

Civil Liability for Deficiency in Medical Services with Special Reference to Surgical Treatments: A Critique of Consumer Protection Act, 1986

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“The patient is not just a group of symptoms, damaged organs and altered emotions. The patient is a human being, at the same time worried and hopeful, who is searching for relief, help and trust”

Abstract:

The concept of negligence is well illustrated under the various statutory laws in India and all around the world but it's of grave importance when we coin the term negligence or deficiency in regard to medical services as it poses the question of life and death so it's of paramount importance to know what constitutes the concept of medical negligence. The duty of doctor towards his patient includes the use of utmost care who is seeking help for his illness. Understanding the concept of deficiency or medical negligence not only helps the doctors in doing their duty without worry but also helps the adjudication process in India to be fast speedy and unprejudiced.

Keywords: Deficiency, Doctors, Adjudication, Unprejudiced.

Patient is rightly termed as the most delicate consumer as the world of medicine and therapy is alien to him. Medical negligence cases are increasing in number and are causing irreparable damage to their physical and mental well-being. Legal approach to medical interference has undergone an attitudinal change concomitant to social development. There is a growing awareness regarding patient's rights. This trend is clear from the spurt in medical negligence litigations. The Indian Supreme Court has endeavoured painstaking efforts to constitutionalize right to health as a fundamental right.¹ The patient-centred initiative of rights protection is critical in the economic context of the rapid decline of state spending and massive private investment in the sphere of the health care system.

I. RIGHT TO HEALTH AND HEALTH CARE

India is a member of UN since the time of proclamation of Universal Declaration of Human Rights (UDHR) in 1945 and was a party to it. The spirit of Indian Constitution indicates the influence of this International legal instrument. Most of the Civil and Political rights are guaranteed as Fundamental Rights.

1. *Paschim Banga Khet Mazdoor Samiti v. State of West Bengal*, (1996)4 SCC37, *Parmanand Katara v. Union of India*, AIR 1989 SC 2039

The Constitution makes a forceful appeal to the state through Directive Principles of State Policy to work towards assuring the Economic, Social and Cultural Rights.²

The Constitution of India guarantees 'Right to Life' as the fundamental right of the citizen. It states, "No person shall be deprived of his life or personal liberty except through procedure established by law"³

Till 1970s, the courts, by and large interpreted "life" literally. A change was visible in the judicial approach, lately. Over the years, it has come to be accepted that life not only means animal existence, but the life of a human being with all its concomitant attributes. This would include a healthy environment and effective health care facilities.

II. CIVIL LIABILITY AND DEFICIENCY IN MEDICAL SERVICE

There are two kinds of civil remedies. Public law and private law remedy. Private law remedy involves action under Torts or Contract. In public law remedy, the claim is against the state for a wrong committed by it or persons acting under it. Both exist independent of each other. If there is a medical negligence by a doctor in a government hospital, writ jurisdiction of the SC or HC can be invoked. At the same time the injured party can also seek civil law remedy under Torts, contract against individuals before civil courts or consumer fora.

The civil liability in negligence cases are by and large covered by the judge made common law under law of Torts. The Indian law on negligence is highly influenced by this part of common law. The trend remained the same over decades with few changes, here and there.⁴

The Supreme Court held in *Laxman Joshi's*⁵ case that, when the medical practitioner gives treatment or advice, he impliedly undertakes that he is possessed of skill and knowledge for that purpose. And in executing his duty he must employ a reasonable skill, knowledge and care. Therefore, the medical practitioner will be bound by liability in the absence of any of the two. In an action for medical negligence the injured party has to prove, not only that, he has suffered injury but it is the result of the negligence of the doctor.⁶

III. LIABILITY UNDER CONSUMER PROTECTION ACT, 1986

In case of medical negligence, an injured party can claim compensation either through a civil suit or a complaint lodged under consumer Protection Act (COPRA), 1986. After the enactment of this legislation, there has been a wide spread debate as to whether the Act is applicable to medical services or not? Wide ranging issues from the applicability of the Act to medical practitioners, the nature of medical services which would be covered, nature of consumers etc. have been litigated. The Supreme Court finally set at rest the controversy in the case of *Indian Medical Association v. V.P. Shantha*.⁷ The Court held that proceedings under COPRA are summary proceedings for speedy redressal and the remedies are in addition

