



## Medical negligence and consumer protection Act: A critical assessment

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**Abstract:** *In the twentieth century, the hospital's sole responsibility was "to provide a properly equipped medical facility". Over the years the function of the hospital has slowly changed from a venue for treatment to a provider of treatment. The patient has a right to expect a certain standard of care when he puts himself in the hands of the hospital authority or health care providers. When a hospital fails to uphold this responsibility, the institution may be held liable for causing damage to its patients. They can be vicariously as well as directly liable for providing health care facilities. 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. This article reviews the issue of liability of the hospital with reference to medical negligence and the resulting implications both to the hospital as well as the patients. COPRA has always been a strong tool for consumers in fighting the menace of any service available to them.*

**Keywords:** *Negligence, Vicarious Liability, Compensation, Liability, Awareness, Professional Misconduct.*

"Doctor Treat, God Cures"

&

"Doctor Operates, God Saves".

**Introduction :** A doctor is said to be not negligent if he is acting in accordance with the practice accepted as proper by reasonable body of medical men skilled in that particular art. It is the duty of the government to provide the fundamental right to life and personal liberty guaranteed by Article 21 of the Constitution. Therefore, it is the duty of the state to provide to all citizens adequate and proper medical services<sup>1</sup>. The COPRA, 1986 was enacted 'to provide for better protection of the interests of the consumers'- the consumers of goods and services as defined under the Act. Negligence is the breach of a legal duty of care. A breach of this duty gives the patient a right to initiate action against negligence<sup>2</sup>. All

medical professionals, doctors, nurses, and other health care providers are responsible for the health and safety of their patients and are expected to provide a high level of quality care. Unfortunately, medical professionals and health care providers can fail in this responsibility to their patients by not giving them proper care and attention, acting maliciously, or by providing substandard care, thus causing far-reaching complications like personal injuries, and even death<sup>3</sup>. Over the years the function of the hospital has slowly changed from 'a venue for treatment' to 'a provider of treatment.'

But today with the increase in medical negligence and malpractices this profession is looked upon with doubt and



contempt. The deterioration in the standard of patient care is considered to be due to interest in the monetary gains. The Consumer Protection Act was passed in 24th December, 1986 for the better protection of the interest of consumers and to make provisions for the establishment of consumer councils and other authorities for the settlement of consumer's dispute and for matters connected therewith.

The 'Bolam' test in *Bolam vs. Frien* hospital management committee (1957). Mr. Bolam was advised electro convulsive therapy for mental illness. He was however, not warned of the risks of fractures involved in the treatment. There were two bodies of opinion. One preferred the use of relaxant drugs. Using relaxants, the patient sustained dislocation of both hip joints with fracture of pelvis. The Supreme Court held that the doctor was not negligent because he acted in accordance with practice accepted as proper by a responsible body of medical men skilled in that art. The 'Bolam' principle implies that a doctor is not negligent if he acts in accordance with a practice accepted at the time as proper in diagnosis and treatment but also to advice and warning by a "responsible body" of medical opinion even though other doctors adopt a different practice. A doctor is not liable for taking one choice out of two for favouring one line of treatment rather than another.

In a landmark case in 1995, the Supreme Court decision in *Indian Medical Association vsVP Shantha*,<sup>4</sup> medical profession has been brought under the Section 2(1) (o) of Consumer Protection Act, 1986 and also, it has included the following categories of doctors/hospitals under this Section:

1. All medical/dental practitioners doing independent medical/dental practice unless rendering only free service.
2. Private hospitals charging all patients.
3. All hospitals having free as well as paying patients and all the paying and free category patients receiving treatment in such hospitals.
4. Medical/dental practitioners and hospitals paid by an insurance firm for the treatment of a client or an employment for that of an employee.

The medical profession has also been included within the ambit of a 'service' as defined in the Consumer Protection Act; 1986. This defined the relationship between patients and medical professionals as contractual and not a master servant relationship as argued by the medical professionals. Patients who had sustained injuries in the course of treatment can now sue doctors in consumer protection courts for compensation.

