

Medical negligence liability under consumer protection act: Judicial approaches in India

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Abstract

Medical profession is a noble profession. The relationship between the patient and the doctor is based on mutual trust and faith. Consumer Protection Act, 1986 is a very unique and highly progressive piece of social welfare legislation and the provisions are intended to provide effective and efficient safeguards to the consumers against various forms of exploitations and unfair dealings. It is a handy weapon of consumer to ensure accountability of service providers. The patients have started using this Act, when they are aggrieved by medical negligence of the health care. Every doctor irrespective of the place of his service has a professional obligation to extend his service for protecting life. Deficiency may be result of inability and lack of competency whereas negligence would be caused by carelessness. In all cases of negligence, there will be deficiency but in all cases of deficiency, negligence will not be present. The Indian judiciary has commendable service in protecting and preserving the rights of the consumers as well as sensitizing the society concerning the rights of the consumers. The researcher through some case laws attempt to focus upon the judicial activism on medical negligence liability under the Consumer Protection Act.

Keywords: consumer protection, deficiency in services, medical negligence, compensation and judicial activism

Introduction

Medical negligence gives rise to civil as well as criminal liability. Civil wrongs an aggrieved person can file claim of compensation either through suit or a complaint lodged in consumer forum. Since the enactment of Consumer Protection Act, 1986 there has been a significant increase in medical negligence cases being filed. Medical profession is a noble profession. The relationship between the patient and the doctor is based on mutual trust and faith. Consumer protection Act is a very unique and highly progressive piece of social welfare legislation and the provisions are intended to provide effective and efficient safeguards to the consumers against various forms of exploitations and unfair dealings. It is a handy weapon of consumer to ensure accountability of service providers. The patients have started using this Act, when they are aggrieved by medical negligence of the health care. Every doctor irrespective of the place of his service has a professional obligation to extend his service for protecting life. Medical Negligence means the failure to exercise reasonable skill as per the general standards and prevalent situations is called as medical negligence. The main objective of this Act is to promote and protect the rights of consumers. The researcher through some case laws attempt to focus upon the new approaches of the judiciary relating to medical negligence liability under the Consumer Protection Act.

Who is Consumer

Under section 2 (d) of Consumer Protection Act, 1986, the world Consumer has been defined separately for the purpose of goods and services.

A Consumer means a person who- (i) buys any goods for consideration which has been paid or promised or partly promised or partly paid or under any system of deferred

payment and includes any user of 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 any person who obtain such goods for resale or for any commercial purpose.

(ii) who hires any service or services for consideration which has paid or promised or partly paid or partly promised or under any system of deferred payments and includes any beneficiary or such services other than the person who heirs or avails of the services for consideration paid or promised, partly or partly promised or under any system of deferred payment when such services are availed of with the approval of the first mentioned person^[1]

Every person who hires or avails services of a medical practitioner after payment comes within the ambit of consumer section 2 (1) (0) of Consumer Protection Act, 1986. A patient is also a consumer. The activity of providing medical assistance for payment carried on by hospitals and members of medical profession falls within the scope of service as defined under section 2 (1) (0) of the Act and the persons who avails such services is a consumer under the Act^[2]. A consumer is not only the person who hires or avails any services for consideration but also the person who is beneficiary of such services^[3].

Aims and Objects of consumer protection act

Consumer Protection Act, 1986 is a very unique and highly progressive piece of social welfare legislation and the provisions are intended to provide effective and efficient safeguards to the consumers against various forms of exploitations and unfair dealings. It is a handy weapon of consumer to ensure accountability of service providers. The

main objective is to promote and protect the rights of consumers such as- a) the right to be protected against the marketing of goods, which are hazardous to life and property. b) the right to seek redressed against unfair practices or unscrupulous exploitation of consumers c) the right to be heard and to be assured that consumers interest will receive due consideration at appropriate fora; d) the right to be informed about the quality, quantity, potential, purity, standard and price of goods so as to protect the consumer against unfair trade practices. It is essential the consumers need to be aware of their rights as well as how to get a redressal for their grievances so as to avoid becoming the victims of such exploitation

Medical Negligence

Medical Negligence means the failure to exercise reasonable skill as per the general standards and prevalent situations is called as medical negligence. It was also defined as want of reasonable degree of care and skill or willful negligence on the part of medical practitioners in the treatment of a patient with whom relationship of professional attendants established so as to lead to his bodily injury or permanent disability or loss of life. In order to prove negligence the aggrieved consumer must be prove following ingredients before the court.

