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A JURAL ANALYSIS OF MEDICAL NEGLIGENCE IN THE ERA OF CONSUMER PROTECTION

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Abstract

The field of medicine bridges the fractures between science and society. Due to the growing commercialization of everything the doctors are no longer concerned with their patients' health and safety but are just considering them as the money-minting machines. As a consequence, doctors are failing to observe the due caution and standard of care. The law relating to the Medical Negligence is well settled and a remedy can be sought under Tort, Criminal, and Civil law. Apart from these, a patient is ipso facto a consumer and thus a remedy under the consumer laws can also be sought. This work aims to analyze the concept of Medical negligence vis-à-vis the Consumer Protection Act, 1986 in its various dimensions. A patient being a consumer also possesses certain rights. This work also enumerates certain major rights that in the opinion of the author, every patient possesses as a consumer.

Keywords: Consumer Protection, consumerism, Medical Negligence, Rights of the Patient.

1. Introduction

Medical practitioners occupy a very respectful position in society. Every time somebody faces any health problem, he immediately rushes to a doctor with an expectation to get treated and get healthy again. Doctors are considered as visible Gods. They give solace and confidence to those who are suffering from a health problem. Life is the most precious gift given to us and it is the doctor who actually saves a life when it is in danger. Earlier there existed a warm and compassionate relationship between a doctor and a patient. Doctors were missionaries and they took the oath of service to the suffering human beings, in return receiving subsistence and satisfaction. But now the situations have changed. The noble service of the doctors has disappeared and Hippocrates's noble professional oath also stands as commercialized as the profession itself. With the onslaught of mechanization and with the

advent of commercialization, the noble traits of 'Medical Men' have been demolished. Health sector today has plummeted down to merely a money minting business. The trustworthy and homely atmosphere that the patient used to enjoy with his doctor hitherto is now completely vanished. The Medical profession today has changed from rendering humanitarian services to exploiting the gullible patient. Due to this growing materialistic approach of this noble profession, the doctors have forgotten their actual duties and are now running in the rat-race to earn more. Such commercial mindset of the doctors is the major cause of growing malpractices and instances of negligence.

Whenever a patient approaches a doctor or a hospital he has a two-fold expectation. Firstly, the Doctor or the hospital shall employ their best skills to treat him and secondly, the doctor or the hospital shall not harm him. The failure in complying with these expectations gives rise to liability which may be either 'Tortious' or 'Criminal' depending upon the nature of the act. Doctors are visualized as God figures but they are in fact Humans only. Erring is a basic tendency of humans. Thus many times a doctor also commits errors. Trivial or minor errors can be ignored. However, there are cases where a doctor commits errors by being negligent. Such negligence on the part of doctors can even be life-threatening. Till a long time, such unethical and deadly acts of the doctors have not been known to the public and that was the major cause of such practices being on the rise.

With the advent of The Consumer Protection Act, 1986 a lot many people started coming forward and putting ahead their grievances. This immediately attracted the protests by the doctors by challenging the constitutionality of the Act. But this step failed and doctors were brought under the ambit of the Act. The Medical Council of India and the State Medical Councils are statutory authorities to look into the complaints of alleged misconduct and negligence of medical professionals and have powers to inflict punishment for such an act. Till 1986 if there were any disputes regarding negligence on the part of doctors in government or private hospitals, then the doctor could be prosecuted under various provisions of the Indian Penal Code, 1860 or a suit for damages could be filed in a civil court having jurisdiction. However, such action would take months and even years to come at a discreet conclusion. With the enactment of Consumer Protection Act, 1986, a complaint under the Act can be filed by a patient against the doctor for deficiency in services and speedy redressal can

be sought. Under consumer protection laws, medical negligence is another form of deficiency in services. It is mostly similar to the liability under the law of torts. But there is a 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.

The Consumer Protection Act, 1986 was enacted to strengthen the Consumers by providing them with the right to seek a speedy, cheap and efficacious remedy in case of any consumer grievance. In the landmark judgment of *Indian Medical Association v. V.P. Santha*[1], the doctors were brought under the ambit of the Consumer Protection Act, 1986 for their negligent acts. The number of instances of medical negligence was on a rise and majorly, the people from lower strata were affected by these acts of negligence and either due to their ignorance or due to their incapacity to identify the same, many of the doctors or hospitals went unpunished.

The cases of medical negligence are rising rapidly akin to the flourishing money-motivated health industry. The Union Minister for Health and Family Welfare, itself had admitted that in 2009, over 90,000 cases of negligence were filed in consumer courts, which were almost 50 per cent more than those filed in 2004. The pharmaceutical company, drug controller, and medical practitioners seem to have formed a nexus to play havoc with the life of the patients.[2]

2. Doctor-Patient Relationship

A doctor-patient relationship is one of the most fundamental relationships in this world. Even though a doctor cannot confer on making the man immortal yet he can increase the health and longevity of life. Probably that is the reason that the doctor is impersonated with the almighty itself. The relationship between a doctor and a patient is a fiduciary relationship based on mutual trust and understanding. From the legal point of view, this relationship is contractual in nature. This deals with the contractual obligations, liabilities and standard of care expected of doctors. The contractual relationship arises when the patient approaches the doctor for medical examination, diagnosis, advice, check-up etc. and the doctor undertakes to take

[1] 1995(3) CPR 412.
[2] Reported in *The Hindu,* June 7th 2009, p. 7.

these. It must be noted here that the contract between the doctor and the patient is generally implied in nature. While a doctor cannot be forced to treat a person, he has certain responsibilities for those whom he accepts to treat. The doctor-patient contract requires the following:

