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"An Insight into Judicial Trend of Medical Negligence in India"

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[I] Introduction

"From inability to leave well alone, from too much zeal for the new and contempt for what is old; from putting knowledge before wisdom, science before art, cleverness before common-sense; from treating patients as cases; and for making cure of a disease more grievous than the endurance, good Lord, deliver."

Robert Hutchison[1]

Medical professionals commit errors despite prudence and care in their day to day medical practice such as incorrect diagnostics, wrong treatment, and lack of consent. Any such blunder may result in harm to the patient or even death. This inherent fallibility in the medical profession is directly related to legal action. Hence, medical professionals should be aware of moral and legal fallibility while performing their duties.

[II] Basic understanding of 'negligence', 'MALPRACTICE' & 'medical negligence'

Negligence has been defined in the Oxford dictionary as '*lack of proper care and attention; careless behaviour*', and malpractice has been defined as '*the careless, illegal or unacceptable behaviour by somebody in a professional or official position*'.[2] From these definitions it can be deduced that medical malpractice is broad term that includes all types of irregular conduct by a medical professional, whereas the term 'medical negligence' deals mainly with the aspect of lack of care and attention while treating a patient.

Medical negligence is the failure of a medical practitioner or a health care provider to provide proper care and attention and exercise those skills which a prudent, qualified person would do under similar circumstances. The fairness of any compensation due to medical negligence will depend upon the country's legal system.

[III] Doctor – patient conflict in India

Consumer protection gives a reflection of the fact that the corpus of consumer laws has been growing very rapidly in India and the Courts are also actively contributing in this evolutionary process. The professional services become an inseparable part of a consumer's daily requirement. Services reduced by professional men like doctors, lawyers and engineers

[1] Russel, *et al.* (eds), 2004
[2] Oxford Advanced Learner's Dictionary, fifth edition

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are indispensable for any society. They exercise great skill and competence in rendering these services. At the same time, they have to comply certain larger standards. In the matter of professional liability, professional officer from other occupations for the reason, that they operate in shares where success cannot be achieved in every case and very often success and failure depends on factor beyond the professional man's control. In devising a rational approach to professional liability which must provide proper protection to the consumer, the approach of the Courts is to require that professional men should possess a certain minimum degree of competence and they should exercise degree of competence and they should exercise reasonable case in the discharge of their duties.

Medical practitioners did not contract or tort on the ground that they failed to exercise reasonable skill and care. Action for malfeasant was allowed as only as in 1370 against veterinary doctor. Subsequently, it was allowed against a surgeon also gradually tortuous liability made a headway and is well established in all jurisdictions including India. Out of the recent controversies, that relating to medical services has been in the news headlines due to the protests by various medical practitioners and also the Indian Medical Association, which are the largest national organization representing medical practitioners. The Indian Medical Association took a firm stand against the inclusion of medical service under the Consumer Protection Act.

Professional bodies formed under the Act, like the Indian Medical Council and certain other organizations like, Indian Medical Association have not addressed themselves to issue of commercialization of medical case, negligence, decline in medical ethics and accountability what then are patients expected to do? They have to seek redressal and compensation whereas the Medical Councils have no provision for following compensation to the consumer patients. Ordinary civil suits take a life time for rendering decisions. According to Justice Krishna Iyer,

"It is a pity that never or rarely in the history of Indian Medical Connects Act primitive action has been taken against the peers. Nor can compensation and criminal sentence be awarded by avenues like the civil Courts and criminal Courts which take years and often decades to resolve cases. Under these circumstances, the Consumer Redressal Commission is the only alternative of the grievances under the Consumer Protection Act, 1986.[3]

The question of application of Consumer Protection Act, 1986 to the Medical profession with a view to redressing grievances of patients against doctors and hospitals has been a highly disputed issue. The question whether doctors and hospitals are covered by the Consumer Protection Act was considered by the National Consumer Disputes Redressal Commission

[3] Mamta Rao, *Public Utility Services under the Consumer Protection Act, 1999*, p. 299, Deep & Deep Publications Pvt. Ltd.

in *Consumer Unity and Trust Society, Jaipur v. The State of Rajasthan*[4] *and M/s Cosmopolitics Hospitals & another v. Vasantha P. Nair*[5].