#### **Rights under constitution**

The Constitution of India does not confer any special rights relating to health care although courts have read such rights as interest in Article 21 of the constitution. The Supreme Court in *Paschim Banga Kheta Mazdoor Samity and others v. State of West Bengal*<sup>5</sup> the Apex Court held that denial of emergency treatment on the ground of unavailability of beds in a Government Hospital is a violation of fundamental rights on the ground of constraints of finance. Further, *Pt. Paramanda Katara V. Union of India*<sup>6</sup> the Supreme Court was of the view that the duty of the doctor in an emergency to begin treatment of the patient & he should not wait the arrival of the police or to complete the legal formalities.

#### **Negligence: A Tort and Crime**

In common parlance, negligence means carelessness, lack of proper care and



attention. In law, negligence becomes actionable, when it results in injury or damage. Negligence is treated as a tort as well as a crime. As a tort, it is actionable under the civil law and as a crime under the criminal law. Actions for damages in tort are filed in civil courts and after coming into force of the COPRA 1986, in consumer forums also. Criminal complaints are filed under the relevant provisions of the Indian Penal Code and Criminal Procedure Code alleging rashness or negligence on the part of the persons concerned. Negligence is also a deficiency in service and actionable, whether committed by an individual doctor, a hospital, a lawyer, an architect, a builder or any individual. A doctor owes to his patient 'to bring to his task a reasonable degree of skill and knowledge and to exercise a reasonable degree of care.' And, he is not guilty of negligence 'if he acted in accordance with the practice accepted as proper by a reasonable body of medical men skilled in that particular art.'

The skill of medical practitioners may differ from one doctor to another. There may be more than one course of treatment which may be given for treating a particular disease. Medical opinion may differ with regard to the course of action to be taken for treating a patient. As long as the doctor acts in a manner which is acceptable to the medical profession and he treats the patient with due care and skill, the doctor will not be guilty of negligence even if the patient does not survive or suffers a permanent ailment. Some of the important duties are to:

- exercise a reasonable degree of skill and knowledge and a reasonable degree of care;
- exercise reasonable care in deciding whether to undertake the case and

also in deciding what treatment to give and how to administer that treatment;

- extend his service with due expertise for protecting the life of the patient and stabilize his condition in emergency situations;
- attend to his patient when required and not to withdraw his services without giving him sufficient notice;
- study symptoms and complaints of the patient carefully and administer standard treatment;
- carry out necessary investigations through appropriate laboratory tests wherever required to arrive at a proper diagnosis;
- advise and assist the patient to get a second opinion and call a specialist if necessary;
- obtain informed consent from the patient for procedures with inherent risks to life;
- take appropriate precautionary measures before administering injections and medicines and meet emergency situations;
- Inform the patient or his relatives the relevant facts about his illness.

#### **Medical negligence and criminal law**

Medical Negligence may be defined as the "act of omission which a reasonably competent medical practitioner, guided by such medical knowledge and practice as is commonly known at the time and at the place where he practices and further guided by such other considerations which ordinarily regulate the conduct of a reasonably competent medical practitioners, would do, or doing something which a reasonably competent medical practitioners would not do".

It is the failure on the part of a doctor to exercise his skill and diligence, which are required of a medical professional



resulting in harm to the patient. However deviation from common practice is not necessarily an evidence of negligence. Similarly a mere accident or error of judgment is also not evidence of negligence. To label any act or omission by the doctor as negligence, all the essential ingredients of medical negligence must be present.