Continued treatment

Once the doctor undertakes to treat a patient, an implied contract is formulated and *inter alia* it requires continued treatment by the doctor till the patient is recovered. This does not, however, mean that once accepted a doctor cannot deny treating a patient. In certain circumstances the doctor can deny treatment even after undertaking the same in the following circumstance:

1.) the patient/attendant does not pay the doctor's fees (in case of a private practitioner);

2.) the patient/attendant consults another doctor (of any branch) without the knowledge of the first attending doctor;

3.) the patient/attendants do not co-operate nor follow the doctor's instructions;

4.) the patient is under some other responsible care, e.g., the patient, after admission in a hospital, comes under the care of senior doctors/unit head;

5.) the doctor has given due notice (oral or written) for discontinuing treatment;

6.) the doctor is convinced that the illness is a fictitious one;

7.) the patient has been referred elsewhere for treatment.[3]

[3] Jagdish Singh and Vishwa Bhushan, *Medical Negligence and Compensation* 5 (Bharat Law Publications, Jaipur, 2007).

Apart from these situations, a doctor's liability is fixed under the contractual relationship to provide a continuous treatment to the patient until he is recovered.

Reasonable care and skill

A doctor has the inherent obligation to employ reasonably required skill in treating the patient. Along with the skill, due care must be observed by the doctor while treating the patient. This simply means that experimentation on the patients should be completely avoided. A doctor must use hygienic and appropriate instruments. He should provide his patients with proper and suitable medicines if he dispenses them himself. He should write the prescriptions legibly, using standard abbreviations and mention instructions for the pharmacist in full to aid him in interpreting the prescription. He should give complete directions to his patients as regards the administration of drugs and other measures. He must suggest/insist on consultation with a specialist when the condition of the patient demands so. A doctor must observe the reasonable standard of care while treating a patient. A reasonable standard of care means the level of care which a reasonably prudent doctor would have observed had he been in similar conditions.

Professional Secrets

A doctor is under the obligation to not to disclose that crucial information that he has obtained about the patient during the treatment. Such information comes to the knowledge of the doctor only due to the confidence and trust of the patient in him. Breach of such confidence could be highly detrimental to the patient and thus, such professional secrets must not be revealed in any manner as could prove to be detrimental for the patient.

Apart from these contractual obligations, a doctor has various obligations towards his patient. First and the foremost is the obligation to observe the standard of care. This means the application of principles of standard care that an average person must have observed in similar circumstances. Standard of care is the most prominent ingredient in dealing with medical negligence cases. Secondly, the doctor has the duty to provide information to the

patient regarding the treatment in its totality. The patient must be informed about the necessity of the treatment, the risks involved, or the alternatives available etc. Thirdly, the consent of the patient must be there before the treatment. In the cases where the patient is not in the situation to give consent, the parents/guardian of the patient must give the consent to such treatment. In emergency situations involving children, where parents or guardians are not available; the person acting in *loco parentis* must consent for such treatment. Fourthly, a doctor must not involve in illegal practices or such acts which are against the law. A doctor must not violate professional ethics.

The violation of the aforesaid obligations and duties amounts in what is called the Medical Negligence. Medical negligence, simply stating is the omission to observe the due standard of care that a reasonably prudent man must have observed in a similar situation.

4. Negligence- Meaning of

Simply stating, Negligence means the omission to do something which a reasonable man guided by those ordinary considerations which ordinarily regulate human affairs, would do or the doing of something which a reasonable and prudent man would not do.[4] Negligence, generally stating, does not always mean absolute carelessness. It is, in fact, the want of such a degree of care which is required in particular situations. In the case of *Municipal Corporation of Greater Bombay v. Shri Laxman Iyer*,[5] it was observed that Negligence is the failure to observe, the degree of care, precaution and vigilance for the protection of the interests of another person, which the circumstances justly demand in the absence of which, the person suffers injury. The idea of negligence and obligation are strictly correlative. Negligence means a careless state of mind or objectively careless conduct. No absolute standard and no mathematically exact formula can be fixed using which negligence or lack of it care can be infallibly measured in a case. The constituents of negligence vary under different conditions

[4] *Black's Law Dictionary* 1184 (4th Edn.)
[5] CIVIL APPEAL NO.8424 OF 2003

and in determining whether negligence exists in a particular case or not. All the attending and surrounding facts and circumstances have to be taken into account in order to figure out whether a mere act or course of conduct amounts to negligence. It is relevant to determine if any reasonable man would foresee that the act would cause damage or not in order to determine if an act would be or would not be negligent. The omission to do what the law obligates; or even the failure to do anything in a manner mode or method envisaged by law would *per se* constitutes negligence on the part of such person, if the answer is in the affirmative, it is a negligent act.[6]

The term medical negligence may be defined as "the breach of duty owed by a doctor to his patient to exercise reasonable care and skill, which results in some physical, mental or a financial disability."[7] So far as persons engaged in Medical profession are concerned, it may be stated that every person who enters into the profession, has to bring in practice a reasonable degree of care and skill. It is true that a Doctor or a Surgeon does not undertake to use the highest possible degree of skill nor does he undertake that he will positively cure a patient, as there may be persons more learned and skilled than him, but he definitely undertakes to use a fair, reasonable and competent degree of skill.[8] This implied undertaking constitutes the real test of negligence which will also be clear from a study and analysis of the judgment in *Bolam v. Friern Hospital Management Committee*,[9] in which, McNair, J. while addressing the Jury summed up the law as under:

> The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill; it is well-established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art. In the case of a medical man, negligence means failure to act in accordance with the standards of reasonably competent medical men at the time. There may be one or more perfectly proper standards, and if he conforms to one of these proper standards, then he is not negligent.

