"Consumer Protection In Digital Era: New Challenges"

Medical Negligence and the Laws in India

Ashwini Biradar
Asst. Prof. (LL.M.)

(TMV'S LOKMANYA TILAK LAW COLLEGE, PUNE)

Abstract

The idea of negligence in medical profession overshadows its credibility. First key concept in this design is medical negligence and it requires greater analysis as discussed further. The service which medical professionals render to us is the noblest. Any man practicing a profession requires particular level of learning, which impliedly assures a person dealing with him, that he possesses such requisite knowledge, expertise and will profess his skill with reasonable degree of care and caution. It should be taken in to consideration that the professional should command the "corpus of knowledge" of his profession. Since long the medical profession is highly respected, but today a decline in the standard of the medical profession can be attributed to increasing number of litigations against doctors for being negligent narrowing down to "medical negligence.

Synopsis

1. Introduction:

In the law of negligence, professionals such as lawyers, doctors, architects and others are included in the category of persons professing some special skill or skilled persons generally. Any task which is required to be performed with a special skill would generally be admitted or undertaken to be performed only if the per-

son possesses the requisite skill for performing that task. Medical negligence has caused many deaths as well as adverse results to the patient's health. This article focuses on explaining negligence under various laws, professional negligence, medical negligence and landmark as well as recent cases in India. This provides information on liability that can be incurred by the victim of the medical malpractice. It aims at providing information about the topic to create as much awareness as possible.

2.Concept of Medical Negligence:

Medical Negligence Medical Negligence means the failure to exercise reasonable skill as per the general standards and prevalent situations is called as medical negligence. It was also defined as want of reasonable degree of care and skill or willful negligence on the part of medical practitioners in the treatment of a patient with whom relationship of professional attendants established so as to lead to his bodily injury or permanent disability or loss of life.

In order to prove negligence the aggrieved consumer must be prove following ingredients before the court.

1. The doctor breached the duty of care,
2. The doctor owed him duty of care of a particular standard of professional conduct,
3. The patient (Plaintiff) has suffered any injury due to his breach and cause actual damage and the doctor's conduct was directly and approximate cause damage. Doctor owes certain duties to the patients who consult him for illness or not feeling well, deficiency in his duty results in negligence. Breach of duty means omitting to do something, which a reasonable doctor would do or being something that a reasonable doctor would not do, even if there is injury, the injury must be the proximate and direct result of breach of duty. It is now well-established fact that hospital and doctor providing medical service are covered under the Consumer Protection Act, 1986. In case V. Kisan Rao v. Nikhil Super Specialty Hospital [4] the Mxim resipsaloqiter is applicable to instance of medical negligence giving rise to deficiency in medical service in terms of sec. 2 (1) (g) in which instance the complainant is absolved of liability of prove anything else, and the respondent is burdened with the liability for proving that he has taken care and caution in the discharge of his duty. In action of negligence, it has to be proved by the patient that the doctor had not only the duty of care but he breached the duty of care. The breach of duty to care means omitting to do something which reasonable doctors do or doing something that a reasonable doctor would not do. It is also observed that, if there is injury, the injury must be the proximate and direct result of the breach of duty. Doctors are blamed

for the death of the patients without consideration about the limitations and handicaps they have in the discharge of their duties.

Medical negligence also known as medical malpractice is improper, unskilled, or negligent treatment of a patient by a physician, dentist, nurse, pharmacist, or other health care professional. Mistakes or Negligence in medical profession may lead to minor injuries or some serious kinds of injuries and sometimes these kinds of mistakes may even cause death. Since no man is perfect in this world, it is evident that a person who is skilled and has knowledge over a particular subject can also commit mistakes during his practice. Too err is human but to replicate the same mistake due to one's carelessness is negligence. The fundamental reason behind medical error or medical negligence is the carelessness of the said doctors or medical professionals it can be observed in various cases where reasonable care is not taken during the diagnosis, during operations, sometimes while injecting anaesthesia etc. Negligence doesn't arise just because of a wrongful conduct by a person; it is essential that that misconduct has caused a foreseeable harm to the other. If there's no harm, there's no negligence.
Negligence under Consumer Protection Legislations
Ever since professions have been included under the purview of consumer protection laws; medical practitioners too have felt the heat. It is on a footing different from any other kind of negligence. Under consumer protection laws, medical negligence is another form of deficiency in service. It is most akin to the liability under the law of torts. But there is stricter and broader liability in this situation as failure to exercise skill and care as is ordinarily expected of a medical practitioner is the test under consumer protection laws.

Admittedly, doctors have an extremely difficult duty to perform. They are the ones in whose hands a patient places what is most valuable to each human – their lives. It is for this reason that doctors are expected to exercise a very high degree of skill and care, but this is also the precise reason why they should not be inhibited in the exercise of their duty. Therefore the laws imposing liability on medical practitioners have been tailored to accord to practitioners maximum possible protection.

