

MEDICAL NEGLIGENCE AND CONSUMER RIGHTS: EMERGING JUDICIAL TRENDS

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The medical profession is one of the noblest professions in the world. However, corporatisation and commercialization of medical profession has made it like any other business and the medical profession is increasingly being guided by the profit motive rather than that of service. Such a situation gave rise to unethical practices and negligence. When business motive comes to the force, service to the patients takes place as last row. Today like every thing in the society Hippocrates noble profession has become commercialized and people are not only suspicious but downright sceptical of their practice. Therefore, if there is a rashness or negligence on the part of the doctor while treating a patient he is being made liable under the Consumer Protection Act, 1986.

The Consumer Protection Act, 1986 is an innovation in India for the better protection of the consumers. The praiseworthy objective of the enactment is to provide inexpensive and quick justice without any delay. There are number of laws which protect the rights of consumers, but each Act deals with a special class of consumers and that too, with regards to only a particular area of consumer behaviour. Whereas the Consumer Protection Act is a special class of legislation, which not only recognizes certain basic rights of consumers but also provides for an expeditious mechanism for the redressal of their grievances. Though the Consumer Protection Act has not changed the law of medical negligence, has created an inexpensive and speedy remedy against medical negligence.

However, it is pertinent to note that there are divergent opinions in judgments of Supreme Court in deciding the negligence of a doctor while treating a patient. The issue of what amounts to medical negligence and when can a doctor be said to be negligent and the standard of care that a doctor is expected to meet in his practice has been the topic of a number of landmark judgments of the Judiciary.

The present paper focuses on medical negligence and the role of higher judiciary in protecting the rights of consumers along with divergent opinions delivered by the Supreme Court of India with respect to liability of the doctors for their negligence.

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Medical Negligence

The issues relating to civil liability of the doctors assume special significance in the present context, due to commercialization of medical profession. The action against personal injury caused to the complainant at the hands of doctors requires the proof of legal duty to take care, breach of such duty and consequential damage suffered by the complainant. The Supreme Court in *A.S. Mittal v. State of U.P.*¹ held that “a mistake by a medical practitioner which no reasonably competent and careful practitioner would have committed is negligent one”. A medical practitioner can be said to be reasonably competent and careful when he adopts the ordinary skills and normal practices of the profession. Law does not expect very high or very low standard from a person who renders professional services. In *Dr. L.B. Joshi v. T.B. Golbole*² the Court held that, “the duties which a doctor owes to his patients are:

- i) A duty of care in deciding whether to undertake the case;
- ii) A duty of care in deciding what treatment to give; and
- iii) A duty of care in administration of that treatment.

A breach of any of these duties gives a right of action for negligence to the patient”.

Medical Negligence: The Bolam Rule

In United Kingdom the issue of medical negligence was considered in great detail in the case of *Bolam v. Friern Hospital Management Committee*.³ This case is seminal authority for determining the standard of care required from medical professionals. In this case the Court held that “in the case of a medical man negligence means failure to act in accordance with the standards of reasonably competent medical men at that time and that there may be one or more perfectly proper standards and if the medical man conforms with one of those proper standards he is not negligent”. Hence, the Courts there opined that a doctor is not guilty of negligence if he has acted in accordance with the practice accepted as proper by a responsible body of medical men. The Court will take into consideration what other medical professionals do in similar situation while deciding medical negligence. Hence, *Bolam* case laid down a modest and “ordinary skilled professional standard of care” for determining the liability of the doctors.

1. AIR 1989 SC 1570.

2. AIR 1969 SC 128.

3. (1957)1 WLR 582.

Liability of Doctors for Medical Negligence: The Judicial Approach to the Issue

In deciding the cases of medical negligence the Supreme Court of India has followed liberal approach in some cases while it preferred to follow the strict liability rule in some other cases. The approach of Judiciary in deciding with the cases of medical negligence and liability of the doctors has been described as “Two lines of judicial authorities on medical negligence liability in India” by B.B.Pande. He opined that “in India in respect of claims for medical negligence the judicial rulings of the Supreme Court of India and of the State High Courts can be put in two distinct lines. The first line, that favours a limited liability based on ‘ordinary professional standard’ as laid down in *Bolam* case. The second line, that favours expanding the sphere of medical profession’s liability and demanding a higher duty of care towards the patient and his relatives, particularly where medical expertise is provided on a commercial basis”.⁴