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[6] *Municipal Corporation of Greater Bombay v. Laxman Iyer*, 2003 (3) SCC 731.
[7] H.M.V. Cox, *Medical Jurisprudence and Toxicology* 16 (Eastern Publication, New Delhi, 2001).
[8] *Gujrat State road Transport corporation v. Kamlaben Valjibhai Vora*, 2002(3) TAC 465.
[9] (1957) 2 All ER 118.

The test pointed out by McNair, J. covers the liability of a doctor in respect of his diagnosis, his liability to warn the patient of the risk inherent in the treatment and his liability in respect of the treatment.[10]

Medical Negligence as it is known in the modern sense is not of Indian origin. Its roots can be traced in England where negligence developed as a separate Tort. Negligence, simply stating, is the breach of a legal duty to care. One of the essentials to make negligence actionable is the existence of a legal duty of care in others who violated that duty by being careless which resulted in injury. A well-known English principle can be quoted here *viz. Imperitia culpae annumeratur* which means ignorance and want of skill is reckoned as a fault.[11] A doctor's profession is not an easy profession. It carries with it the requirement of minute precisions and carefulness in treating the patients. A doctor has to observe a standard of care while treating his patients. A certain amount of care has to be observed which reasonably prudent person would have observed if he were on the former's place.

In order to maintain an action for medical negligence, the following ingredients need to be satisfied:

1.) existence of the duty to take care

2.) breach of duty to take care and

3.) the breach of duty must cause the injury or loss to the plaintiff

On the fulfilment of these essentials, an action for medical negligence may arise. According to Lord Wright, "no case of medical negligence would arise unless the duty to be careful exists between doctor and patients". Shelat, J. delivering the Judgment in the matter of *Dr.*

[10] *Poonam Verma v. Ashwini Patel,* AIR 1996 SC 2111
[11] *Donoghue v. Stevenson,* (1923) A.C. 562.

Laxman Bai Krishnan Joshi v. Dr. Trimbak Bapu Godbole[12] had propounded the criteria for determination of negligence in the professional duty of a doctor. The Judge observed that:

> ….a person who holds himself ready to give medical advice and treatment impliedly undertakes that he has possessed skill and knowledge for the purpose. Such a person, when consulted by the patient, owes him certain duties; a duty of care in the administration of that treatment, a breach of those duties gives a right of action for negligence to the patient.

It is a widely recognized proposition of law that a person will be guilty of negligence if he undertakes a task, which he knows or ought to know that he is not qualified to give treatment or advice.[13]

The issue of breach of duty is covered with whether the defendant was careless, in the sense of failing to conform to the standard of care applicable to him. The level at which the standard is set is a question of law.[14] And regarding the third essential that such breach of duty must result in some kind of injury (physical or mental) to the plaintiff.

5. The Concept of Consumerism

When the mindset of society got materialistic and when morality and ethics were put at stakes to earn more profits, it was the consumer who had to suffer. Throughout the market and in almost all the sectors, the producers and the seller began to employ unethical practices to cheat upon the consumer. Either by selling a low-quality product or by charging more than the market price, a huge variety of unfair practices began to exploit the consumer. In such an atmosphere of 'Consumer injustice', the public outcry was obvious enough which lead to development throughout the globe. 'Consumerism' signifies the welfare of the consumer by safeguarding their rights, by protecting them from those goods or services which may be injurious to them and by giving them protection from the restrictive trade practices or the unfair trade practices. With the development of the concept of 'Consumerism', the English

[12] AIR 1969 SC 128.
[13] *Gracy Kutty v. Dr. Annamma* ,(1991)1 CPR 251.
[14] *Hazell v. British Transport Commission,* (1958) WLR 169, 171.

principle of *Caveat Emptor* (Buyer beware) was discarded and the principle of *Caveat venditor* or consumerism began to flourish after the authority laid down in *Donoghue v. Stevenson*.[15]

The Consumer Protection Act came to picture in December 1986 and is marked as a landmark in the Indian Legal history. It provided six broad rights to the consumers. There are:

1.) Right to Safety

2.) Right to Information

3.) Right to Choose

4.) Right to be Heard

5.) Right to seek redressal

6.) Right to Education

In India, consumer laws are in an advanced position than many other countries. With the increasing public awareness about their rights, the patients as consumers are now insisting on getting their money's worth in terms of quality health care services. On the historic day of April 27, 1992, Justice Balakrishna Eradi delivered the landmark judgment in the case of *Cosmopolitan Hospital v. Vasantha P. Nair*,[16] where it was decreed that the patient is a consumer under Section 2 (1) (a) of the Consumer Protection Act, 1986. Hence, he is entitled to invoke the jurisdiction of redressal for an unlawful activity by the defendant party (hospitals and doctors) who constitute service as defined under section 2(1) (O) of the Act. It

[15] (1923) AC 562.
[16] (1992), CPJ 302 (NC).

was also held that the legal heirs of the deceased are also to be considered as consumers and they are *ipso facto* covered under the Act.

Any patient who pays or promises to pay in future, the consideration for the treatment can avail the protection of the Consumer Protection Act,1986. The above-mentioned decision gave rise to a nation-wide controversy. The matter finally knocked the doors of the Hon'ble apex court in the case of *Indian Medical Association v. V.P. Shantha.*[17] The Hon'ble Supreme court put a full stop on the entire controversy by affirming that the services rendered by to the patient by the doctors or the hospitals are covered under the ambit of the Consumer Protection Act, 1986. The apex court laid down the following guidelines to ascertain which services should be covered or excluded, as the case may be, under the Act:

(1) Service rendered to a patient by a medical practitioner (except where the doctor renders service free of charge to every patient or under a contract of personal service), by way of consultation, diagnosis and treatment, both medicinal and surgical, would fall within the ambit of 'service' as defined in section 2(1) (o) of the Act.

