

Medical Negligence under Consumer Protection Act:

A Judicial Approach

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INTRODUCTION

Professional negligence or Medical negligence might be characterized as need of sensible level of care or expertise or wilful negligence with respect to the medical specialist in the treatment of a patient with whom a relationship of expert attendant is built up, in order to prompt substantial damage or to loss of life. Consumerism is currently settled in the medicinal practice and the idea that fault might be credited and remunerated has a high need.

Medical profession is highly respected in the society and doctors try to provide their best to treat patients with due care and negligence. There are many medical negligence cases which comes before either in consumer courts or criminal and civil Courts. Now the medical negligence cases are covered under the Consumer Protection Act, 1986.

On 9 April, 1985, The United Nations General Assembly adopted certain guidelines to protect the interest of consumers, especially in developing countries. The basic aim was to enact laws and frame policies in order to achieve and maintain adequate protection for consumers from hazards to their health and safety, and to ensure availability of effective consumer redress.¹ The Consumer Protection Act, 1986 (CPA) was enacted by the Parliament of India to safeguard consumer interest, in compliance with these UN guidelines. Consumer courts were established for the settlement of consumer disputes and related matters.

The Act protects not only the interest of a consumer when he purchases goods and services for daily use, but also protects his interests when he goes for treatment to a medical professional.. Many medical associations filed strong protest against the application of the Act to the doctors on the grounds that the relationship between doctor and a patient is not that of a buyer and seller. They reiterated that misconduct and the negligence of medical professionals can be tried and disputes be solved at existing forums like the Medical Council of India, Stated Medical Councils, and the civil and criminal courts.² However their view was not accepted.

¹ *The IMA case*, Indian Medical Association v. V.P. Shantha and Ors., AIR 1996 SC 550, 1995 (3) CPJ 1.

² TAPAS KUMAR KOLEY: MEDICAL NEGLIGENCE AND THE LAW IN INDIA, (OXFORD UNIVERSITY PRESS, 2010) Consumer Protection Act and the Medical Profession, 134-158.

In the initial period after the enactment of the act, there was a lot of confusions and contradictions in the judiciary as well as medical fraternity regarding the application of the act in the case of medical negligence. The definition of service, consumer All the confusions regarding the scope of CPA regarding medical negligence cases were cleared by the Supreme Court of India in its landmark judgment of the IMA case.

The test for determining the negligence of a medical professional was given by McNair J. in *Bolam's* case to be the standard of the ordinary skilled man exercising and professing to have that skill.³

INTRODUCTION TO THE BOLAM'S TEST

Since 1957, the *Bolam* test has been the benchmark by which professional negligence has been assessed. It is based on the direction to the jury of a high court judge, McNair J, in *Bolam v Friern Hospital Management Committee*⁴. The claimant was undergoing electro convulsive therapy as treatment for his mental illness. The doctor did not give any relaxant drugs and the claimant suffered a serious fracture. There was divided opinion amongst professionals as to whether relaxant drugs should be given. If they are given there is a very small risk of death, if they are not given there is a small risk of fractures. The claimant argued that the doctor was in breach of duty by not using the relaxant drug. The Court Held that doctor was not in breach of duty. The House of Lords formulated the *Bolam* test:

'A doctor is not guilty of 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. Putting it another way round, a doctor is not negligent if he is acting in accordance with such a practice, merely because there is a body of opinion that takes a contrary view.'

It follows that if a medical practice is supported by a responsible body of peers, then the *Bolam* test is satisfied and the practitioner has met the required standard of care in law. This test has been applied on numerous occasions in cases of medical litigation. A strong authorization of this test was provided in the House of Lords by Lord Scarman in the case of *Maynard*. His Lordship stated:

³ *Bolam v. Friern Hospital Management Committee* [1957] 1 WLR 583.

⁴ *Ibid.*

“ I have to say that a judge’s ‘preference’ for one body of distinguished professional opinion to another also professionally distinguished is not sufficient to establish negligence in a practitioner whose actions have received the seal of approval of those whose opinions, truthfully expressed and honestly held, were not preferred. ...For in the realm of diagnosis and treatment negligence is not established by preferring one respectable body of professional opinion to another.”