The Supreme Court while adopting a liberal approach, has approved the rule of “ordinary skilled professional standard of care” laid down in *Bolam* case in *Dr. Suresh Gupta v. Govt. of N.C.T of Delhi*,⁵ *State of Punjab v. Shiv Ram*⁶ and *Jacob Matthew v. Union of India*⁷ cases. These cases are some of the instances where the court has preferred to follow liberal approach in the matters of medical negligence. In *Jacob Matthew v. Union of India*⁸ the Supreme Court held that “no sensible professional would intentionally commit an act or omission which would result in harm or injury to the patient since the professional reputation of the professional would be at stake”.

In *Martin F. D’Souza v. Mohd. Ishaq*⁹ the Supreme Court has once again approving the *Bolam* rule held that “judges are not experts in medical science, rather they are lay men. This itself often makes it somewhat difficult for them to decide cases relating to medical negligence... While doctors who cause death or agony due to medical negligence should certainly be penalized, it must also be remembered that like all professionals doctors too can make errors of judgment but if they are punished for this no doctor can practice his vocation with equanimity. Indiscriminative proceedings and

4. B.B. Pande, ‘Why Indian Patients do not deserve the Highest Expert Skills from Doctors?’(2009) 4 SCC 21.

5. (2004) 6 SCC 422.

6. (2005) 7 SCC 1.

7. (2005) 6 SCC 1.

8. *Ibid.*

9. (2009) 3 SCC 1.

decisions against doctors are counter productive and serve society no good. They inhibit the free exercise of judgment by a professional in a particular situation”. And the Supreme Court has further directed that, “whenever a complaint received against a doctor or hospital by the consumer fora or by the Criminal Court then before issuing notice to the doctor or hospital against whom the complaint was made the consumer fora or Criminal Court should first refer the matter to a competent doctor or committee of doctors, specialized in the field relating to which the medical negligence is attributed and only after that doctor or committee reports that there is prima facie case of medical negligence should notice be then issued to the concerned doctor or hospital. This is necessary to avoid harassment to doctors who may not be ultimately found to be negligent”. Thus in this case the Supreme Court not only has taken very liberal approach but also directed consumer fora to take the opinion of the medical experts before initiating the proceedings in medical negligence cases. This judgment has far reaching effects in deciding medical negligence cases. If the expert committee opines that there is no negligence on the part of the doctor or hospital the victim’s remedy will become vein as, he has no chance to say any thing in favour of his case.

On the other hand the Supreme Court has taken stringent action in some medical negligence cases following ‘higher duty of care rule’. In cases of grave professional negligence like, failure on the part of the doctor to inform or warn the patient about the risks involved in the treatment the court has not followed the rule laid down in *Bolam* case. The Supreme Court even applied the doctrine of *res ipsa loquitur* in some cases where the negligence is manifest. *Dr. Khusaldas Pammandas*¹⁰, *Achut Rao Haribhau Khodwa*¹¹, and *Spring Meadows Hospitals v. Harjot Ahluwalia*¹² are some illustrative cases where the Supreme Court has applied the ‘higher duty of care rule’ in deciding the negligence of the doctors. Recently the Supreme Court refrained to take a liberal approach in establishing medical negligence and emphasized on accountability and higher duty of care in medical profession in *B. Jagdish v. State of A.P.*¹³ In a historic judgment in *Nizam’s Institute of Medical Sciences v. Prasanth S. Dhananka*¹⁴ the Supreme Court held that “moreover, in a case involving medical negligence, once the initial burden has been discharged by the

10. *Dr. Khusaldas Pammandas v.State of M.P.*, AIR 1960 50.

11. *Achut Rao Haribhau Khodwa v. State of Maharashtra*, (1996) 2 SCC 634.

12. (1998) 4 SCC 39.

13. (2009) 1 SCC 681.

14. (2009) 6 SCC 1.

complainant by making out a case of negligence on the part of the hospital or doctor concerned, the onus then shifts on to the hospital or to the attending doctors and it is for the hospital to satisfy the Court that there was no lack of care or diligence". In this case the Court awarded Rs. 1 crore as compensation to the victim of medical negligence.