(2) The fact that medical practitioners belong to the medical profession and are subject to the disciplinary control of the Medical Council of India and/or State Medical Councils constituted under the provisions of the Indian Medical Council Act would not exclude the services rendered by them from the ambit of the Act.

(3) A 'contract of personal service' has to be distinguished from a 'contract for personal services'. In the absence of a relationship of master and servant between the patient and medical practitioner, the service rendered by a medical practitioner to the patient cannot be regarded as service rendered under a 'contract of personal service'. Such service is service rendered under a `contract for personal services' and is not covered by exclusionary clause of the definition of 'service' contained in section 2(1) (o) of the Act. (4) The expression 'contract of personal service' in section 2(1) (o) of the Act cannot be confined to contracts for employment of domestic servants only and the said expression would include the

[17] AIR 1996 SC 550.

employment of a medical officer for the purpose of rendering medical service to the employer. The service rendered by a medical officer to his employer under the contract of employment would be outside the purview of 'service' as defined in section 2(1) (o) of the Act.

(5) Service rendered free of charge by a medical practitioner attached to a hospital/Nursing home or a medical officer employed in a hospital/Nursing home where such services are rendered free of charge to everybody, would not be ‘service’ as defined in section 2(1) (o) of the Act. The payment of a token amount for registration purpose only at the hospital/nursing home would not alter the position.

(6) Service rendered at a non-Government hospital/Nursing home where no charge whatsoever is made from any person availing the service and all patients (rich and poor) are given free service - is outside the purview of the expression 'service' as defined in section 2(1) (o) of the Act. The payment of a token amount for registration purpose only at the hospital/Nursing home would not alter the position.

(7) Service rendered at a non-Government hospital/Nursing home where charges are required to be paid by the persons availing such services falls within the purview of the expression 'service' as defined in section 2(1) (o) of the Act.

(8) Service rendered at a non-Government hospital/Nursing home where charges are required to be paid by persons who are in a position to pay and persons who cannot afford to pay is rendered service free of charge would fall within the ambit of the expression 'service' as defined in section 2(1) (o) 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. Free service, would also be ‘service’ and the recipient a ‘consumer’ under the Act.

(9) Service rendered at a Government hospital/health Centre/dispensary where no charge whatsoever is made from any person availing the services and all patients (rich and poor) are given free service - is outside the purview of the expression 'service' as defined in section

2(1) (o) of the Act. The payment of a token amount for registration purpose only at the hospital/nursing home would not alter the position.

(10) Service rendered at a Government hospital/health Centre/dispensary where services are rendered on payment of charges and also rendered free of charge to other persons availing such services would fall within the ambit of the expression 'service' as defined in section 2(1) (o) of the Act irrespective of the fact that the service is rendered free of charge to persons who do not pay for such service. Free service would also be ‘service’ and the recipient a ‘consumer’ under the Act.

(11) Service rendered by a medical practitioner or hospital/nursing home cannot be regarded as service rendered free of charge if the person availing the service has taken an insurance policy for medical care where under the charges for consultation, diagnosis and medical treatment are borne by the insurance company and such service would fall within the ambit of 'service' as defined in section 2(1) (o) of the Act.

(12) Similarly, where, as a part of the conditions of service, the employer bears the expenses of medical treatment of an employee and his family members dependent on him, the service rendered to such an employee and his family members by a medical practitioner or a hospital/nursing home would not be free of charge and would constitute 'service' under section 2(1) (o) of the Act.[18]

The claim for damages in the cases relating to medical negligence, prior to the enactment of Consumer Protection Act, 1986 was maintainable only in the civil courts or under the provisions of Law of Torts. With the enactment of the Act, a more appropriate and effective forum was set up that could handle such cases speedily and efficaciously.

6. Liability of Medical Professionals for Negligence under the Consumer Protection Act, 1986

[18] *Ibid.*

The historical decision of the Supreme Court in Indian Medical Association's case is being analyzed in the following paragraphs in which various incidents of applicability of the Consumer Protection Act, 1986 to the Medical Professionals are being discussed in the light of the said decision:

Section 2(l)(d) of the Consumer Protection Act defines 'consumer' as under:

'Consumer' means any person who—

(i) buys any goods for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any user of such goods other than the person who buys such goods for consideration paid or promised or partly paid or partly promised, or under any system of deferred payment when such use is made with the approval of such person but does not include a person who obtains such goods for resale or for any commercial purpose; or

(ii) hires or avails of any services for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any beneficiary of such services other than the person who 'hires or avails of the services for consideration paid or promised, or partly paid and partly promised, or under any system of deferred payment, when such services are availed of with the approval of the first-mentioned person but does not include a person who avails of such services for any commercial purposes;

Explanation.— For the purposes of this clause, "commercial purpose" does not include use by a person of goods bought and used by him and services availed by him exclusively for the purposes of earning his livelihood by means of self-employment;[19]

The Supreme Court has held in this case that services rendered to a patient by a medical professional are 'service' within the meaning of the Consumer Protection Act, 1986 [S. 2(l)(o)], persons who hire or avail of such services are, therefore, 'consumers' as defined under the Act, with the exception that where the doctor/hospital renders service free of charge to

[19] The Consumer Protection Act, 1986 (Act 68 of 1986), s. 2 (1) (d).

every patient or under a contract of personal service. a patient availing of such free of charge services will not be a consumer.