It is important to remember that the "*Bolam test*" is just one stage in the fourfold test to determine negligence. *First*, it must be established that there is a duty of care (between a doctor and patient this can be taken for granted). *Second*, it must be shown that the duty of care has been breached. This is where the *Bolam test* is relevant, because falling below the standard of a responsible body of medical men means that person will be considered negligent. *Thirdly* it must be shown that there was a causal link between the breach of duty and harm. And *fourth*, it must be shown that the harm was not too remote.

The *Bolam test* does not vary significantly in professional negligence litigation, but it causes greater difficulty for the courts in medical negligence than in claims against, say, a lawyer or an accountant, because of the technical issues involved. The problem is as follows:

- The award of damages in the civil law is intended to compensate the claimant for the loss and damage caused by the relevant defendant.
- A person seeks the assistance of a medical practitioner because of an inherent condition which may be physical, psychological, or contain elements of both, e.g. a person may be admitted to hospital with traumatic compression injuries resulting from an industrial or road traffic accident, and exhibit symptoms of shock.
- But suppose that the claimant receives negligent treatment in the hospital. In theory, a second cause of action arises against the medical practitioners and their employers. The court must be able to distinguish between any loss and damage flowing from the two causes.
- Damages for the first cause must be valued by assessing what hypothetically perfect treatment would have achieved. This may be a complete recovery at some time in the future, or residual permanent disability represented by a percentage loss of movement in joints, etc.
- In the second action, the court must find that the negligent treatment actually caused a different outcome which is measurably more severe than the first hypothetical outcome.

The law distinguishes between liability flowing from acts and omissions, and liability flowing from misstatements. The *Bolam* principle addresses the first element and may be formulated as a rule that a doctor or other health professional is not negligent if he or she acts in accordance with a practice accepted at the time as proper by a responsible body of medical opinion, even though some other practitioners adopt a different practice. In addition, *Hedley Byrne & Co. Ltd v. Heller & Partners Ltd.*⁵ created the rule of "reasonable reliance" by the claimant on the professional judgment of the defendant.

"Where a person is so placed that others could reasonably rely upon his judgment or his skill or upon his ability to make careful inquiry, and a person takes it upon himself to give information or advice to, or allows his information or advice to be passed on to, another person who, as he knows or should know, will place reliance upon it, then a duty of care will arise."

Because of the nature of the relationship between a medical practitioner and a patient, it is reasonable for the patient to rely on the advice given by the practitioner. Thus, *Bolam* applies to all the acts and omissions constituting diagnosis and consequential treatment, and *Hedley Byrne* applies to all advisory activities involving the communication of diagnosis and prognosis, giving of advice on both therapeutic and non-therapeutic options for treatment, and disclosure of relevant information to obtain informed consent.

The English view is that a doctor is not guilty of negligence if he acted in accordance with the practice accepted as proper by a responsible body of medical men. But what amounts to reasonable conduct should only be decided upon by the court, based on views of the experts in the field. As to what other medical professionals do in similar situations, will be a material consideration to be weighed by the court. The view in *Bolam's* case was accepted in India in the landmark case of *Suresh Gupta v. Govt. of NCT Delhi and Anr.*⁶ However that case got referred to a larger bench of the Supreme Court and finally in *Jacob Mathew v. State of Punjab*,⁷ and *Shiv Ram v. State of Punjab*⁸ and the *Bolam test* was approved.

⁵ [1964] AC 465.

⁶ [2004] 6 SCC 422.

⁷ [2005] 6 SCC 1.

⁸ AIR 2005 SC 3280.

CONSUMER PROTECTION ACT AND MEDICAL PROFESSION

In 1995, the Supreme Court decision in *Indian Medical Association v. V P Shantha*⁹ brought the medical profession within the ambit of a 'service' as defined in the Consumer Protection Act, 1986. This defined the relationship between patients and medical professionals as contractual. Patients who had sustained injuries in the course of treatment could now sue doctors in 'procedure-free' consumer protection courts for compensation.

The Court held that even though services rendered by medical practitioners are of a personal nature they cannot be treated as contracts of personal service (which are excluded from the Consumer Protection Act). They are contracts for service, under which a doctor too can be sued in Consumer Protection Courts.

