



The Profession of the Living God in Question

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ABSTRACT *This article is an attempt made by the author in the form of an appeal to the noblest professionals of this world, i.e., the doctors, whom we consider as the living God, to be kind enough towards their patients while treating them. The profession of the doctors is considered as the noblest one because since the inception of the human civilization people consider them as their savior from all kinds of sufferings and miseries next to God. The relationship between a doctor and a patient is that of a fiduciary relationship means a relationship of trust and confidence which should not be betrayed by any of the parties, but now days there is a drastic decline in the standard of the medical profession that results increasing number of litigations against the doctors for being negligent. In this paper the author has tried to show the instances of medical negligence which brought the Godly profession in the dock through the judicial response to the sensitive issue. The matters relating to medical negligence were always dealt under the provisions of various penal laws but with the efflux of time the long pendency of cases in the regular courts lead to think for an alternative remedy by the judiciary which ultimately took the shape after the judgment of the Supreme Court in the case of Indian Medical Association v. V. P. Shantha & others that held that the medical practitioners of government hospitals, private hospitals as well as nursing homes are covered under the consumer law and thus could also be tried under the Consumer Protection Act (CPA), 1986. This judgment of far reaching importance is found to be much helpful for the aggrieved patients because of the facts that they do not have to wait for years together and to spend considerable amount of money in getting the relief.*

Introduction

The profession of the doctors is considered as the Godly profession in the world, because of the fact that besides God if somebody can save the mankind from suffering and sickness and can give life, it is the Doctors only. That is why since time immemorial when no professionally qualified doctors were there and people were being treated by the Vaidyas through herbal medicines only, then also they were being worshipped as next to God and thus whatever they said people accepted it unquestioningly. Perhaps this is the reason that has now created a situation where many treacherous medical practitioners who conduct themselves without any regard for their professional ethics and patient's safety resulting in many negligent deaths and medical complications. Such kinds of situations give rise to lot many questions on the ethics of the doctors and the deficiency in medical services.

As everybody knows, the relationship between a doctor and a patient is a kind of fiduciary relationship, means a relationship of trust and confidence which should not be breached by any of the parties, but today there is a drastic decline in the standard of the medical profession that gives rise to increasing number of litigations against the doctors for being negligent. Medical negligence may be defined as want of reasonable degree of care or skill or willful negligence on the part of a medical practitioner in the treatment of a patient with whom a relationship of professional attendant is established, so as to lead to bodily injury or to loss of life or in other words it can simply be said that it occurs when the act of a medical professional in treating a patient deviates from the accepted medical standard of care. As human life is the most precious thing in this world which cannot be calculated through wealth, thus persons dealing with that must do their duty with utmost care and caution failing which they would be made liable for negligence. With the increase of large number of cases on medical negligence, the Supreme Court in the case of Indian Medical Association v. V. P. Shantha & others has held that medical practitioners of government hospitals, private hospitals as well as nursing homes are covered under the consumer law and thus could also be tried under the Consumer Protection Act (CPA), 1986 if it is not a charita-

ble medical clinic where services are rendered free of charge to everybody availing of the said service. However, a doctor can be held liable for negligence only if one can prove that she or he is guilty of a failure that no doctor with ordinary skills would be guilty of if acting with reasonable care. In *Parmanand Katara vs. Union of India* the Supreme Court even made it obligatory that "every doctor, at the governmental hospital or elsewhere, has a professional obligation to extend his services with due expertise for protecting life". The Court even went a step further in saying that as Art. 21 of the Indian Constitution casts the obligation on the State to preserve life, thus it is the obligation of those who are in charge of the health of the community to preserve life so that the innocent may be protected without waiting for the legal formalities to be complied with.

Medical Negligence- the Available Remedies

Whenever a matter relating to medical negligence is reported, the matter is considered with great concern. But it is not a fact that in all cases where a patient has suffered any injury, it is due to the negligence of the doctor. The liability of a doctor will definitely arise when the injury has been resulted due to the lack of reasonable care taken by the doctor. As rightly pointed out by the Apex Court in *Laxman Balkrishnavs. Trimbak* the duty owed by a doctor towards his patient is to "bring to his task a reasonable degree of skill and knowledge and to exercise a reasonable degree of care". Thus a doctor is not held liable for every injury suffered by a patient, rather he is made liable only for those cases that are the consequence of a breach of his duty. Hence, in all cases the burden of proof lies on the plaintiff to show what is considered as reasonable care under those circumstances and how the doctor fall short of that causing injury to him. Remedies for medical negligence is available both in civil and criminal laws and as mentioned earlier now after the landmark judgment of the Apex Court in *Indian Medical Association v. V. P. Shantha & others*, it is also made available under the Consumer Protection Act (CPA), 1986.