Secondly, A Negligence in treatment is 'deficiency in service'. Section 2(1) (g) of the Act defines 'deficiency' as under "any fault, imperfection, shortcoming or inadequacy in the quality, nature and manner of performance which is required to be the maintained under any law or undertaken to be performed by a person in pursuance of a contract to any service." Earlier to the Supreme Court's judgment in the *Indian Medical Association case*, 1996, the Haryana State Commission in *Dr Ravindra Gupta v. Gangadevi*[20] had observed that there is a clear distinction between medical negligence in the law of tort and a deficiency in the medical services undertaken to be rendered within the consumer jurisdiction. The latter under the Act, undoubtedly, includes what is negligence in the law of tort but is somewhat wider and more than strict liability under the former law.

The State Commission, however, admitted that there would remain a grey penumbral area between the two till the matter crystallizes fully in the as-yet nascent consumer jurisdiction.

The Supreme Court now seems to have crystallized the definition of 'deficiency' as applicable to medical negligence in its judgment.[21]

While rejecting the contention that: under the said clause defining 'deficiency', the deficiency with regard to fault, imperfection, shortcoming or inadequacy in respect of a service has to be ascertained on the basis of certain norms relating to quality, nature and manner of performance and that medical service rendered by a medical practitioner cannot be judged on the basis of any fixed norms and, therefore, a medical practitioner cannot be said to have been covered by the expression 'service' as defined in section 2(l)(o), the Supreme Court observed:

> "We are unable to agree. While construing the scope of the provisions of the Act in the context of deficiency in service it would be relevant to take note of the provisions contained in section 14 of the Act which indicate the reliefs that

[20] 1993 (3) CPR 255 (Haryana SCDRC).
[21] *Indian Medical Association v. V.P. Shantha,* AIR 1996 SC 550.

can be granted on a complaint filed under the Act. In respect of 'deficiency' in service, the following reliefs can be granted:

(i) return of the charges paid by the complainant; [clause (c)]
(ii) payment of such amount as may be awarded as compensation to the consumer for any loss or injury suffered by the consumer due to the negligence of the opposite party; [clause (d)]
(iii) removal of the defects in the services in question. [clause (e)].[22]

Section l4 (l) (d) would, therefore, indicate that the compensation to be awarded is for loss or injury suffered by the consumer due to the negligence of the opposite party. A determination about deficiency in service for the purpose of section 2(l) (g) has, therefore, to be made by applying the same test as is applied in an action for damages for negligence.

It is now well settled that the services rendered by the medical professional do come under the definition of 'service' as provided under section 2 (1) (o) of the Act, 1986. It must also be noted here that the Services rendered by the doctor is not under a 'Contract of personal Service'. It was urged before the court that the relationship between a medical practitioner and the patient is of trust and confidence and, therefore, it is in the nature of a contract of personal service and the services rendered by the medical practitioner to the patient is not 'service' under section 2 (1) (0) of the Act. The contention was rejected by the apex court and the opposite was ruled.

In *Wood v. Thurston*[23] a drunken man who was run over by a motor lorry, was brought to the hospital. The physician did not examine him as closely as the case demanded. In addition to this, he permitted the patient to return home who consequently after a few hours died. The surgeon was held guilty of negligence for failing to make a proper diagnosis of the patient.

The courts have exercised a lot of caution in determining the liability of a doctor for medical negligence. Unless it is shown that he has fallen short of reasonable medical care the courts

[22] *Id. para 30*
[23] 1953 C.L.C. 6871.

do not impose civil liability on the doctor.[24] In *Ram Biharilal v. Shrivastava*[25] a hospital took up a surgery even when the hospital was in the state of disrepair and the operation theatre was under repair. The facilities for surgery were almost absent. The court decreed that the doctor should have advised the complainant to approach another hospital which had all the facilities that the situation demanded. The doctor, therefore, failed in his duty of care in undertaking the operation without employing the necessary precautions.

In the case of *Kidney Stone Center v. Khem Singh Alias Khem Chand*,[26] the complainant was suffering from a stone in the prostatic urethra. The Kidney Stone Center at Chandigarh promised to remove the stone without surgery on payment of Rs. 10,000/- by the complainant. The opposite party failed to do the same. The District Forum ordered the refund of fees of Rs. 10,000/- along with interest treating it to be a case of deficiency in services by the opposite party.

In *Laxmshmi Rajan v. Malar Hospital Ltd*,[27] the complainant a married woman aged around 40 years, noticed the development of a painful lump in her breast. She went to the opposite party hospital for diagnosis and treatment. The lump had no effect on the uterus, but her uterus was removed without any justification by the hospital. The complainant's hope for the child had thereby ended. It was held to be a case of deficiency in service on the part of the doctor and he was held liable to pay compensation of Rs. 2,00,000/- to the complainant.

In another case of *Indrani Bhattacharjee v. Chief Medical Officer*,[28] the ECG of the patient was not found normal. However, the doctor did not take much interest in the same and his failure in advising the patient to consult a cardiologist and to reduce smoking and drinking, instead of giving him medicines for gastric trouble etc. amount to deficiency in service.

[24] *Gopinath v. Eskaycee Medical Foundation,* 1994 (1) CPR 456 (NCDRC).
[25] AIR 1985 MP 150.
[26] CPJ 436 Chandigharh S.C.D.R.C., 2000
[27] C P J 586 Tamil Nadu S.C.D.R.C., 1998.
[28] II CPJ 342 UP S.C.D.R.C., 1998.