A 'contract for service' implies a contract whereby one party undertakes to render services (such as professional or technical services) to another, in which the service provider is not subjected to a detailed direction and control. The provider exercises professional or technical skill and uses his or her own knowledge and discretion. A 'contract of service' implies a relationship of master and servant and involves an obligation to obey orders in the work to be performed and as to its mode and manner of performance. The 'contract of service' is beyond the ambit of the Consumer Protection Act, 1986, under Section 2(1) (o) of the Act.

The Consumer Protection Act will cover if some person are charged and some are exempted from charging because of their inability of affording such services will be treated as consumer under Section 2 (1) (d) of the Act.

WHO IS A CONSUMER?:

“Consumer”¹⁰ 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

⁹ *The IMA case.*

¹⁰ 2(d) of Consumer Protection Act, 1986.

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;

By this definition, it can be clearly documented that, definition of the consumer is wide enough to cover the patient who promises to pay medical expenses.

Now another definition which needs to analyse is definition of service to understand the properly medical services.

“Service”¹¹ means service of any description which is made available to potential users and includes the provision of facilities in connection with banking, financing, insurance, transport, processing, supply of electrical or other energy, board or lodging or both, housing construction, entertainment, amusement or the purveying of news or other information, but does not include the rendering of any service free of charge or under a contract of personal service;

Analysis of the above definition provides list of the certain category of the services. This list is not an exhaustive one; therefore, it can include any kind of the services belong to ant sector. Hence, medical services will also fall within the purview of this definition. However, in order to bring the service within the purview of the definition following criteria need to satisfy:

1. Services should not be free of charge
2. It should not be under a contract of personal service

Therefore, medical services render free of the charge or under the contract of personal services will be outside the scope of the definition of the services itself.

¹¹ Section 2(1) (o) of Consumer Protection Act, 1986.

WHAT IS DEFICIENCY OF SERVICE?:

The word 'deficiency' has been defined by Section 2(1) (g) of the Consumer Protection Act, 1986 as follow:

'Deficiency' means, any fault, imperfection, shortcoming or inadequacy in the quality, nature, and 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.

Therefore, from the analysis of the above definition it can be clearly documented that, deficient service provided by medical practitioner is actionable and it can be fall under the purview of the above definition.

In *Nihal Kaur v. Director, P.G.I.M.S.R.*,¹² a patient dies a day after the surgery and the relatives found a pair of scissors utilized by the surgeon while collecting the last remains. The doctor was held liable and a compensation of Rs. 1.20 lakhs was awarded by the state consumer forum, Chandigarh.

Recently, the Supreme Court in *Malay Ku. Ganguly v. Sukumar Mukharjee*,¹³ exhaustively dealt with 'medical negligence' and the standard of care that is required to be exercised by a doctor. The court framed certain principles and observed that there cannot be any doubt or dispute that for establishing medical negligence or deficiency in services, the courts would determine the following rules:

- No guarantee is given by any doctor or surgeon that the patient would be cured.
- The doctor however must undertake a fair reasonable and competent degree of skill, which may not be the highest skill.
- Adoption of one of the modes of treatment, if there are many and treating the patient with due care and caution would not constitute any negligence.

¹² (1996) CPJ 112.

¹³

- Failure to act in accordance with the standard, reasonable degree of care and skill and knowledge which he possesses. Failure to use due skill in diagnosis with the result that wrong treatment is given would be negligence.
- In a complicated case, the court would be slow in attributing negligence on the part of the doctor, if he is performing his duties to the best of his ability.

The court further took the view that informed consent after evaluating the risks is increasingly becoming a requirement keeping the developments in medical science in view and opined that no communication was made in this case by the doctors about the risks involved in the line of treatment, whereupon the patient would decide whether to opt for such treatment or not.

The Supreme Court in *Indian Medical Association v. V.P Shantha and Others*¹⁴ Case has clearly reiterated that, services rendered to a patient by a medical practitioner (except where the doctor renders services free of charge to every patient or under a contract of personal service) by way of consultation, diagnosis and treatment, both medical and surgical, would fall within the ambit of service as defined in section 2(1) (o) of the Consumer Protection Act 1986.