2. RAVI DUGGAL, Right to health and Healthcare, Theoretical Perspectives, HEALTH CARE CASE LAWS IN INDIA 1-16 (MIHIR DESAI & KAMAYANI MAHABAL ed. 2007)

3. The Constitution of India, Art. 21

4. *Supra* note 2 at 71-86

5. *Laxman Balkrishna Joshi v. Trimbak Babu Godbole*, AIR 1969 SC 128

6. *Philips India Ltd. v. Kunju Punnu*, 1975 M. L.J. 792

7. (1995) 6 SCC 651

to private law remedy. Therefore, it cannot be denied to a patient who is suffering from deficiency in medical service.⁸

IV. DEFICIENCY IN MEDICAL SERVICE UNDER CONSUMER PROTECTION ACT, 1986

The Consumer Protection Act was enacted in India in 1986 to protect the interests of consumers. It is one of the most comprehensive and progressive piece of social welfare legislation. This is an umbrella legislation covering all goods and services. Unlike other laws, which are basically punitive or preventive in nature, the provisions of the Act are also compensatory. This statute provides more effective protection to the consumers than any corresponding legislation in force in other developed countries⁹

The Act is intended to provide simple, speedy and inexpensive redressal to the consumers' grievances. It also provides relief of a specific nature and awards compensation, wherever appropriate. The Consumer Protection Act, 1986 has ensured the rights of consumer for safety, information, choice, representation, and redressal and consumer education. The Act provides for exclusive three tier redressal machinery as an alternative to the civil court and other legal remedies available in the country.¹⁰

For decades injured patients or their relatives had been extremely reluctant to take legal action against negligent medical practitioners under civil law.

The prime reasons for impassivity were the following.

- High expenditure involved in the civil litigation. The Court fee and legal fee had been alarmingly huge in initiating an action for common man.
- The Compensation awarded, in comparison with the effort, time and money was meagre.
- A civil action involved a fair bit of procedural formalities and had an uncertain end.
- Prolonged legal action was capable of affecting, financial, social and health status of the injured party.

Medical negligence is deficiency in service. There can also be cases, not involving negligence, but can constitute deficiency in service For example, the surgeon is involving in some unfair practices, collecting excess charge, falsely claiming qualification etc. Loss or injury caused due to deficiency in service will make hospitals and doctors liable for compensation. The inclusive part of the definition of 'service' under the Act was positively used by various courts. The Supreme Court in **Lucknow Development Authority case**¹¹ observed that...

..... the entire purpose of widening the definition is to include in it not only day to day buying and selling activity undertaken by a common man but even such activities which are otherwise not commercial in nature yet they partake of a character in which some benefit is conferred on the consumer.

In *A.S. Chandra v. Union of India*,¹² Andhra Pradesh High Court has held that service rendered for consideration by private medical practitioners, private hospitals and nursing homes must be construed as 'service' for the purpose of Section 2(1)(d) of the Act and the persons availing such services are 'consumers' within the meaning of Section 2(1)(d) of the Act.

8. *supra* note 2 at 71-86

9. Report Of The Working Group On Consumer Protection Twelfth Plan (2012-17) Volume

10 . Government of India, Report of Ministry Of Consumer Affairs, Food and Public Distribution <http://planningcommission.gov.in/aboutus/committee/wrkgrp12/pp/wg_cp2.pdf. last visited on 30-03-2019 .

11. 1994 (1) SCC 243

12. (1992) 1 Andhra Law Times 713

In this case, it was argued that professional services rendered by medical practitioners do not fall within the purview of ‘complaint’ under Section 2(b) of the Consumer Protection Act, 1986. The expression ‘service’ as defined by Section 2(o) of the Act excludes professional services rendered by members of the medical profession. It was contended that, bringing, medical services, within the purview of Section 2(o) of the Act would be unconstitutional being violative of Article 14 of the Constitution. Further argument was that the consumer forum is not the proper forum to decide the question since; in this case, the allegations levelled by the fourth respondent constitute a tortious act, the adjudication of which requires receiving of elaborate evidence and consideration of complicated medical norms. Hauling up of doctors before Consumer Forums in respect of the professional services rendered by them for consideration would be violative of Article 19(1) (g) of the Constitution also.