In *Geeta Sapra v. Dr B. L. Kapoor Memorial Hospital,*[29] the ventilator in the hospital was not functioning due to which the patient died. The hospital was held liable to pay compensation for death. In this case, two separate claims of medical negligence and deficiency in service held to be maintainable.

In *Dr Balram Prasad v. Dr Kunal Shah,*[30] decided on October 24, 2013, Supreme Court of India awarded the highest amount of compensation to the tune of Rs. 60000000/- along with the interest. The case was pending for fifteen years and even with simple interest of 6% will amount to another Rs. 60000000/- i.e. total Rs. 120000000/- as the amount of compensation for medical negligence due to which petitioner's wife passed away. In this case, the hospital along with four other doctors had been held to be guilty of medical negligence. This amount gives an alarm to all medical professionals, hospitals, and their staff that they should be diligent and careful while treating patients

7. Rights of the Patients as Consumers

Any person who visits a doctor expects certain things from him. Firstly, a patient expects proper information which includes the knowledge about the health problem, the diagnosis, the treatment, the estimated duration of treatment, the risks involved, the alternative treatment etc. Secondly, a patient seeks proper guidance of the doctor with the expectation of getting well soon. Thirdly and most importantly, a patient puts his trust and confidence in the doctor that the latter will not harm him while treating. When out of his negligence, a doctor omits to observe the due standard of care necessary in the treatment; the patient has every right to bring appropriate action against the negligent doctor. Even though Medical Negligence is actionable under various laws *viz.* Criminal Law, Law of Torts or even under the Indian Medical Council Act etc. the most efficacious and expeditious remedy lies under the Consumer Laws. There is no longer *res integra* on the fact that a patient is, *ipso facto,* consumer within the scope of section 2 (1) (d) of the Consumer Protection Act, 1986. Thus as a consumer, a patient possesses various rights.

[29] AIR NCC 101 NCC, 2007 (5) ALJ 735, 2006.
[30] (2014) 1 SCC 384.

The Right to Adequate Information

In the past, the doctors were under no obligation to provide any information to the patient about his prognoses, illness, treatment etc. On the contrary, it was up to the doctor to exercise his skill and care in deciding the best course of action for a patient.[31] Probably during that time doctor were more concerned of the patient as any negative information could worsen the situation of an already vulnerable patient. This principle that the doctor should decide which treatment for the patient, keeping in view the best possibilities, has progressively been replaced by a 'Partnership model' of decision-making during the twentieth century. Under such a system, the doctor was the source of the information and the expert advice but the ultimate decision is of the patient to take. The principle of Patient Autonomy grabbed space and it became a duty of the physician to provide adequate information to the patient.

As a consumer, the patient has this crucial right of being informed. This right covers all the crucial aspects involved in the treatment. The patient must be informed about the nature of the illness. The courts in the United States had brought the doctor-patient relationship under the category of a fiduciary relationship, thus giving rise to a duty to inform.[32] No crucial fact relating to the illness of the patient should be kept hidden from him unless his medical condition demands the contrary. A patient must be given information regarding the estimated time of recovery, the medicines or drugs that the doctor is prescribing and similar information. Sometimes, some treatment involves certain risks. Such risks must be disclosed to the patient. Lord Steyn in *Chester v. Afshar*[33] observed the following in this regard:

> A surgeon owes a legal duty to a patient to warn him or her in general terms of possible serious risks involved in the procedure… In modern law medical paternalism no longer rules and a patient has a prima facie right to be informed by a surgeon of a small, but well established, risk of serious injury as a result of surgery.

[31] Emily Jackson, *Medical Law Text, Cases and Materials* 167(Oxford University Press, United Kingdoms, 2nd Edn.., 2010).
[32] Canterbury v. Spence, 464 F.2d 772 (D.C. Cir. 1972).
[33] (1998) 48 BMLR 118.

The patient must also be informed about any alternative treatment if available that would benefit the patient. This includes recommending a specialist doctor if the situation so demands. This right includes all such information which is must for the patient to know about. A patient's body is not a dummy for experimentation. The patient must be aware of everything happening with his person. This right also acts as a shield against the misleading and objectionable advertisements. Such information, by means of advertisements that may mislead the patients, is against medical ethics. In India, the Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954 prohibits the advertisements of Drugs or Medicines that claim to have magical properties, in order to safeguard the patients from falling in the trap of such luring advertisements.

The Right to Safety

One of the basic expectations that motivate a person to visit a doctor in illness is of getting well again and of enjoying a healthy life. A patient fundamentally believes that a doctor will not harm him rather he will treat him. Each person has the right to be free from harm caused by the poor functioning of health services, medical malpractice and errors, and the right of access to health services and treatments that meet high safety standards.[34]

As a consumer, the patient has the right to safety. This right ensures that such medicines, tests, examinations, processes etc. which are hazardous or harmful for the patient should not be administered on him. Doctors are the lifesavers and they should not play with the safety of the patient. While conducting any procedure, the safety of the patient must be ensured. This right extends protection against the negligent behaviour by the doctor as well. If a doctor fails to observe a reasonable standard of care in the treatment, he violates the rights to the safety of the patient.

'Safety' not only means physical safety but also includes moral and emotional safety. A doctor while treating a patient must respect the emotions and feelings of the patient. Along with that, a doctor must respect the modesty of the patient.

[34] European Charter of Patients' Rights, *Fourteen Rights of the Patient* 12 (2002).