In the former case, the National Commission held that persons who avail themselves of the facility of medical treatment in government hospitals are not consumer and the said facility offered in government hospitals cannot be regarded as service hired to consideration. In the latter case, the National Commission held that the activity of providing medical assistance, for payment, carried on by hospitals and members of the medical profession falls within the scope of the expression "services"[6] as defined in the Act. And a patient would be a consumer[7] entitled to invoke the remedy provided under the Consumer Protection Act.

[IV] Medical Services v. Consumer's Interest

Following issues are comprehensively discussed below:

- Medical service - whether service?
- Patient - whether a consumer?
- Times - whether consideration?

As defined by Section 2(1)(0) of the Consumer Protection Act, Service means service of any description which is made available to a potential user and includes the provision of facilities in connection with banking, postal, insurance, transport, *etc*. But, does not include the rendering of any service free of charges or under a contract of personal service". Thus, the definition is worded in the widest possible terms and includes all categories of service except two categories mentioned therein. The fact that it is inclusive definition does not mean that the medical service does not fall within the inclusive definition.

When a patient consults a medial practitioner, it makes available or renders service to the patient as potential user. Medical service rendered on payment is service rendered free of charge. These principles apply whether the service is rendered to the patient in a hospital or nursing home or a clinic run by medical practitioner. While a medical service may be loosely called personal, it will be incorrect to describe it as a 'personal service'. A contract of personal service involves a master and servant relationship which is wholly different from a doctor patient relationship. It will be totally wrong to all services rendered by a medical practitioner to his patient as a personal service coming within the exempted category of services mentioned in Section 2(1)(0)[8].

With regard to the second issue, as defined by Section 2(i)(ii), consumer means any person who hires any service for a consideration which has been paid to promised or partly paid and

[4] *Consumer Unity and Trust Society, Jaipur v. The State of Rajasthan*, 1991 (1) C.P.R. 241 : (1992) CPJ 259 (N.C.)
[5] *M/s Cosmopolitics Hospitals & another v. Vasantha P. Nair*, (1992) CPJ. 302 (N.C.)
[6] Consumer Protection Act, 1986, Section 2(1)(0)
[7] *Id.* Section 2(1)(d)
[8] *A.C. Modagi v. Cross Well Tailors* (1991) 11CPJ 586 **followed in** *M/s Cosmopolitics Hospitals & another v. Vasantha P. Nair*, (1992) CPJ. 302 (N.C.).

promised. The Act is aimed at providing relief to persons who have hired any services for consideration, when the services rendered, suffer from any deficiency. Before a person is said to be a consumer, he must satisfy the following three conditions.

1. The service must be hired by them.
2. The service should have been reduced to them
3. For hiring service, he must have paid or promised to pay consideration.

The impression 'hire' postulates an antecedent agreement for payment of money for services rendered and imparts on obligation to pay for the same. This was stated in *Minochar P. Patel v. A.M. Amin*[9]. Payment for services hired may be in cash or cheque or demand draft. If services are rendered free of charge, then there is no 'hire' as contemplated by the said section. On the other hand, if he obtains such service on payment, wholly or in part, in a private hospital or nursing home a clinic, whether run by the government a charitable institution or a medical practitioner, he is a consumer and therefore invokes the remedies provided in the Act by filing a complaint before the redressal agencies.

However, the doctors joined hands and fought a legal battle. Consumers won quite a few legal battles by winning in the State Commission but the doctors and their association appealed to the National Commission and then to the Supreme Court against their inclusion under the Consumer Protection Act.

In *S.K. Abdul Sakur v. State of Orissa*[10], the State Commission dismissed the complaint merely for the reason that the matter requires oral evidences and cross-examination. It was held by the National Commission that the State Commission was not justified in declining to adjudicate upon the complaints on merits by stating that the competent forum to adjudicate upon matters is only the Civil Court. Another important decision is that of *Ch. D.P. Bhandari v. Ganga Ram Hospital*[11]. Here, Delhi State Commission held that deteriorating condition of the patient required close monitoring and that was possible only in ICU. It was not established that the facility of doctors and nurses was provided to the patient in the same way as it was in ICU. Then the hospital was held responsible for the death of the patient and compensation of Rupees One lakh was awarded with ₹ 2,000 against costs.

