

Medical Negligence: Criminal, Consumer Protection and Tort

INTRODUCTION:

With the awareness in the society and the people in general gathering consciousness about their rights, measures for damages in civil suits and criminal proceedings are on the augment. Not only civil suits are filed, the accessibility of a medium for grievance redressal under the Consumer Protection Act, 1986(CPA), having jurisdiction to hear complaints against medical professionals for 'deficiency in service', has given rise to a large number of complaints against doctors, being filed by the persons feeling aggrieved. The criminal complaints are being filed against doctors alleging commission of offences punishable under Sec.304 A or Section 336/337/338 of the Indian Penal Code, 1860(IPC) alleging rashness or negligence on the part of the doctors resulting in loss of life or injury of varying degree to the patient. This has given rise to a situation of great distrust from unnecessary and arbitrary complaints, is the need of the hour. The liability of medical professionals must be clearly demarcated so that they can perform their benevolent duties without any fear of legal sword. At the same time, justice must be done to the victims of medical negligence and a punitive sting must be adopted in deserving cases. This is more so when the most sacrosanct right to life or personal liberty is at stake.

NEGLIGENCE UNDER TORT:

It is very difficult to define negligence; however the concept has been accepted in jurisprudence. The authoritative text on the subject in India is the "Law of Torts" by Ratanlal and Dhirajlal. Negligence has been discussed as:

Negligence is the breach of a duty caused by the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable

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man would not do. Actionable negligence consists in the neglect of the ordinary care of skill towards a person to whom the defendant owes the duty of observing ordinary care and skill, by which neglect the plaintiff has suffered injury to his person or property.

The definition involves three constituents of negligence;

- (1) A legal duty to exercise due care on the part of the complained of towards the party complaining the former's conduct within the scope of the duty;
- (2) Breach of the said duty ; and
- (3) Consequential damage.

Under civil laws, at a point where the Consumer Protection Act ends, the law of torts takes over and protects the interests of patients. This applies even if medical professionals provide fee services. In cases where the services offered by the doctor or hospital do not fall in the ambit of 'service' as defined in the Consumer Protection Act, patients can take recourse to the law relating to negligence under the law of torts and successfully claim compensation. The onus is on the patient to prove that the doctor was negligent and that the injury was a consequence of the doctor's negligence.

NEGLIGENCE UNDER CONSUMER PROTECTION ACT:

It may be defined as want of reasonable degree of care or skill or willful negligence on the part of the 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. The absence or lack of care that a reasonable person should have taken in the circumstances of the case is held to be negligent .The three ingredients of negligence are as follows:

The defendant owes a duty of care to the plaintiff.

The defendant has breached this duty of care.

The plaintiff has suffered an injury due to this breach.

Over the last fifteen years there has been increased speculation on whether "Medical Services" are expressly or categorically included in the definition of term "services" under Section 2(1)(0) of the Consumer Protection Act. In *Indian Medical Association v. V.P. Shantha and Ors* the principal issue which arose for decision before the Supreme Court was whether a medical practitioner renders 'service' and can be proceeded against for 'deficiency in service' before a forum under the Consumer Protection Act, 1986. Court gave the answer in positive and consumer can file a case in a consumer forum for seeking damages arising out of wrong treatment or removal of sensitive body parts during operation.

NEGLIGENCE UNDER CRIMINAL LAW:

It is claimed that negligence is negligence and jurisprudentially no distinction can be drawn between negligence under civil law and negligence under criminal law. Generally speaking it's the amount of damages incurred which is determinative of the extent of liability in tort; but in criminal law it is not the amount of damages but the amount of degree of negligence that is determinative of liability. In criminal law the degree of negligence has to be higher than that of negligence enough to fasten liability for damages in civil law. The essential ingredient of mens rea cannot be excluded from consideration when the charge in a criminal court consists of criminal negligence.