3.Medical negligence liability under the consumer protection act, 1986 :

With the awareness in the society and the people in general gathering consciousness about their rights, measures for damages in tort, civil suits and criminal proceedings are on the augment. Not only civil suits are filed, the accessibility of a medium for grievance redressal under the Consumer Protection Act, 1986

(CPA), having jurisdiction to hear complaints against medical professionals for 'deficiency in service', has given rise to a large number of complaints against doctors, being filed by the persons feeling aggrieved. The criminal complaints are being filed against doctors alleging commission of offences punishable under Sec. 304A or Sections 336/337/338 of the Indian Penal Code, 1860 (IPC) alleging rashness or negligence on the part of the doctors resulting in loss of life or injury of varying degree to the patient. This has given rise to a situation of great distrust and fear among the medical profession and a legal assurance, ensuring protection from unnecessary and arbitrary complaints, is the need of the hour. The liability of medical professionals must be clearly demarcated so that they can perform their benevolent duties without any fear of legal sword. At the same time, justice must be done to the victims of medical negligence and a punitive sting must be adopted in deserving cases. This is more so when the most sacrosanct right to life or personal liberty is at stake. Under Indian law, the remedies available to a person seeking redress for medical malpractice are:

1. Suit for damages under the Civil Procedure Code,
2. Complaint for negligence under the Criminal Procedure Code,
3. Redressal under the Consumer Protection Act, and
4. Medical Council of India for disciplinary action.

Multiple grievance redress facilities often cause confusion in the mind of aggrieved patients. At present, however, they choose to file their case at the various consumer courts under CPA because it is the easiest way. Although there are so many grievance redress facilities, their methods of proving negligence of medical professional are quite similar.

4.Judicial Contribution on Medical Negligence:

By and large the following legal issues have been addressed and responded to by different forums and Courts in India. Failure of an operation and side effects are not negligence. The term negligence is defined as the absence or lack of care that a reasonable person should have taken in the circumstances of the case. In the allegation of negligence in a case of wrist drop, the following observations were made. Nothing has been mentioned in the complaint or in the grounds of appeal about the type of care desired from the doctor in which he failed. It is not said anywhere what type of negligence was done during the course of the operation. Nerves may be cut down at the time of operation and mere cutting of a nerve does not amount to negligence. It is not said that it has been deliberately done. To the contrary it is also not said that the nerves were cut in the operation and it was not cut at the time of the accident. No expert evidence whatso-

ever has been produced.

Judicial Approaches

The Indian judiciary has commendable service in protecting and preserving the rights of the consumers as well as sensitizing the society concerning the rights of the consumers. The researcher through some case laws attempt to focus upon the new approaches of the judiciary relating to medical negligence liability under the Consumer Protection Act. Laxman B. Joshi v. T. B. Godbole and Another [8] in this case the duties which a doctor owes to his patients are clear. A person who holds himself out, ready to give medical advice and treatment undertakes that he is possessed of skill and knowledge for the purpose. Such a person, who consulted by the patient owes him certain duties, i.e. a duty of care in deciding to undertake the care, a duty of care in deciding what treatment to give and a duty of care in the admiration of that treatment. A breach of any of those duties gives right of action for negligence to the patient. The practitioner must bring his task a reasonable degree of skill and knowledge and must exercise a reasonable degree of care, neither the very highest nor a very low degree of care and competence judged in the light of the particular circumstances of each case is what the International Journal of Law 109 law requires.

Kusum Sharma v. Batra Hospital and Medical research Center and Other ,
in this case the court observed that, when the conduct of a medical practitioner, falls below the level of standards of reasonably competent medical practitioner in the same field they said medical practitioner would be liable for medical negligence, giving rise to deficiency in medical service in terms of section 2 (1) (g) of Consumer Protection Act

The recent judgment pronounced in Martin F. D'Souza V. Mohd. Ishfaq by the Hon'ble Supreme Court of India quite explicitly addresses the concerns of medical professionals regarding the adjudicatory process that is to be adopted by Courts and Forums in cases of alleged medical negligence filed against Doctors.

In March 1991, the Respondent who was suffering from chronic renal failure was referred by the Director of Health Services to the Nanavati Hospital in Mumbai for the purpose of a kidney transplant. At that stage, the Respondent was undergoing hemodialysis twice a week and was awaiting a suitable kidney donor. On May 20, 1991, the Respondent approached the Appellant doctor with a high fever, but he refused hospitalization despite the advice of the Appellant. On May 29, 1991 the Respondent who still had a high fever finally agreed to get admitted into the hospital due to his serious condition. On June 3, 1991, the reports of the urine culture and sensitivity showed a