The judgement has faced a lot of opposition from the people involved in the medical field. However, this judgement has come as a wave of relief for all the consumers. With rampant increase in commercialisation of services which also includes medical services, the patient has now become a mere consumer. This definitely causes deterioration in the fiduciary relationship between a doctor and his/her patient. This judgement which extends the arms of the Consumer Protection Act, 1986 to the medical profession will surely enable to keep a check on the doctors so that they perform their duties diligently, for it is always the patient's life that is at stake. It will make the process of treatment and surgery more transparent. One negative aspect about this judgement is that it does not prescribe any relief or compensation who avail free medical services. As a consequence, only doctors who work in paid hospitals come under the scanner while those who work in hospitals offering free medical services will go scot-free if they commit any blunder. Also the burden of proof is on the patient to prove that there was negligence on part of the doctor. Instead, the burden of proof should be shifted onto the doctor to prove that he was diligent enough while performing his duties.

¹⁴ AIR 1996 SC 550.

Whatever is upheld by the Supreme Court in the case of V. P shantha case not followed in the case of *Achutrao Haribhau Khodwa v. State of Maharashtra*¹⁵

In instant case court refused to hold either doctor or government liable for death caused due to the negligence on the part of the doctor. In such case doctor left towel inside abdomen while conducting the operation. The court held that neither the doctor nor the government is liable unless it is proved that the death was caused due to leaving towel inside the abdomen. It is humble submission with great respect that, leaving a towel itself amount to the negligence on the part of the doctors.

However, The Supreme Court took a very progressive view in the case of *Spring Meadows Hospital v. Harjot Ahluwalia*¹⁶, In the instant case Court held that, when a young child was taken to a private hospital by parents and treated by the doctors, and then not only the child but his parents also treated as consumer under the Consumer protection Act. Hence, parent can claim the Compensation under the Consumer protection Act.

Hence, court, ruled in favour of the parents of the child, and the child who was the beneficiary of the service. The hospital argued that sufficient care had indeed been taken, and therefore would not be entitled to pay compensation for the mental agony the parents went through. They contended that the parents would not come under the definition of consumer, in the consumer protection act. The court rightly pointed out that this contention was false since the definition of consumer under the act does clearly include parents as well.

*Jacob Mathew v. State of Panjab and another*¹⁷, In the instant case SC court upheld that, the jurisprudential concept of the negligence differs in civil and criminal law. What may be negligence in civil law may not be necessarily be negligence in criminal law. For negligence to amount an offence, the element of mens rea must be shown to exist. For an act to amount to criminal negligence, the degree of the negligence would be much higher i.e. gross or of a very high degree negligence, which is neither gross nor of a higher degree may provide a ground for action in civil law but cannot from the basis of the prosecution¹⁸.

¹⁵ (1996) 2 SCC 634.

¹⁶ (1998) 4 SCC 39.

¹⁷ AIR 2005 SC 3180.

¹⁸ Y.V Rao, commentary on the Consumer protection Act, 1986, Asia law House, Hyderabad, 3rd ed. (2013) page 351.

In *Dr. Suresh Gupta case*¹⁹ Supreme Court of India in year 2004 upheld that, the legal position on medical negligence is quite clear and well settled that whenever a patient died due to the medical negligence the doctor was liable in civil law for paying the compensation. Only when the negligence was so gross and his act was so res and his act was reckless as to endanger the life of the patient, then criminal law for offence under section 304A of Indian Penal Code, 1860 will apply.

In *Kurban Hussein Mohamedalli Rangawalla v. State of Maharashtra* while dealing with section 304A of IPC, the following statement was cited with approval, “To impose criminal liability under section 304 A, IPC, it is necessary that the death should have been the direct result of a rash and negligent act of the accused, and that the act must be proximate and efficient cause without the intervention of another’s negligence. It must be the *causa causans*; it is not enough that it may have been the *causa sine qua non*”.²⁰

Inclusions of Medical Services under the CPA

This is probably the most significant issue that was clarified by the Supreme Court in the IMA case. It removed all the confusions prevailing initially regarding the inclusion of medical services under the purview of the act. All types of medical services were brought under the purview of CPA.