The essential constituents of negligence include four "D"s namely:

1. Duty of Care towards Patient (Doctor Patient Relationship)
2. Dereliction or Breach in Duty of Care
3. Damage that results to the patient must be Reasonably Foreseeable
4. Direct Causation (Direct relation between the Breach in Duty of Care and the Damage)

There are of course provisions in the Civil and Criminal law offering remedies to aggrieved patients. But the Criminal law was pressed into services mostly in case of death as if bodily injury lesser than death has resulted from negligence, then charge would be either simple hurt or grievous hurt. Liability of criminal law is probably different from Civil Law, therefore the standard of proof is also different from that of Civil Law, which is stricter and has to be established beyond all reasonable doubts. Section 304 A IPC deals with causing death by rash or negligent act and this has been applied to doctors. While dealing with Section 304 A IPC the Courts have reiterated that criminal negligence is a gross neglect and cells for high degree of indifference on the part of the accused. Criminal negligence is a dangerous act with the knowledge that it may cause injury but without intention to cause injury or knowledge that it will be probably be caused. The criminality lies in running risk of doing such an act with

recklessness or indifference as to consequences. Criminal negligence is the gross and culpable neglect or failure to exercise that reasonable and proper care and precaution to guard against injury either to the public generally or to individual in particular. The insertion of Section 357 C in Criminal Procedure Code 1973 imposes a statutory duty on hospitals run privately or Govt. or autonomous agencies to provide first aid or medical treatment immediately free of charge to victims of offences covered under sections 326 A, 376, 376 A, 376 B, 376 C, 376 D or 377 of Indian Penal Code & should also inform the police of such incident. The victim of this problem is punishable under section 166 B of the IPC. The punishment may be extending to 1 Year or fine or both.

A criminal liability arises, when it is proved that the doctor has committed an act or made omission that is grossly rash or negligent, which is the proximate, direct or substantive cause of patient's death. There are multiple sections in the Indian Penal Code, 1860 under which a person aggrieved due to any deficiency in service can file a case against the relevant person or authority. Section 304-A has come to the fore quite often in cases of medical negligence as the same deals with "causing death by negligence". The Section reads as thus – Whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both. Apart from this, sections 319-338 of IPC speaks about causing hurt and grievous hurt, voluntarily or even accidentally for that matter. Sections 312-316 of IPC further lay down the punishments for miscarriage, which can be specifically



brought under medical law. Sections 87, 88, 89, 90 and 92 of IPC explicitly mention that in cases where the act is done with the consent of the person, then that particular act would fall under the general exceptions thereby reducing the liability of the person.

Similarly, Section 357 of the Code of Criminal Procedure 1973 provides for compensation that can be ordered in cases a doctor is held criminally liable for any offence. In *Jaggankhan vs. State of MP*, a homoeopathic doctor gave to his patient, who was suffering from guinea worms, 24 drops of stramonium and a leaf of *datura* without contemplating the reaction such a medicine could cause, resulting in the death of the patient. The doctor was held guilty of criminal negligence for committing the offence under this section. Recently the Supreme Court in *Dr Suresh Gupta vs. Government of NCT* has declared that for fixing criminal liability on a doctor or surgeon, the standard of negligence required to be proved should be so high that it can be described as 'gross negligence' or 'recklessness' and be made criminally liable for offence under Section 304-A IPC. The medical services which are excluded from the purview of COPRA are:

1. Under the contract of personal service, i.e. where a medical professional, in the capacity of an employee renders some professional service to his employer. In other words, wherever there is master and servant relationship between the recipient of the medical treatment and the doctor, the same would fall outside the purview of the definition of service under the Act.
2. At a government or non-government hospital/health centre/dispensary where no charge what so ever is collected from

any patients whether rich or poor would fall outside the purview of service under the Act.

### **Vicarious Liability of Hospital**

Hospitals and nursing homes are equally liable for the negligence of the paramedical staff and doctors working under them. In case of negligence by the doctor or the professional staff, the patient can claim damages either from the doctor or from the hospital under the doctrine of vicarious liability.