Remedies under the civil law

An aggrieved of medical negligence can avail the remedy

under the civil law as it is covered under its purview. Because the duty of a doctor towards his patient can either be a contractual duty or a duty arising out of tort, both being covered under the purview of civil law, thus when there is absence of due care in performing the duty that causes negligence, for which a person can be held liable under the civil law. But to prove negligence on the part of a doctor, like any other case, three things are to be proved-

- i. That the defendant owes a duty of care to the plaintiff.
- ii. That the defendant has not performed his duty with reasonable care causing negligence.
- iii. That the plaintiff has suffered an injury due to such act of the defendant.

One important point to be noted that an allegation of negligence cannot be imposed upon a doctor simply because something went wrong or something has not been done in a particular manner. Because he cannot be held guilty of negligence if he has acted in accordance with the practice adopted as proper by a reasonable body of medical professionals under similar circumstances. This is, in fact the decision of the Apex Court in a number of cases considering that a doctor cannot be made liable for negligence because of the fact that someone else of better skill or knowledge have prescribed a different treatment or operated in a different way.

In order to make a doctor liable under the Civil law, the aggrieved patients have to file a case against the doctor in the civil court for monetary compensation. The legal remedies are based on the law of Torts, and Section 1-A of the Fatal Accidents Act, 1855. But this remedy is not found to be that much helpful for the aggrieved patients because of the facts that they have to wait for years together and to spend considerable amount of money in getting the relief and in some cases it may also happen that the aggrieved might not get relief throughout his life.

Remedies under the criminal law

Criminal law too considers acts of medical negligence as crimes, but like any other criminal act, an act of medical negligence too needs the presence of a malicious intention to prosecute a medical practitioner. Secondly, merely by getting information from the aggrieved, a criminal proceeding cannot be initiated against a medical practitioner, for this also a credible opinion from a competent doctor, preferably a government doctor in the same field of medicine supporting the negligent act is needed. Because merely lack of reasonable care cannot make a doctor criminally liable as it may not amount to gross negligence as required under the provisions of the Indian Penal Code. The cases relating to criminal negligence are dealt under various provisions of the Indian Penal Code, like- Sections 52, 80, 81, 83, 88, 90, 91, 92, hurt and grievous hurt under s. 337 and s. 338 respectively and culpable homicide not amounting to murder under s.304A. According to s.304A, whoever causes the death of the person due to negligence or a rash act, not amounting to culpable homicide, can be tried and suitably punished with imprisonment for 2 years or fine or both.

The question of medical negligence in the context of Section 304-A of Indian Penal Code came up before the Apex Court in the case of Jacob Mathew vs. State of Punjab where Chief Justice Lahoti, speaking for the unanimous three-Judge Bench, made a clear distinction between degree of negligence in criminal law and civil law. His Lordship relying on the speech of Lord Diplock in *R. vs. Lawrence* has held that to constitute negligence in criminal law the essential ingredient of 'mensrea' cannot be excluded. The learned Chief Justice further opined that in order to pronounce on criminal negligence it has to be established that the rashness was of such a degree as to amount to taking a hazard in which injury was most likely imminent.

The jurisprudential concept of negligence differs in civil and

criminal law. What may be negligence in civil law may not necessarily be negligence in criminal law. For negligence to amount to an offence, the element of mensrea must be shown to exist. For an act to amount to criminal negligence, the degree of negligence should be much higher i.e. gross or of a very high degree.