Surgery has developed as a critical component of medical culture in last century. And it has gradually established its inescapable presence as an essential tool for healthy life. The increased safety and ease of surgery have produced an explosion in the volume of operations being performed. This evolution has brought other tasks such as ensuring the quality and appropriateness of the procedures performed, access to surgical care etc. The concern became intense, in the light of large scale commercialisation of health sector, with wide differences in outcomes among institutions, and large disparities in access to care both within and between countries. The brutality and risks of opening a living person's body has apparently attracted great amount of attention from various sectors, social, political and legal.

Every surgical operation is fraught with risk. No operation can be considered to be safe as any complication, during the operation may appear any time. The more the invasiveness, the greater the risk. No two human bodies are exactly alike. Each has its own deviation and distinctive features. Human bodies are as individual and different in their details as are human beings. This is so in best of centres all over the world and with best of surgeons. This has also been accepted by the courts and reiterated in their judgments. 587 In number of decisions Supreme Court, various High Courts, State Commission and National Commission has made candid explanations in respect of liability of doctors and hospital while performing a surgery. The main reason for dissatisfaction of the patient following surgery is lack of proper communication between doctor and patient.

A doctor cannot be held negligent, if he has acted with normal care, in accordance with the recognised practice accepted as proper by responsible body of medical men. However, when the doctor professes that he is specialist, possessing some special skill, he is expected to exercise, high degree of care than general practitioner, whose conduct is to be judged on different parameter, reiterated the national Commission.¹³

In *Narangiben S.Shah v. Gujrat Research and Medical Institute and others*,¹⁴ deficiency in service and violation of medical ethics was alleged against the action of doctors in prescribing and conducting angiography and bypass surgery. The National commission held that the doctors have followed most desirable and expected course of action and if in the process patient has died, they cannot be held liable. The commission observed, “ after all doctors can only treat, hay cannot guarantee success of a surgical operation which inevitably is fraught with risk.”

¹³. *Baidya Nath Chakraborty v. Chandi Bhattacharjee*, (2014)CPJ 601 (NC)

¹⁴. (2012)CPJ 509 (NC)

V. CONCLUSION

It is clearly established that in India, Consumer Protection Act, 1986 gives the best remedy available for deficiency in medical service generally and specifically in surgical care. But the dispute is on how far or how limited is the access of this legislation. And how expeditious this remedy is actually reaching the people to whom it intended to reach.

Consumer Protection Act, 1986 was passed with high hopes. India was the first country to enact legislation, immediately after the United Nations came up with the model. The apparent objectives of the Act include providing the right to get consumer education. This statute has shouldered central/state governments, responsibility to set up Consumer Protection Council, which will work towards achieving the declared objectives. It establishes a three tier system of Redressal Agencies which will provide economic, expeditious and effective remedy with a rather informal approach.

Remarkable developments in the field of medicine might have revolutionized health care. But they cannot be afforded by the common man. The woes of non-affording patients have in no way decreased. Gone are the days when any patient could go to a neighbourhood general practitioner or a family doctor and get affordable treatment at a very reasonable cost, with affection, care and concern. Their noble tribe is dwindling. Every Doctor wants to be a specialist. The proliferation of specialists and super specialists, have exhausted many a patient both financially and physically, by having to move from doctor to doctor, in search of the appropriate specialist who can identify the problem and provide treatment. What used to be competent treatment by one General Practitioner has now become multi-pronged treatment by several specialists.¹⁵

There is new-generation medical consumer emerging. Since they are tech and net savvy, information is readily available for them. But the dependability on the doctor or the hegemony of his fellow men never diminishes. The doctor may no longer be considered as ‘God’ but his relationship with the patient is still fiduciary.

15. *Saroj Chandhoke v. Sir Ganga Ram Hospital*, (2007) CPJ 189 NC