### **Direct liability**

A hospital can be held directly liable for negligence on many grounds. Failure to maintain equipments in proper working condition constitutes negligence. In case of damage occurring to a patient due to absence/ non-working equipment e.g. oxygen cylinder, suction machine, insulator, ventilator etc. the hospital can be held liable<sup>7</sup>. Failure to hand over copies of medical records, X-rays, etc., constitutes negligence or deficiency in service. In India, a provision in respect of medical records has been made in the Indian Medical Council [Professional conduct, Etiquette and Ethics] Regulations 2002, Regulations 1.3.1 and 1.3.2 which state that every registered medical practitioner has to maintain medical records pertaining to its indoor or outdoor patients for a period of at least three years from the date of commencement of treatment in the prescribed form given by MCI and if any request is made for medical records either by patient/ authorized attendant or legal authorities involved, the same may be duly acknowledged and documents be issued within the period of 72 hours<sup>8</sup>. Also it must not be forgotten that it is the right of every patient to obtain in writing about his/her medical illness, investigations and treatment



given on a prescription/ discharge ticket. Non-providing of medical records to the patients/ attendants may amount to deficiency in service under the Consumer Protection Act, 1986.

In *Mr. M Ramesh Reddy v. State of Andhra Pradesh* [2003 (1) CLD 81 (AP SCDRC)], the hospital authorities were held to be negligent, inter alia, for not keeping the bathroom clean [in this case the bathroom was covered with fungus and was slippery], which resulted in the fall of an obstetrics patient in the bathroom leading to her death. A compensation of Rs. 1 Lac was awarded against the hospital.

In another judgment by the Madras High Court in *Aparna Dutta v. Apollo Hospitals Enterprises Ltd.*<sup>9</sup>, it was held that it was the hospital that was offering the medical services. The terms under which the hospital employs the doctors and surgeons are between them but because of this it cannot be stated that the hospital cannot be held liable so far as third party patients are concerned. It is expected from the hospital, to provide such a medical service and in case where there is deficiency of service or in cases, where the operation has been done negligently without bestowing normal care and caution, the hospital also must be held liable and it cannot be allowed to escape from the liability by stating that there is no master-servant relationship between the hospital, and the surgeon who performed the operation.

In another judgment by the National Consumer Redressal Commission in case of *Smt. Rekha Gupta v. Bombay Hospital Trust & Anr.*<sup>10</sup>, the NCDRC related to negligence of a consultant doctor, the Commission observed that the hospital

who employed all of them whatever the rules were, has to own up for the conduct of its employees. It cannot escape liability by mere statement that it only provided infrastructural facilities, services of nursing staff, supporting staff and technicians and that it cannot suo moto perform or recommend any operation/ amputation. Failure of the senior/ super specialist to personally supervise the postoperative care may not constitute negligence provided the doctor to whom responsibility of the post-operative care lies is competent; same applying to a visiting physician. It has been held by National Consumer Redressal Commission [1993 (3) CPR 414 (NCDRC)] that in case of the operation being performed in an institution, it is the duty of the institution to render postoperative treatment and care to the hospital's patients.

In many cases of negligence against government hospitals, it has been held that the State is vicariously liable for negligence of its doctors or staff or even primarily liable where there is lack of proper equipment or staff. In few cases, court has passed orders to the effect that the compensation paid to the complainant may be recovered from the government doctors whose negligence has been established. The Honorable Supreme Court in *Achutrao & ors v. State of Maharashtra & Ors*<sup>11</sup>. The Apex Court has observed that running a hospital is a welfare activity undertaken by the Government but it is not an exclusive function or activity of the Government so as to be regarded as being in exercise of its sovereign power. Hence, the State would be vicariously liable for the damages which may become payable on account of negligence of its doctors or other employees.



In another case of Smt. Santra v. State of Haryana & Ors<sup>12</sup>, the Apex Court contention that the State is not vicariously liable for the negligence of its officers in performing the sterilization operation was not accepted in view of the above judgment of the Supreme Court of India. The Honorable Punjab and Haryana High Court, in Punjab State v. Surinder Kaur<sup>13</sup>, the P&H-HC has stated that the doctor working in a government hospital was performing the duty while he/ she was under the employment of the State and in these circumstances, the master is always responsible for the vicarious liability of the acts committed by the employee in the course of such employment. It is for the State to determine the liability of the erring doctors.

