

## Right to Health and Medical Negligence Liability : A Review of Judicial Approach Bhagyashree A. Deshpande

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**Introduction** :Right to Health is not included directly as a fundamental right. But according to judicial interpretation, right to health is a fundamental right under Article 21 of the Constitution of India as it is an integral part of right to life. Directive Principle under Article 47 states the right to health and the Indian Judiciary had successfully brought the said right within an ambit of fundamental rights.

Medical profession is considered as noble profession and the doctor is bound to save a precious life of patient. The doctor patient relationship is a based on mutual trust and faith. It is fiduciary relationship. But now-a-days this relationship is getting deteriorated considerably. There are various reasons responsible for this thing such as communication gap between doctor and patient, commercialization of medical services, economic thrust of doctor, greediness of doctor to earn money through cut practice, negligence from the side of medical practitioner, raised expectations from medical practitioners, increased consumer awareness and like that. Negligence means a lack of proper care in doing something. Medical negligence is the negligence from the side of the doctor / medical practitioner. It is negligent treatment to a patient by medical professionals / practitioners. Public awareness for medical negligence is increasing day by day in Indian Society. Negligence is the theory of liability concerning allegations of medical malpractices. The Consumer Protection Act, 1986 (C.P. Act) covers the solution of various problems related to medical negligence and safeguards the rights of the patients. Medical negligence means, negligence resulting from the failure on the part of the medical practitioner to act in accordance with medical standards in practice which are being practiced by an ordinarily reasonable, prudent and competent person practicing the same profession. There are so many examples of medical negligence such as commission of illegal acts beyond the scope of duty of medical practitioner, recklessness in abortion cases, prolongation of anesthesia, failure of eye surgery resulted into complete (total) blindness and like that. According to Charaks Oath (1000 B.C.) and Hippocratic Oath (460 B.C.), medical profession is a sacred profession. Doctors are second God of our life. They are deal with the life of human being and health protection of the patients. "...Heath will finally be seen not as a blessing to be wished for, but as a human right to be fought for...". Kofi Annan, UN Secretary General.

**Concept of Medical Negligence Liability** : A doctor / medical professional is liable for deficiency of service by way of professional negligence. Negligence is a failure to exercise the care that a reasonably prudent person would exercise in like circumstances. Negligence is a crime as well as a tortuous act. Under law of tort, negligence involves harm caused by mere carelessness, and not caused intentionally. Failure to do what is approved practice, failure to do attend to a patient when needed, lack of care in surgical operations, administering risky drugs and like that amounts to medical negligence and subject to liability. Medical negligence liability can be categories as 'civil negligence' and 'criminal negligence' as the negligence is a tort as well as crime.

**Criminal negligence** :Provisions under Indian Penal Code cover that acts of medical malpractice / negligence Section 304-A covers acts of medical professionals. According to this whoever causes the death of the person due to negligence or a rash act, not amounting to culpable homicide, can be tried and suitably punished with imprisonment for 2 years or fine or both. Sections 52, 80, 81, 93, 88, 90, 91, 92, 3904-A, 337 and 338 all over the acts of medical malpractice.

**Medical Negligence Liability And Judicial Approach** :Medical malpractices are increasing day by day. So the doctor should be held liable for negligence if he failed to take reasonable care of the patient by using his skills reasonably as a competent medical man would exercise. The field of medical malpractices is regulated by the law of torts under the tort of negligence. Civil suits can be instituted against the concerned doctor or hospital to claim damages for negligence in medical field. After passing of Consumer Protection Act in 1986, it has become on additional forum to the patients who have hired services of doctors/physicians are not outside the purview of Consumer Protection Act.

"It is no doubt true that the relationship between a practitioner and a patient carries within it certain degree of mutual confidence and trust, therefore, the services rendered by the medical practitioner can be

regarded as services of personal nature but since there is no relationship of master and servant between the doctor and the patient the contract between the medical practitioner and his patient cannot be treated as a contract of personal service but is a contract for services and the services rendered by the medical practitioner to his patient under such a contract is not covered by the exclusionary part of the definition of 'Service' contained in Section 2(1) (0) of the Act." [III (1995) CPJ 1 P.20.]