Right to Choose

Every patient has the right to choose a particular physician for his treatment. In the early times, the number of doctors was less and thus patients did not get the opportunity to choose a doctor. However, in this present era of commercialization of everything, there are a wide number of doctors at each place and thus the patient as the consumer has every right to choose a doctor of his choice for his treatment. Even if the patient visits a particular doctor for mere advice or opinion it is his right to decide whether he is willing to get treated by the same doctor or not. A doctor cannot force his treatment on any patient.

Right to choice also includes within its ambit the right to choose an alternative treatment if available. By no means can a doctor keep a patient bound under his treatment. Similarly, a patient also has the right to choose any pharmacy for the prescribed medicines. A patient cannot be forced to visit a particular laboratory only for the test prescribed by the doctor.[35] It must be the duty of every treating doctor to inform the patient that they are free to access prescribed medicines from any pharmacy of their choice. The decision of the patient to access the pharmacy of their choice must not in any ways adversely influence the treatment being provided by the doctor.

Right to Confidentiality

Right to privacy is impliedly guaranteed under Article 21 of the Indian Constitution.[36] In the context of medicine, a patient has to share some of his privacy with the doctor to get a correct diagnosis and treatment and to avoid adverse drug prescriptions and further complications in their health. The doctor-patient relationship is formulated on the basis of mutual trust and confidence. In the course of treatment, a doctor may know much crucial information about the patient the disclosure of which could be detrimental to the patient. Clegg argues:

> The doctor's consulting-room should be as sacrosanct as the priest's confessional. The whole of the art and science of medicine is based on the

[35] *Darpa Narayan Gosh v. Chief Medical Officer of Health, Hooghly*, 2009 (2) CLJ (Cal) 158.
[36] *R. Rajagopal v State of T.N.*, (1994) 6 SCC 632.

> intimate personal relationship between patient and doctor, and to this, it always returns, however, scientific medicine becomes and whatever the great and undeniable benefits society receives from the application of social and preventive medicine.[37]

Thus the patient has every right to ensure the confidentiality of his personal information. In such matters, the doctors have the moral and ethical duty to keep the professional secret relating to a patient confidential and such information which could cause a detriment to the patient should not be disclosed without the latter's consent. In India under the Indian Medical Council Regulations, 2002 every medical practitioner is under an obligation to maintain physician-patient confidentiality.[38]

There is still a debating scenario amongst the jurists round the globe that whether or not in each and every circumstance the confidentiality of some patient's personal information may be maintained. Even though the confidentiality of certain information may be beneficial for a patient however there may be some cases, where the disclosure of some information would be necessary for general public welfare. For instance, an offender of Child Sexual Abuse may approach a doctor for the treatment of his bruises. In that case, whether the doctor should inform the police, or should confine the information to himself only to respect the fiduciary relationship between him and the offender. Thus, Emily Jackson rightly argues that 'working out whether the disclosure is justified in a particular case will often involve a complex balancing exercise between competing interests'.[39]

Right to a Healthy and Safe Environment

A healthy and safe environment ensures the wellbeing of everyone. A doctor or a hospital is under the obligation to provide a clean, healthy and safe environment to the patient.[40] A doctor's clinic or the Hospitals must ensure a healthy environment. Piles biomedical waste,

[37] H.A. Clegg, *Professional Ethics* 44 (1957).
[38] The Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002.
[39] Emily Jackson, *Medical Law Text, Cases and Materials* 392(Oxford University Press, United Kingdoms, 2nd Edn., 2010).
[40] *Ram Biharilal v. Shrivastava*, AIR 1985 MP 150.

garbage, growing mosquitoes and pest, smoke, extra-strong fragrances, mice, excessive dust, stingy smell etc., should be avoided at any cost. Such things are a hindrance in a safe and healthy environment. Patients have the right to be provided with an environment having requisite cleanliness, infection control measures, and safe drinking water as per the set Standards and sanitation facilities. Many clinics and hospitals nowadays use phenol water mops to curb the germs and bacteria. It would be really satirical if a patient is visiting a doctor but comes back worsening his situation due to the unsafe environment. Thus it is the right of the patient to seek a healthy and safe atmosphere in and around the clinic or the hospital.

Right to Equal Treatment

Equality is the essence of our constitution. In earlier times, different treatments were given to people belonging to different *varnas* or Classes. The poor were taken carelessly and where given minor drugs or medicines whereas the rich and the influential people were treated more efficiently and with more caution. Another important concern is that a poor person dying in front of a doctor can be ignored by the doctor for the want of necessary formalities or the paperwork but a rich and influential person is visited by the doctor himself at the former's place even in minor health issues. Such treatment is not only violative of medical ethics and human rights but is also against the right to equality guaranteed by the Indian Constitution. As a consumer, a patient has the right to seek equality in treatment without any discrimination on any basis. For a doctor, his patient must be above the social chains and he should treat upon the patient efficiently without any discrimination.

Right to Redressal

Being a Consumer, a patient can take the necessary action against the doctor in the appropriate forum. The Consumer Protection Act, 1986 have formulated a three-tier system including The District Forum, The State Commission and The National Commission for the redressal of the consumer grievances. Without a redressal mechanism, all the rights of the patients as the consumers would have been of no use and would have merely existed in the

papers. With the formulation of the redressal authorities, a consumer can approach the appropriate forum to enforce his rights and to seek compensation for the injury caused.

Right to Education

Many times the acts of Medical negligence go unpunished as the patients are unaware of their rights. Lack of awareness is a major concern in every field of Law. The lawmakers formulate the laws but the beneficiaries of those laws are mostly unaware of the same. As a consumer, a patient has the right to know his rights and responsibilities and the procedure to enforce them. Appropriate steps must be taken by the authorities to spread awareness amongst the masses to give them the opportunity to educate themselves. The simplest step in this regard can be taken in the following manner.