Where blood supplied contained hospitals norms, the Delhi State Commission in *Harish Kumar v. Sunil Blood Bank*[12] held that it was beyond doubt that a writ of blood purchased by the complaint for his wife was contaminated and had Virus of Hepatitis B, due to which, the wife of the complainant suffered from virul Hepatitus B. The Commission held that the Blood Bank and transfusion centre guilty of supplying contaminated blood. Causes which received wide publicity and caused furore in the camp of docks *were Cosmopolitian*

[9] *Minochar P. Patel v. A.M. Amin,* (1968) Guj. L.R. 171 at p. 175.
[10] *S.K. Abdul Sakur v. State of Orissa,* (1991) II CPJ. Here doctors acted negligently in conducting blood grouping test and the resultant cross-matching resulted in the death of the patient.
[11] *Ch. D.P. Bhandari v. Ganga Ram Hospital,* (1991) II CPJ 409. In this case an operation which should have been performed resulting in the death of the patient
[12] *Harish Kumar v. Sunil Blood Bank,* (1991) ICPJ 645.

Hospitals v. Vasantha P. Nair[13] and *Cosmopolitian Hospitals v. P. Shantha*[14]. These cases gave way to a number of state commissions awarding compensation to the complainants for the negligence of doctors. While on one hand, it gave relief to the consumers, on the other hand, it caused distress among doctors as it was a first major step towards the accountability in the medical profession. In this judgment, the National Commission upheld the right of a consumer to seek redressal before the Consumer Court for any negligence or deficiency in service rendered by medical practitioners for a fee. In the appeal, the Supreme Court[15] arrived at the following conclusions.

- Service rendered by a medical practitioner, other than free of charge, by way of consultation, diagnosis and treatment would fall within the ambit of the service as defined in Section 2(1)(0) of the Act.
- A contract of personal service has to be distinguished from a contract for personal services. Medical service is under a contract for personal service and is not covered by exclusionary clause.
- Service rendered free of charge by Medical Practitioners attached to a hospital would not be service as defined in Section 2(1)(a) of the Act. The payment of a token amount for registration purpose would not alter the position.
- Service rendered at a non-government hospital where the charges are required to be paid by persons who are in a position to pay and persons who cannot afford to pay are reduced services free of charge would fall within the ambit of the expression service as defined in Section 2(1)(0) of the Act, irrespective of the fact that the service is rendered free of charge to persons who are not in a position to pay for such services.
- As a part of the condition of service, the employer bears the expenses of medical treatments of an employee and his family member dependent on him, the service reduced to such an employee and his family members by a medical practitioner would not be free of charge and would constitute service under Section 2 (1)(0) of the Act.

In a welfare state, it was held in *Consumer Unity and Trust Society v. State of Rajasthan*[16], that it was the responsibility of government to provide adequate medical, health care and other facilities to all citizens. The hospitals established by the governments are funded from the consolidated fund of the Government and under the Constitution, these funds comprise the revenues which are raised in the form of direct taxes as well as indirect taxes. As pointed out by the Supreme Court in *Commissioner, Hindu Religious Endowments, Madras v. Lakshmindra Thirtha Swamiar*[17] that tax is the compulsory extraction of money by public authority for public purposes enforceable by law and a no payment for service rendered.

[13] *M/s Cosmopolitics Hospitals & another v. Vasantha P. Nair,* (1992) CPJ. 302 (N.C.)
[14] *Cosmopolitian Hospitals v. P. Shantha,* (1992) II CPJ 302 (NCDRC)
[15] *Indian Medical Association* v. *V.P. Shantha,* AIR 1996 SC 550
[16] *Consumer Unity and Trust Society v. State of Rajasthan,* (1992) ICPR 30 (Raj. CDRC)
[17] *Commissioner, Hindu Religious Endowments, Madras v. Lakshmindra Thirtha Swamiar,* 1954 SCR 1005

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The legal position is now settled that tax in its time nature is a levy made by the state for the general purposes of government and it cannot be recorded as payment for any particular or special service. Further, it cannot be said that a tax levied for the general purpose of the state for consideration for any specific facility, benefit for service provided by the state.[18]

It was held in *SMND Consumer Protection Council v. Chief Engineer, Highway and Rural works Government of Tamil Nadu*[19], that payment of tax to the government cannot be considered as a consideration for the services rendered by the government. The question whether the source rendered by a government is included under the Consumer Protection Act, came as before the commission in *Hanuman Prasad Darban v. Dr. C.S. Sharma, S.M.S. Hospital Jaipur*, where the state commission held that if a person gets the service rendered by the doctors in the hospital run by the State Government, such services are the free services and no consideration is paid by that person. It is fine that doctors are paid salary from the public exchequer and the government employs them for payment of salary but as the government hospital gives free services, it cannot be said that a consumer has hired services for consideration. So, it could not be said that he is a consumer within the meaning of Section 2(1)(0).