In case of deficiency in the medical services, the consumer (patient) can claim remedy under the provision of C.P. Act by a filing a complaint against doctor/hospital and medical negligence liability can be imposed on the doctor. Consumers have a right to seek redressal in consumer forums i.e. in the District Forum if the value of service and compensation claimed is less than 20 lakh rupees, before the State Commission if the compensation claimed is upto one crore rupees and in the National Commission if the compensation exceeds more than one crore rupees. Any person aggrieved by an order made by the District Forum may prefer an appeal against such order to the State Commission within a period of thirty days from the date of the order, in such form and manner as may be prescribed. From an order of State Commission appeal can be filed to a National Commission. Appeal from an order of the National Commission is filed in the Supreme Court. There are the examples of the landmark judicial pronouncements of the Supreme Court where medical negligence liability was imposed on the defendants (doctors/medical authorities). Expert evidence is required to prove medical negligence when allegation of medical negligence is not proved, no deficiency in medical services is considered and no liability is imposed on medical professional. Thus, an autonomy and integrity of medical profession is protected while considering an issue of imposition of medical negligence liability.

It is the duty of the consumer forums to impose liability upon the doctors in case of medical negligence and to protect the right to health of the patients. It is very important to safeguard the patients against malpractices by medical professions as right to health is one of the valuable human rights as well as a fundamental right under Article 21 of the Indian Constitution. However right to health was not included directly in the Constitution as a fundamental right. In *Parmanand Katara*,<sup>1</sup> the Supreme Court held that it is the professional obligation of all doctors, whether government or private, to extend medical aid to the injured immediately to preserve life without waiting legal formalities to be complied with by the police under the Cr.P.C. Article 21 of the Constitution imposes obligation on the State to preserve Life. It is the obligatory duty of the doctors to preserve and protect the life of the patient. Otherwise it would amount to medical negligence. In *A.S. Mittal*,<sup>2</sup> public interest litigation was brought under article 32 of the Constitution and the allied negligence on the part of the doctors in a free eye care camp. The operated eyes of the patient were irreversibly damaged owing to post operative infection. After an inquiry it was found that it was a case of medical negligence. The victims were awarded a compensation of Rs. 5000/- as interim relief. The State Government was directed to pay a sum of Rs. 12,500/- to each of the victims. In *Subhash Chandra Bose*,<sup>3</sup> the Supreme Court held that the right to health is a fundamental right. In a historic judgment in *C.E. and R.C.*,<sup>4</sup> the Supreme Court held that right to health and medical care is a fundamental right under Article 21 of the Constitution as it is essential for making the life of the workman meaningful and purposeful with dignity of person, "Right to Life" in Article 21 includes protection of the health and strength of the worker. The expression, 'Life' in Article 14 does not be a mere animal existence.

In *Indian Medical Association v. V. P. Shantha*,<sup>5</sup> the Supreme Court has evolved various new principles regarding the professional liability of medical professionals under the Consumer Protection Act. In this case the law discussed in this case is as follows.

**I.** In the matter of professional liability, professions differ from other occupations for the reason that professions operate in spheres where success cannot be achieved in every case and very often success or failure depends upon factors beyond the professional man's control. In devising a rational approach to professional liability which must provide proper protection to the consumer while allowing for the factors mentioned above, the approach of the courts is to require that professional men should possess a certain minimum degree of competence and they should exercise reasonable care in the discharge of their duties. In general, a professional man owes to his client a duty in tort as well as in contract to exercise reasonable care in giving advice or performing services. Medical practitioners do not enjoy any immunity and they can be sued in contract or tort on the ground that they have failed to exercise reasonable care" [III (1995) CPJ1 (SC) P.14].

**II.** Medical practitioners are not outside the purview of Consumer Protection Act. “Medical practitioners though belonging to medical profession are not immune, from claim for damages on the ground of negligence. Merely because medical practitioners belong to the medical profession they are not outside the purview of the provisions of the Act. Services rendered by the medical practitioners are covered by Section 2(1) (o) of the Act” [III (1995) CPJ 1(SC) P.15.

**III.** The Court held and clarified that the service provided to a patient by a medical practitioner by a way of construction, diagnosis, treatment, surgery etc. would come with the purview of provisions of the Consumer Protection Act.