Every patient has to visit a doctor thus the awareness work must start from the doctor itself. Each and every clinic and hospital must be provided with flyers issued under the authority and supervision of the government providing about various rights of the patients and the enforcement mechanism. Such kind of flyers can be distributed by the social volunteers amongst the masses. Local events like Rallies, Street Plays, and Awareness camps can be organized by the NGOs or more prominently by the Colleges. With such steps, many people would know about their rights and could safeguard themselves in various instances.

8. Conclusion

Medical Negligence is not a concept of recent origin. Its roots can be sketched back to ancient times. There is no fixed formula to determine the negligent act by a medical practitioner but time and again the judiciary has formulated various canons to determine the liability of the negligent doctor. The negligent act of the doctor can also make the hospital vicariously liable for the same. The action for medical negligence must be guided upon the principle of a reasonable standard of care, which simply means the observance of the degree of care which a reasonably prudent person would have observed had he been in the similar circumstances. The profession of medicine is very difficult and it inherently requires a certain

degree of skill and knowledge which raises the expectation level of standard of care to be observed by a practitioner while treating upon a patient. An action against negligence can only be taken if the practitioner fails to observe the expected standard of care. There is a very thin line of distinction between 'Accidents' and 'Negligence' in the field of medicine. Accidents happen when the doctor have employed his complete skill and knowledge in the treatment of a patient but due to the act of some supernatural agency which is beyond human control, the patient suffers an injury or in extreme cases faces death. On the other hand, negligence arises when a doctor out of his personal beliefs and estimations do not understands the gravity of the matter or gets negligent by not observing the due standard of care which his position demands. Where Medical Negligence is actionable, Medical accidents are not actionable. Many times, a doctor escapes culpability taking the defence of Accident. The lack of proper legislation on the subject of Medical Negligence in India is a major weapon which aids a negligent doctor in escaping his liability. Even though the concept of Medical Negligence may be recognized under various laws yet the need for specific legislation is a must. Such legislation must clearly lay down in substance as to what actually constitutes medical negligence.

Suits against the Medical Negligence by the doctors and the health care institutions can also be initiated in the civil courts of ordinary jurisdiction under the ambit of the law of contract or law of torts. However such litigation in practice would face a lot of difficulties in invoking the jurisdiction of the civil court for getting justice as greater the damages claimed greater will be the court fee. Even if victims of medical malpractice can afford to pay, the inordinate delay and the strict proof of evidence will increase the agony of the petitioner. In order to tackle such a problem, the Consumer Protection Act came into the picture. With the inclusion of Patient under the definition of consumer, the action for medical negligence could be maintained easily and appropriate compensation could be awarded for the same. However, even under the Consumer Protection Act, a few lacunas can be observed.

Firstly, section 10, 16 and 20 of the Consumer Protection Act, 1986 provides for the composition of the District Forum, State Commission and The National Commission. However, the Act does not provide for the member of these Forums to have a basic understanding of medical matters. The Medical Field is a scientific field and a lot of

technicalities are involved in this field. There may be the cases of utmost technicality which the members of the redressal authorities may not understand. Thus there is a need for a comprehensive redressal mechanism to deal specifically with the cases of Medical Negligence.

Secondly, there may be certain cases which involve a lot of complexities and a comprehensive analysis of evidences and witness. Consumer courts formulated under the Consumer Protection Act, 1986 were formed for the speedier and effective redressal of the consumer matters. However, the cases involving a lot of complexity and evidences must be adjudicated by a more suitable and effective forum. Practically stating Consumer redressal Authorities may be doing wonderful work throughout this country yet, in order to administer proper justice in the deeply complex and technical matter especially dealing in the field of medicine must be adjudicated by a more appropriate and effective forum.

Thirdly, the burden of proof is on the complainant to show the negligence of the medical practitioner. The court ordinarily presumes that every doctor tries his level best to give relief to the patient when he is approached. Even if surgery fails it does not mean that there is any negligence on the part of the doctor. In order to show negligence by the doctor, proper evidences and witnesses must be shown. Most importantly the evidence by a medical expert is required to prove the guilt of the respondent doctor. However, there may be the cases where out of the medical expert may intentionally formulate a wrong opinion or may turn hostile for professional reasons, then the action for medical negligence may fail. In the absence of a substantive piece of evidence, failure of surgery or the error of judgment does not amount to medical negligence. Thus this protective attitude of the courts towards the Practitioners is one of the causes which aid the doctors to escape their liability.

In India, Medical Negligence is a serious concern. Where the majority of people do not take an action against the same even if some victims dare to seek redress, they have to face a lot of difficulties in proving the same as the onus is on the complainant to prove the negligence by the doctor. The court needs the testimony of a medical expert to corroborate the allegation but practically, the majority of medical practitioners do not come forward to depose against

someone of the same medical fraternity. As a consequence, the negligent doctor escapes the long-arm of law and the victim suffers incalculable sufferings. The need of the hour is to formulate comprehensive legislation on the subject of Medical Negligence. Even though at present the consumer laws are providing reasonable redress to a few victims yet the future of such a system seems endangered. There is a need for some authority to take *suo moto* cognizance of such an act rather than waiting for a complaint to be lodged. A patient-centric approach must be adopted by the courts and medico-legal experts must be appointed in the adjudicating panel.

A comprehensive legislation must be formulated on the subject of Medical Negligence. The Judiciary must adopt a liberal perspective and must withdraw itself from the shackles of the archaic thoughts. New strategies and new methods must be formulated to inflict justice upon the victims of Medical Negligence.

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