In the case of *Dr. Suresh Gupta's case (Dr. Suresh Gupta vs. Govt of NCT Delhi, AIR 2004, SC 4091:(2004)6 SCC 42)*, the Full bench of the Supreme Court on India consisting of Chief Justice R.C. Lahoti, Justice G.P. Mathur, and Justice P.K. Balasubramanyam declared while reviewing the previous order that extreme care and caution should be exercised while initiating criminal proceedings against medical practitioners for alleged medical negligence.

In a well considered order, the Apex court felt that bonafide medical practitioners should not be put through unnecessary harassment. The court said that doctors would not be save lives if they

were to tremble with the fear of facing criminal prosecution.

The Apex court laid down the following status regarding prosecution of cases: cases of doctors being subjected to criminal prosecution are on the increase. The criminal process once initiated subjects in the medical professionals to serious embarrassment and sometimes harassment. Statutory rules or executive instructions incorporating certain guidelines are to be framed and issued by the Government of State Government in consultation with the Medical Council of India. A private complaint may not be entertained unless the complainant produces prima facie evidence before the court in the form of credible opinion given by another competent doctor to support the charge of rashness or negligence on the part of the accused doctor.

In the case of *Jacob Mathew (Dr.) vs. State of Punjab and Anr.* 3(2005) CPJ 9(SC) (Criminal Appeal) where a cancer patient in an advanced stage died due to non availability of an oxygen cylinder in the room, the Supreme Court considered three weighty issues: first, negligence in the context of the medical profession necessarily calls for treatment with difference; second, the difference between occupational negligence and medical negligence has to be properly understood; and third the standard to be applied to hold a medical professional as negligent has to be carefully considered.

JUDICIAL VIEW FOR MEDICAL NEGLIGENCE UNDER CRIMINAL LAW :

In paragraphs 51, 52 and 53 of *Jacob Mathew's* case, court held that the offence under Section 304 A IPC cannot be registered against any doctor unless and until the medical opinion from a Board is constituted. Court held that a private complaint may not be entertained unless the complainant has produced prima facie evidence before the Court in the form of a credible opinion given by another competent doctor to support the charge of rashness or negligence on the part of the accused doctor. The investigating officer should, before proceeding against the doctor accused of rash or

negligent act or omission, obtain an independent and competent medical opinion preferably from a doctor in government service qualified in that branch of medical practice who can normally be expected to give an impartial and unbiased opinion applying Bolam's test to the facts collected in the investigation. A doctor accused of rashness or negligence, may not be arrested in a routine manner (simply because a charge has been leveled against him). Unless his arrest is necessary for furthering the investigation or for collecting evidence or unless the investigation officer feels satisfied that the doctor proceeded against would not make himself available to face the prosecution unless arrested, the arrest may be withheld.

In *Lalita Kumari vs. Government of Uttar Pradesh & ORS(2013)13 SCALE559*, the important issue which was considered by the Constitutional Bench in the referred matter was whether "a police officer is bound to register a First Information Report (FIR) upon receiving any information relating to commission of a cognizable offence under Section 154 of the Code of Criminal Procedure, 1973(in short 'the Code') or the police officer has the power to conduct a "preliminary inquiry" in order to test the veracity of such information before registering the same?"

The Hon'ble Constitutional Bench has concluded its findings in below mentioned directions:

- (i) Registration of FIR is mandatory under Section 154 of the Code, if the information discloses commission of a cognizable offence and no preliminary inquiry is permissible in such a situation.
- (ii) If the information received does not disclose a cognizable offence but indicated the necessity for an inquiry , a preliminary inquiry may be conducted only to ascertain whether cognizable offence is disclosed or not.
- (iii) If the inquiry discloses the commission of a cognizable offence, the FIR must be registered. In cases where preliminary inquiry ends in closing the complaint, a copy of the entry of such closure must be supplied to the first

information forthwith and not later than one week. It must disclose reasons in brief for closing the complaint and not proceeding further.

