  - Contract of service in Section 2(1) (o) cannot be confined to contracts for employment of domestic servants only. The services rendered to employer are not covered under the Act.
2. Medical Services rendered by hospital/nursing home free of charge are not in the purview of Section 2(1) (o) of the Act.
3. Medical Services rendered by independent Doctor free of charge are under Section 2(1) (o) of the jurisdiction of the Act.
4. Medical Services rendered against payment of consideration are in the scope of the Act.
5. A medical service where payment of consideration is paid by third party is treated as in the ambit of the Act.
6. Hospital in which some person are charged and some are exempted from charging because of their inability of affording such services will be treated as consumer under of Section 2(1) (d) of the Act.

In *Nihal Kaur v. Director, P.G.I.M.S.R.*<sup>35</sup> a patient died a day after surgery and the relatives found a pair of scissors utilized by the surgeon while collecting the last remains. The doctor was held liable and a compensation of Rs. 1.20 lakhs was awarded by the state consumer forum, Chandigarh.

Recently the Supreme Court in *Malay Ku. Ganguly v. Sukumar Mukharjee*<sup>36</sup>, exhaustively dealt with 'medical negligence' and the standard of care 'that is required to be exercised by a doctor the court framed certain principles and observed that there cannot be, however, by any doubt or dispute that for establishing medical negligence or deficiency in services, the courts would determine the following:

- No guarantee is given by any doctor or surgeon that the patient would be cured.
- The doctor however must undertake a fair reasonable and competent degree of skill, which may not be the highest skill.

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<sup>35</sup> (1996) CPJ 112.

<sup>36</sup> AIR 2010 SC 1162.

- Adoption of one of the modes of treatment, if there are many and treating the patient with due care and caution would not constitute any negligence.
- Failure to act in accordance with the standard, reasonable degree of care and skill and knowledge which he possesses. Failure to use due skill in diagnosis with the result that wrong treatment is given would be negligence.
- In a complicated case, the Court would be slow in attributing negligence on the part of the doctor, if he is performing his duties to the best of his ability.

The Court further took the view that informed consent after evaluating the risks is increasingly becoming a requirement keeping the developments in medical science in view and opined that no communication was made in this case by the doctors about the risks involved in the line of treatment, whereupon the patient would decide whether to opt for such treatment or not.

## **Conclusion**

The concept of medical negligence as we have seen is simply one of the principles which is deeply engrained in Tort Law. The present legal position in regard to Criminal Liability of a doctor is that it cannot be fixed upon the doctor unless there is a prima facie of gross negligence and recklessness. On the basis of the interpretation of the judicial decisions of the Supreme Court certain principles have been provided which can, if implemented effectively, help the courts to develop the law on medical negligence which at the present is faced with many obstacles and has seen frequent deadlocks in several cases.

The Consumer Protection Act provides an inexpensive and speedy remedy for adjudication of such claims. No court fee is needed for any claim made before the consumer courts. Thus a poor person who has been given deficient services by medical practitioners, hospitals or nursing homes can conveniently seek redress.