The Supreme Court observed that medical practice is a profession rather than an occupation and medical professionals provide a service to the patients and thus they are not immune to the claim from damage on the ground of negligence. From this view point the court concluded that patient can be a ‘consumer’ for the purpose of CPA. The court also observed the consumerism established by the USA and the UK in the field of medical practice. The Supreme Court referred the well-known book *Law and Medical Ethics*, by Mason and McCall Smith,²¹ and *Arizona v. Maricopa County Medical Society*,²² which is the leading case on price fixing in the health care industry. In that case it was held that the fixing of maximum prices for insured users of medical services constituted per se illegal price fixing under Section 1 of the Sherman Act. Considering all these facts the Supreme Court concluded, the majority of medical negligence cases in India

¹⁹ Dr. Suresh Gupta vs. Government of N.C.T. of Delhi, 4, 2004, Supreme Court of India, AIR 2004 SC 4091 available at <http://pbtindia.com/wp-content/uploads/2011/10/Medical-Negligence>

²⁰ Asia Law house Hyderabad, Law relating to Medical Negligence, Yetukuri Venkateswara Rao, 1st ed. 2005, pp 32.

²¹ Fourth edition.

²² 457 US 332 (1982).

are filed in consumer courts under the Act. The Indian Medical Association had put forward many arguments in its attempt to persuade the Court that doctors should not be brought under the purview of the CPA.

NECESSITY OF THE CONSUMER PROTECTION ACT

This is the primary inquiry which comes to the mind of the medical personnel. This need emerged in light of the fact that the current traditions that must be adhered to which accommodate activity in instances of medical negligence under the Law of Tort and Indian Penal Code. These incorporate the accompanying:

- (i) Delay, which, in medicinal carelessness cases, has a tendency to be more noteworthy;
- (ii) The cost of bringing an action, which is famously high in connection to the sum recovered in damages;
- (iii) restricted access to the courts ;
- (iv) Success relies upon confirmation of both negligence and causation (which can be especially troublesome in instances of medical negligence).

Consequently need to accommodate an alternate framework which would be effortlessly available, speed and shabby, brought forth the Consumer Protection Act. This Act was made appropriate to the specialists in light of the fact that there are no arrangements in the Indian Medical Council Act, 1956;

- (i) To entertain any complaint from the patient;
- (ii) To take action against the Medical Practitioner in case any negligence has been committed;
- (iii) To award any compensation, etc. in case the negligence is proved.

ABUSE OF THE CONSUMER PROTECTION ACT

The CPA was promulgated mainly to safeguard the interests of its consumers. However, the easy and quick disposal of the cases under the Act has led to its increasing misuse. Today, it seems that unscrupulous patients have started using it as a means to blackmail medical

professionals. However, doctors need to be alarmed as the law safeguards the rights of the medical professional as well. As per section 26 of the CPA, if a complaint is found to be frivolous or vexatious, the consumer forum will dismiss the complaint and make an order that the complainant shall pay the opposite party costs, not exceeding ten thousand rupees. There are provisions in the act to check frivolous and speculative complaints.

CONCLUSION

As it is very much evident from the preamble of the consumer Protection Act and various Supreme Court judgments that Consumer protection Act is one of the social welfare legislation enacted to protect the common people. Therefore, to do the justice with the consumer, the law should to adapt itself to the need of the changing society; it must be flexible and adaptable to do the justice with the consumer. With the rapid expansion of population and shortages of healthcare facilities in government hospitals, private hospitals in the society have been playing a vital role. Even though there are many government hospitals which are providing health services to the populace of the region, the services rendered is inadequate in terms of quantity and quality.

Medical negligence is a very crucial aspect. It's very difficult to conclude if the doctor is liable under medical negligence or not. There is a very thin border to differentiate if they are liable or not. If you look the fact sheet of this case we can see that the doctor was accused for being negligent. This can actually harm a doctor's reputation when he is not guilty of such an act. Negligent doctors will be punished. And the court makes the point to punish the negligent doctors in a right way.

Same time it is also not right on the part of the people to blame the doctors for every human life lost during the treatment of the patient. A doctor wouldn't purposely kill someone for vengeance. Doctors perform the most sacred act of curing a human and it does no good to the society by blaming a doctor for the life lost. Hence proper rules and principles should be looked after before filing a case of medical negligence against a doctor.