severe urinary tract infection due to Klebsiella species (1 lac/ml) sensitive only to Amikacin and Methenamine Mandelate. Methnamine Mandelate cannot be used in patients suffering from renal failure. Since the urinary infection was sensitive only to Amikacin, an injection of Amikacin was administered to the Respondent for 3 days (from June 5, 1991 to June 7, 1991). Upon treatment, the temperature of the Respondent rapidly subsided. On June 11, 1991, the Respondent who presented to the hemodialysis unit complained to the Appellant that he had slight tinnitus (ringing in the ear). The Appellant has alleged that he immediately told the Respondent to stop taking the Amikacin and Augmentin and scored out the treatment on the discharge card. However, despite express instructions from the Appellant, the Respondent continued taking Amikacin until June 17, 1991. Thereafter, the Respondent was not under the treatment of the Appellant. On June 14, 1991, June 18, 1991, and June 20, 1991 the Respondent received hemodialysis at Nanavati Hospital and allegedly did not complain of deafness during this period. On June 25, 1991, the Respondent, on his own accord, was admitted to Prince Aly Khan Hospital. The Complainant allegedly did not complain of deafness during this period and conversed with doctors normally, as is proved from their evidence. On July 30, 1991, the Respondent was operated upon for a transplant and on August 13, 1991, the Respondent was discharged from Prince Aly Khan Hospital after his transplant. The Respondent returned to Delhi on August 14, 991 after his discharge. On July 7, 1992, the Respondent filed a complaint before the National Consumer Disputes Redressal Commission, New Delhi claiming compensation of an amount of Rs.12,00,000/- as his hearing had been affected. The Appellant filed his reply stating, inter alia, that there was no material brought on record by the Respondent to show any co-relationship between the drugs prescribed and the state of his health. The National Consumer Disputes Redressal Commission passed an order on October 6, 1993 directing the nomination of an expert from the All India Institute of Medical Sciences, New Delhi (AIIMS) to examine the complaint and give an unbiased and neutral opinion. AIIMS nominated Dr. P. Ghosh who was of the opinion that the drug Amikacin was administered by the Appellant as a life-saving measure and was rightly used. It is submitted by the Appellant that the said report further makes it clear that there has been no negligence on the part of the Appellant. However, the National Commission has come to the conclusion that the Doctor was negligent.

The law, like medicine, is an inexact science. One cannot predict with certainty an outcome in many

cases. It depends on the particular facts and circumstances of the case, and also the personal notions of the Judge who is hearing the case. However, the broad and general legal principles relating to medical negligence need to be understood. Before dealing with these principles two things have to be kept in mind:

1.Judges are not experts in medical science, rather they are laymen. This itself often makes it somewhat difficult for them to decide cases relating to medical negligence. Moreover, Judges usually have to rely on the testimonies of other doctors, which may not be objective in all cases. Since like in all professions and services, doctors too sometimes have a tendency to support their own colleagues who are charged with medical negligence. The testimony may also be difficult to understand for a Judge, particularly in complicated medical matters and

2.a balance has to be struck in such cases. While doctors who cause death or agony due to medical negligence should certainly be penalized, it must also be remembered that like all professionals doctors too can make errors of judgment but if they are punished for this no doctor can practice his vocation with equanimity. Indiscriminate proceedings and decisions against doctors are counter productive and are no good for society. They inhibit the free exercise of judgment by a professional in a particular situation.

Case Law:

1.Poonam Verma v. Ashwin Patel & Ors–

In this case, the Supreme Court delved into the issue of what is medical negligence. In the context, the Court held as under:

Negligence has many manifestations —it may be active negligence, collateral negligence, comparative negligence, concurrent negligence, continued negligence, criminal negligence, gross negligence, hazardous negligence, active and passive negligence, willful or reckless negligence or Negligence per se."Negligence per se is defined in Black's Law

Dictionary as under:

Negligence per se—Conduct, whether of action or omission, which may be declared and treated as negligence without any argument or proof as to the particular surrounding circumstances, either because it is in violation of a statute or valid municipal ordinance, or because it is so palpably opposed to the dictates of common prudence that it can be said without hesitation or doubt that no careful person would have been guilty of it. As a general rule, the violation of a public duty, enjoined by law for the protection of person or property, so constitutes.

5.Conclusion:

The Consumer Protection Act, protect the interest of the consumers. It provides simplified procedure for resolv-

ing the consumer's grievances. Through this Act consumers can protect their interest against deficiency in services. This Act provides a forum to the victims of negligence or deficiency in medical services by providing cheap, speedy and efficacious remedy. The judges observed that the legal system has to do justice to both patients and doctors. The fear of medical profession should be taken into consideration while the legitimate claims of the patient.

6.Bibliography :

http://shodhganga.inflibnet.ac.in/bitstream/10603/145463/3/chapter%202.pdf
file:///C:/Documents%20and%20Settings/user/My%20Documents/Downloads/3-5-127-476.pdf
https://www.vakilno1.com/legalviews/medical-negligence-case-laws.html

Reference:

Agarwal, V.K., Consumer Protection (Law & Practice) 6th Edition

Dr. Pandey j. N. Law of Torts and Consumers Protection Act, 5th Edition 2005, Central Law Publications, Allahabad

Legislation:

- Consumer Protection Act, 1986

***