- (iv) The police officer cannot avoid his duty of registering offence if cognizable offence is disclosed. Action must be taken against erring officers who do not register the FIR if information received by him discloses a cognizable offence.
- (v) The scope of preliminary inquiry is not to verify the veracity of otherwise of the information received but only to ascertain whether the information reveals any cognizable offence.

As to what type and in which cases preliminary inquiry is to be conducted will depend on the facts and circumstances of each case. The category of cases in which preliminary inquiry may be made are as under:

- (a) Matrimonial disputes/family disputes
- (b) Commercial offences
- (c) Medical negligence cases
- (d) Corruption cases
- (e) Cases where there is abnormal delay/laches in initiating criminal prosecution, for example, over 3 months delay in reporting the matter without satisfactorily explaining the reasons for delay.

It was held that the aforesaid are only illustrations and not exhaustive of all conditions which may warrant preliminary inquiry.

- (vi) While ensuring and protecting the rights of the accused and the complainant, a preliminary inquiry should be made time bound and in any case it should not exceed 7 days. The fact of such delay and the causes of it must be reflected in the General Diary entry.
- (vii) Since the General Diary/Station Diary/ Daily Diary is the record of all information received in a police station, we

direct that all information relating to cognizable offences, whether resulting in registration of FIR or leading to an inquiry, must be mandatorily and meticulously reflected in the said Diary and the decision to conduct a preliminary inquiry must also be reflected, as mentioned above.

THE DUTIES OF POLICE IN CASES OF CRIMINAL PROSECUTION OF DOCTORS FOR RASH AND NEGLIGENT ACT:

- (i) No Police station or investigating agency shall register an offence under 304 A IPC for criminal negligence on the part of the doctor unless the complainant clearly mentions the specific allegation of rashness and negligent act directly and attributively resulting in death of the patient and unless an opinion from the committee is obtained.
- (ii) After receiving any complaint regarding rashness and negligent act of doctor the investigating officer or In-charge of Police Station should forward such complaint along with all the papers related to treatment and investigation etc. to the committee constituted by the Government of India/State Governments for giving opinion in such cases.
- (iii) The police or investigating officer shall not arrest a person unless some prima facie evidence about the rash and negligent act of doctor is expressed by the Committee in opinion.
- (iv) The arrest shall also not be made if the doctor against whom the allegation is made gives reasonable assurance, by virtue of securities/bound to cooperate in the investigation and assure his availability whenever required by the investigating authorities.

The Police shall have power to seize all original document relating to the treatment and investigation of the case if the concerned doctor fails to provide the documents to the

Committee.

CONCLUSION:

In Medical Negligence when a consumer has any complaint/grievance against a Doctor/ Hospital (either Government or Private Hospital) or Nursing Home, for redressal- He should first take a second opinion from a doctor having expertise in the same field.

- If the opinion indicated a case of negligence, he should send his complaint to the Medical Superintendent (M.S) of the concerned Hospital with copy to Chief Medical Officer (CMO) of his area.
- If there is no reply or he is not satisfied with the reply of the concerned official then he should send his complaint to the State Medical Council of his area.
- If he is not satisfied with reply of SMC then he can send his complaint to the Medical Council of India .MCI will charge Rs.500/-as processing fee.
- If there is criminal type complaint than effected consumer can file complaint with the local Police Station. However, the expert opinion will be required to register any police complaint.
- He can file a case with the Consumer Forum, Civil Court and Criminal Court for seeking damages arising out of wrong treatment or removal of sensitive body parts during operation.

Negligence in the context of medical profession necessarily calls for a treatment with a Negligence and criminal negligence are different .The jurisprudential concept of negligence differs in civil and criminal law. In criminal negligence mens rea must be shown to exist .There is no blanket immunity against criminal prosecution for medical professionals. The expression 'rash or negligent act' as occurring in S 304A of the IPC has to be read as qualified by the word

'grossly' .The Indian Penal Code does put the medical professional on a pedestal different from ordinary mortals, *Res ipsa loquiter* is only a rule of evidence in the domain of civil law . It is advantageous for patient himself also to choose the line civil law as against criminal law.