Deviation from normal practice is not necessarily evidence of negligence. To establish liability on that basis it must be shown (1) that there is a usual and normal practice; (2) that the defendant has not adopted it; and (3) that the course in fact adopted is one no professional man of ordinary skill would have. In order to prosecute a doctor it has to be established that he has committed a high degree of negligent conduct that involves an utter disregard to the life and safety of others and a conduct deserving of punishment where the degree of negligence is much higher than that of a simple negligence case. However, a doctor cannot be arrested unless his arrest is necessary for proceeding the investigation or collection of evidence or producing him in front of the court to face the prosecution.

Liability under the Consumer Protection Act (CPA), 1986

As discussed earlier, after the judgment of the Supreme Court in *Indian Medical Association v. V. P. Shantha & others*, the doctors are made liable under the Consumer Protection Act (CPA), 1986 also. But in order to bring somebody within the purview of the CPA, one has to prove that his relationship with the defendant is that of a consumer and there is deficiency of service on the part of the defendant. Delivering a judgment of far reaching importance in *Vasanth P. Nair v Smt. V.P.Nair*, the National Commission held that a patient is a 'consumer' and a medical assistance is a 'service'. A doctor is personally held liable for his acts of negligence although in case of government hospitals, the hospital has to pay the compensation as per the rule of vicarious liability under the law of torts.

The Act defines 'deficiency of service' as any fault, imperfection, shortcoming, or inadequacy in the quality, nature, or manner of performance that is required to be maintained by or under any law for the time being in force or has been undertaken to be performed by a person in pursuance of a contract or otherwise in relation to any service. So as an unsatisfied consumer one can go to a consumer court under the Consumer Protection Act, 1986. As the relationship between a patient and a doctor is very delicate as it is built on the foundation of trust and confidence, the doctor has the duty to ensure best interest of the patient. Medical profession has been brought under the Section 2(1) (o) of the CPA, 1986.

The National Consumer Commission in the case of *Dr. Kunal Saha v. Dr. Sukumar Mukherjee and Ors.* decided on 1st June, 2006, summarised the medical negligence law as follows:

- To examine whether reasonable degree of care was exercised there or not and
- Secondly as the degree of standard of reasonable care is to be judged in each case depending upon expertise of medical man and the circumstances of each case.

Halsbury's Laws of England, 4th Edn. pr.36, p.36, Vol.30 mentions the degree of skill and care to be followed by a medical practitioner as follows: "The practitioner must bring to his task a reasonable degree of skill and knowledge, and must exercise a reasonable degree of care. Failure to use due skill in diagnosis with the result that wrong treatment is given is negligence. Neither the very highest nor a very low degree of care and competence, judged in the light of the particular circumstances of each case, is what the law requires. A person is not liable in negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art, even though a body of adverse opinion also exists among medical men; nor is a

practitioner necessarily negligent if he has acted in accordance with one responsible body of medical opinion in preference to another in relation to the diagnosis and treatment of a certain condition, provided that the practice of that body of medical opinion is reasonable.”

In order to prove negligence on the part of a medical practitioner, as decided by the Madhya Pradesh High Court in the case of Smt.Sudha Gupta and Ors. vs. State of M.P. and Ors., the burden of proof lies on the patient to establish his case against the medical professional and not for the medical professional to prove that he had acted with sufficient care and skill. The National commission has also taken the same view in the case of Kanhiya Kumar Singh vs. Park Medicare and Research Centre, observing that a mishap during operation cannot be said to be deficiency or negligence in medical services. Negligence has to be established and cannot be presumed.

Conclusion

Keeping in view the various remedies available under different statutes as well as the judicial analysis made by the Apex Court, it can be concluded that the inclusion of cases relating to medical negligence within the purview of the Consumer Protection Act (CPA), 1986 along with the existing remedies, is definitely a bold step towards a new horizon of far reaching importance. In order to maintain the sanctity of the noble profession of the doctors, some kinds of check and balance is definitely essential as per the need of the society. Another thing is that, so far as the cases of victims of medical negligence are concerned, expecting patience from them for a longer period to get the relief under the ordinary court procedure would definitely amount to sheer injustice, thus an alternative cheap and speedy remedy in the form of the Consumer Protection Act (CPA), 1986 can surely bring a ray of hope to the victims. At the same time, it is pertinent to mention here that simply the verdict of the Supreme Court cannot give relief to the victims unless the Consumer Forums actively notice the cases relating to medical negligence and act promptly so as to give effect to the decision of the Apex Court in its true letter and spirit.

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