#### **Medical Negligence: Award of Compensation**

As observed, the number of medical negligence cases against Doctors, Hospitals & Nursing Homes is increasing day by day. It has been held that the Doctors, Hospitals, Nursing Homes and other connected establishment are to be dealt with strictly if they are found to be negligent with patients who came to them pawning all their money with the hope to live a better life with dignity. The patients irrespective of their social, cultural and economic background are entitled to be treated with dignity which not only forms their fundamental rights but also their human rights. This decision acts as a deterrent and remainder to those Doctors, Hospitals, and Nursing Homes and other connected establishments who do not take their responsibility seriously. In the instant case the Doctors and Hospitals were held negligent in treating the wife of the claimant on account of which she died. The deceased a resident of U.S.A. Had

contacted a rare skin disease while on a vacation in India and she died due to poor diagnosis & prescription of overdose of steroids. The National Commission held 3 doctors & hospital negligent & awarded a compensation of Rs. 1, 34, 66, 000/-. The Supreme Court has enhanced the amount from Rs. 1, 34, 66, 000/- to Rs. 6, 08, 00, 550/- with six percent per annum from the date of filing the complaint.

#### **Pregnancy despite Sterilization operation**

**In Meena Devi V. Ministry of Health, Uttarakhand and another<sup>14</sup>**, the high held that no negligence is found in sterilization operation and hence the claimant not entitle to damages. It is fact that there was pregnancy despite sterilization operation. Form signed by claimant declaring that she was undergoing sterilization operation & that she understands that such operation at times are unsuccessful. Statements given by the doctor conducting operation, that such operation at times could get unsuccessful.

**Dr. N. Kumar V. K.M. Hameed & others<sup>15</sup>** the Court found that biopsy on patient conducted by pathologist and illness wrongly diagnosed as Tuberculosis. Patient actually suffered from Cancer Death of Patient was occurred for want of proper treatment in time. Wrong diagnosis by expert in pathology amounts to professional negligence. Pathologist held liable to pay compensation.

**Conclusion and Suggestions:** The idea of negligence can be understood only when there is clarity about the duty of the doctor, assisting staff and the hospital as a whole. In several cases, there is a problem of overlapping duties and thus,



it becomes difficult to draw a line between the duty of A and B. In any case, the doctor is under an obligation and is directly liable for the acts performed by him. For the assisting staff, it is the duty of the hospital and the person himself. It provides a basic framework, which helps in deciding matters in situations of confusion and failure. Hence after the consumer protection act has included the medical professional in its ambit it has proved to be double-edged sword for a doctor. In my considered view a doctor should give more importance to excellence in the treatment and patient care and not to the rapid globalisation and commercialisation which have engulfed our society today. COPRA has been of immense help to all consumers of goods and services after it came into force in 1986. Medical services also come under the purview of service in the broader sense as formulated under the Act. The people are now confident enough while visiting doctors and getting treated and can rely on consumer forums to get fast redressal in case of any deficiency in service. The doctors also treat the patients with greater care and caution than they earlier used to because of the existence of this law.

#### References:

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<sup>4</sup> AIR 1996 SC 550 : (1995)6 SCC 651.

<sup>5</sup> AIR 1996 SC 2426

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<sup>9</sup> 2002 ACJ 954 (Mad. HC)

<sup>10</sup> 2003 (2) CPJ 160 (NCDRC)

<sup>11</sup> JT 1996(2) SC 664

<sup>12</sup> (2005) 5 SCC 182

<sup>13</sup> 2001 ACJ 1266 (P&H-HC)

<sup>14</sup> AIR 2014 Uttarakhand 24

<sup>15</sup> AIR 2014 (NOC) 49 Ker