There are various facets of the medical negligence and liability for medical negligence was imposed on the doctors/ hospital authorities by the National Commission and the Supreme Court of India through various landmark judicial pronouncements. In Poonam Verma<sup>6</sup>, Dr. Ashwin Patel was registered homeopathic doctor but treated patient with allopathic medicines. It was held that this amounts to actionable negligence as patient dies due to wrong treatment by the doctor without having qualification in the discipline of allopathy. The National Commission directed Dr. Ashwin Patel to pay a sum of Rs. 3,00,000/- to the family and Supreme Court affirmed the order of the National Commission and imposed a further cost of Rs. 30,000/- In Spring Meadows Hospital<sup>7</sup>, hospital authorities were held vicariously liable for medical negligence caused on the part of the nurse as well as doctor. A nurse of Spring Meadows Hospital gave a wrong injection to a child. Due to that the child collapsed instantly and went into cardiac arrest. She didn't do this under the supervision of the resident doctor. She was not a qualified nurse. For the negligence on the part of the nurse as well as doctor in rendering their professional services, the hospital was held liable and made to pay the compensation of Rs. 12,50,000/- to the minor patient and Rs. 5,00,000/- to the parents for the acute mental agony. The appeal by the hospital was dismissed by the Supreme Court with a cost of Rs. 5,000/- to the hospital. In Pravat Kumar Mukherjee<sup>8</sup>, the National Commission held that the Ruby Hospital was guilty of deficiency of service and awarded Rs. 10,00,000/- as compensation to Sumanta's parents. In this case reliance was placed on the Supreme Court's decision in Parmanand Katara v. Union of India. The National Commission held that Sumanta was a consumer. He was hit by a bus and was brought to the Ruby General Hospital by passers-by. Hospital authorities demanded Rs. 15,000/- to be deposited immediately. The crowd that brought him to the hospital could collect Rs. 2,000/- and also offered the motor cycle of the victim to the hospital authorities. Also Sumanta gave them the Medical Insurance certificate. But still the hospital authorities stopped his treatment. Someone took him to the government hospital but unfortunately he died on the way. Compensation was awarded to Parvat Kumar, who is father of the deceased who was a student of B. Tech. 2<sup>nd</sup> Year. In Samira Kohli<sup>9</sup>, the Supreme Court has given various guidelines regarding the consent of the patient. It was held that –

- i) prior to a surgery, clear, real and valid consent is a must.
- ii) there was unauthorized removal of reproductive organs. Patient got admitted for Diagnostic Laparoscopy and the consent had to be obtained before commencing the treatment.
- iii) consent given for diagnostic and operative laparoscopy and laparotomy if needed, does not amount to consent for OH-BSO surgery meant for removing reproductive organs.
- iv) patient when competent adult, there is no question of someone else giving a consent. Consent given by the mother not valid or real consent.
- v) only exception, where additional procedure through unauthorized surgery can be necessary, is in order to save life or preserve health of a patient.
- vi) in this case the Supreme Court agreed with doctor that she performed the surgery in the interest of the patient. But the Court held that there was no consent given by Samira for hysterectomy or removal of ovaries and fallopian tubes and she was not admitted for it. The court directed that the doctor should not charge for the surgery and a compensation of Rs. 25,000/- should be paid for the unauthorized surgery. Thus the Court concluded that the consent of patient should be obtained prior to surgery in specific, real and clear manner.

There is a bulk of litigations where liability was imposed on the medical professionals under the Consumer Protection Act for the sufferings caused to the patients due to medical negligence, vitiated consent and breach of confidentiality arising out of doctor-patient relationship. However while doing this

integrity and autonomy of the medical profession should be protected. In *Asha Ram v. Dr. Rohit Grover*<sup>10</sup>, it was held by the National Commission that expert evidence is required to prove medical negligence. In this case, it was held that the complainant has failed to discharge the heavy onus of establishing negligence or defidient on the part of the doctor (respondent). Hence complaint was dismissed. In *Kailash Kumar Sharma*<sup>11</sup>, the complaint alleging negligent operation for cataract was dismissed for want of evidence. In *Kulvinder Kaur*<sup>12</sup>, the complainant alleged that meningitis was caused due to wrongful administration of spiral anesthesia. In the absence of any evidence complaint was dismissed. In *Jacob Mathew*<sup>13</sup> the Supreme Court of India defined ‘criminal negligence’ and held that “to prosecute a medical professional for negligence under criminal law it must be shown that the accused did something or failed to do something which in the given facts and circumstance no medical professional in his ordinary senses prudence would have done or failed to do.” In *Martin D’souza*<sup>14</sup>, the Supreme Court observed that –“In the matter of professional liability professionals differ from other occupations for the reason that professions operate occupations for the success cannot be achieved in every case and very often success or failure depends upon factors beyond the professional man’s control.”

### Conclusion

- Right to health is covered as one of the fundamental rights under Article 21 of the constitution.
- It is the duty of consumer redressal agencies to protect consumers (patients) against malpractices of medical professionals.
- Professional liability differs from other occupations.
- Unless there is prima facie evidence indicating medical negligence, notice either to a doctor or hospital cannot be issued.
- Consent of patient should be obtained in real, clear and specific manner prior to a surgery, otherwise it is not considered as valid consent.
- Balancing has been achieved between the concept of protection of patients (consumes) from medical negligence, vitiated consent and breach of confidentiality by the doctors and the protection of integrity and autonomy of medical profession.

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