V. Kishan Rao Case

In its landmark judgment in *V. Kishan Rao v. Nikhil Super Speciality Hospital*¹⁵ the Supreme Court recently held that 'there cannot be a mechanical or straitjacket approach that each and every medical negligence case must be referred to experts for evidence' and declared that the judgment rendered in *Martin F.D'Souza v. Mohd. Ishfaq*¹⁶ is *per incuriam*. This judgment is a welcome decision for better achievement of the objectives of the Consumer Protection Act, 1986.

In *V. Kishan Rao v. Nikhil Super Speciality Hospital*¹⁷ the Complainant's wife got admitted in Respondent hospital, who was suffering from fever and chills. She was wrongly treated for typhoid instead of malaria for four days. As a result of said wrong treatment she died. On the complaint, District Forum found that there was negligence on the part of the hospital and awarded compensation. The order of the District Forum was reversed by the State Commission and as well by the National Commission. But the Supreme Court set aside the orders passed by the State Commission and National Commission and restored the order passed by the District Commission. In this case the Supreme Court held that "in the context of such jurisprudential thinking in England, time has come for this Court also to reconsider the parameters set down in *Bolam* test as a guide to decide cases in medical negligence and specially in view of Article 21 of the Constitution which encompasses within its guarantee, a right to medical treatment and medical care". While pronouncing the judgment rendered in *Martin F.D'Souza per incuriam*, the Supreme Court further held that "this Court is constraint to take the view that the general directions given in para 106 in *D'Souza* cannot be treated as a binding precedent and those directions must be confirmed to the particular facts of that case". And the further held that, "the larger Bench decision in *J.J. Merchant (Dr)*¹⁸ has not been noted in *D'Souza*. Apart from that, the directions in para 106 in *D'Souza* are contrary to the provisions of the governing statute. That is

15. (2010) 5 SCC 513.

16. (2009) 3 SCC 1.

17. *Supra* n.15.

18. *J.J Merchant (Dr) v. Shrinath Chatruvedi*, (2002) 6 SCC 635.

why this Court cannot accept those directions as constituting a binding precedent in cases of medical negligence before the Consumer Fora”.¹⁹

The Supreme Court further declared that “this Court makes it clear that in these matters no mechanical approach can be followed by these Fora. Each case has to be judged on its own facts. If a decision is taken that in all cases medical negligence has to be proved on the basis of expert evidence, in that event the efficacy of the remedy provided under this Act will be unnecessarily burdened and in many cases such remedy would be illusory”.²⁰ The consequence of the judgment in *V.Kihan Rao*²¹ is that now the Consumer Fora in the country need not necessarily refer the cases of medical negligence to expert committee before issuing the notice to the doctor or hospital accused of medical negligence and the problems arising from the directions given in the *Martin F. D'souza*²² case will be put to an end.

Medical Negligence and the Judiciary: The way forward

The cordial relationship between doctor and patient has undergone drastic changes due to corporatisation of medical profession, resulting in commercialization of the noble profession, much against the letter and the spirit of the Hippocratic Oath. Though rapid advancements in medical science and technology have proved to be efficacious tools for the doctors in the better diagnosis and treatment of the patients, they have equally become tools for the commercial exploitation of the patients.

The development of law pertaining to professional misconduct and negligence is far from satisfactory. The legislations are not adequate and do not cover the entire field of medical negligence. In a situation where medical services are commercialized applying the rule of “ordinary skilled professional standard of care” laid down in *Bolam's* case in establishing the medical negligence may not do the proper justice to the injured patients.

Finally, it is submitted that the judiciary while deciding medical negligence cases, more incline may be showed towards injured patients ensuring them higher medical skills at the hand of doctors rather applying “ordinary skilled” rule. In this way the *V. Kihan Rao's*²³ case is a welcome judgment. To conclude it is useful to cite an observation of former Chief Justice K.G. Balakrishnan in his address at National Seminar on the ‘Human

19. (2010) 5 SCC 533.

20. *Ibid*, p.522.

21. *Supra* n.19.

22. *Supra* n. 9.

23. *Supra* n.19.

Right to Health'²⁴ that “the right to health cannot be conceived of as a traditional right enforceable against the state. Instead, it has to be formulated and acknowledged as a positive right at a global level one which all of us have an interest in protecting and advancing”.

24. (2009)1 SCC 8.