Then the Supreme Court gave a historic judgment whereby it put to rest various controversies regarding inclusion of medical profession under the Consumer Protection Act and at the same time providing cheap and speedy justice to the aggrieved consumer. It also provided a mechanism whereby, doctors, for the first time could be made accountable for their negligence as it is a well-established principle of the law that a mistaken diagnosis is not necessarily a negligent diagnosis. A practitioner can only be liable if he has been palpably negligent. In *Salgaokar Medical Research Centre v. R.B. Raikwar*[20], the complainant was involved in an accident and sustained multiple injuries. He was admitted in the Salagaokar Medical Research Centre. Doctor examined and came to the conclusion that an emergency operation was required. The grievance of constraint was that the doctors did not use reasonable skill and diligence in operating him and a foreign body, medically known as gauze towel, was left in the stomach cavity. The complainant suffered physical agony and had to undergo prolonged and expensive treatment for removing the gauze towel. During the case, permission was sought to cross examine the witnesses of the complainant by the opposite party. The doctor who had performed the operation and removed the gauze was not produced for cross-examination. The State Commission did not give the permission to cross-examine the doctor. The National Commission held that the disposal of the case was not proper.

The revision petition in *Dr. Ashok Dhawan v. Sujeet Singh*[21] was directed against the order of the State Commission, Haryana by which the appeal filed by revision petitioners was dismissed . The complainant has filed a complaint before District Forum, Karnal that Dr.

[18] Id.

[19] *SMND Consumer Protection Council v. Chief Engineer, Highway and Rural works Government of Tamilnadu*, (1992) ICPR 107 (Mad. CDRC)

[20] *Salgaokar Medical Research Centre v. R.B. Raikwar*, (1996) 1CLC 263 NCDRC

[21] *Dr. Ashok Dhawan v. Sujeet Singh*, (1997) 1CPJ 82 NCDRC

Dhawan running a medical clinic at Karnal gave an injection on the right arm of the complainant without proper test. After the injection, his arm stopped moving and he was unable to make use of the arm. He had to spend huge amount for his treatment. With these allegations, he preferred the complaint on grounds of negligence of the doctor. The State Commission awarded compensation of ₹ 10,000.

In *Harjot Ahluwalia (Minor) through his parents v. Spring Medicose Hospital*[22], it was held that hospital was responsible for the acts of the employees and so negligence can be attributed to the functionaries and authorities of the hospital. Thus, the hospital is liable for the consequences. A compensation of ₹ 12.5 lakhs was ordered.

[V] Conclusion & Suggestions

A restrictive interpretation taking medical profession from the scope of the Act works against the interesting consumers insofar as even in obvious cases of medical negligence they may have to approach the ordinary Courts which involve protracted proceedings and high cost of litigation. Remedy before ordinary Courts is not a real remedy in the case of many poor patients. The remedy should be made available to patients. When accountability is provided for and it is made real, chances of negligence will be rare. Consumers of medical services have to be protected against exploitation by hospitals which have now commercialized medical service. The ultimate question therefore is whether patients can be left unprotected by relegating them to pursue the remedy available, but rarely resorted to, before ordinary Courts whether protection under the Consumer Protection Act is to be extended to them so that there could be a better safeguard against negligent treatment and exploitation. The answer is quite obvious.

To the extent possible, the remedy available to the patient should not be costly. Relief should be provided to him without delay. Since there is a duty to take case towards the patient, there should be an effective remedy in case of negligence irrespective of whether the patient pays for the treatment or receives it free. Free treatment shall not be a licence for negligent treatment. The doors of Consumer Disputes Redressal Forum under the Act should be open to patients. Rethinking in this area where vital consumer interest is involved is the need of the time. The Act may be amended if necessary to achieve its true purpose. Safeguards like examination of *prima facie* case by the forum before entertaining a claim and provision for procuring expected evidence in cases of technical nature, may be introduced in the Act. Judiciary should give a liberal interpretation to the provisions of the Act, namely justice to consumers including consumers of medical service.

[22] *Harjot Ahluwalia (Minor) through his parents v. Spring Medicose Hospital*, (1997) 11 CPJ 98 NCDRC

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