1. The doctor breached the duty of care,
2. The doctor owed him duty of care of a particular standard of professional conduct,
3. The patient (Plaintiff) has suffered any injury due to his breach and cause actual damage and the doctor's conduct was directly and approximate cause damage.

Doctor owes certain duties to the patients who consult him for illness or not feeling well, deficiency in his duty results in negligence. Breach of duty means omitting to do something, which a reasonable doctor would do or being something that a reasonable doctor would not do, even if there is injury, the injury must be the proximate and direct result of breach of duty. It is now well-established fact that hospital and doctor providing medical service are covered under the Consumer Protection Act, 1986. In case *V. Kisan Rao v. Nikhil Super Specialty Hospital*^[4] the *Mxim resipsaloqiter* is applicable to instance of medical negligence giving rise to deficiency in medical service in terms of sec. 2 (1) (g) in which instance the complainant is absolved of liability of prove anything else, and the respondent is burdened with the liability for proving that he has taken care and caution in the discharge of his duty. In action of negligence, it has to be proved by the patient that the doctor had not only the duty of care but he breached the duty of care. The breach of duty to care means omitting to do something which reasonable doctors do or doing something that a reasonable doctor would not do. It is also observed that, if there is injury, the injury must be the proximate and direct result of the breach of duty. Doctors are blamed for the death of the patients without consideration about the limitations and handicaps they have in the discharge of their duties.

Liability of medical services

It is observed that, medical services are well within the purview of the Consumer Protection Act, 1986. Through this Act Consumers can protect their interest against the deficiency

in services. This Act does not specifically mentions about medical services, As per section 2 (0) of the Consumer Protection Act Services means services 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 purveying a news or the information, but it does not include the rendering of any service free of charge or under a contract of personal services. The Consumer Forums started awarding compensation to the aggrieved consumers suffered by the defective medical services. *Lucknow Development Authrity v. M. K. Gupta*^[5], in this case Supreme Court observed that, the concept of 'Service' has variety of meaning, it may mean any benefit or any act resulting in promoting of interest of happiness. It may be contractual, professional, public, legal, statutory etc. The concept of service thus is very wide.

Deficiency in medical service

Deficiency means any fault, imperfection, and shortcoming or inadequate in the quality, nature and manner of performance which 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^[6]. Every doctor irrespective of the place of his service has a professional obligation to extend his service for protecting life. Deficiency may be result of inability and lack of competency whereas negligence would be caused by carelessness. In all cases of negligence, there will be deficiency but in all cases of deficiency, negligence will not be present. In landmark case in *England Bolam v. Frien Hospital Management Committee*^[7] the court held that, a doctor is not guilty of negligence if he acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular act. A doctor is not liable for taking one choice out of two for favoring one line of treatment rather than another.

Judicial Approaches

The Indian judiciary has commendable service in protecting and preserving the rights of the consumers as well as sensitizing the society concerning the rights of the consumers. The researcher through some case laws attempt to focus upon the new approaches of the judiciary relating to medical negligence liability under the Consumer Protection Act.

Laxman B. Joshi v. T. B. Godbole and Another^[8] in this case the duties which a doctor owes to his patients are clear. A person who holds himself out, ready to give medical advice and treatment undertakes that he is possessed of skill and knowledge for the purpose. Such a person, who consulted by the patient owes him certain duties, i.e. a duty of care in deciding to undertake the care, a duty of care in deciding what treatment to give and a duty of care in the admiration of that treatment. A breach of any of those duties gives right of action for negligence to the patient. The practitioner must bring his task a reasonable degree of skill and knowledge and must exercise a reasonable degree of care, 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. *Kusum Sharma v. Batra Hospital and Medical research Center and Other* ^[9] in this case the court observed that, when the conduct of a medical practitioner, falls below the level of standards of reasonably competent medical practitioner in the same field they said medical practitioner would be liable for medical negligence, giving rise to deficiency in medical service in terms of section 2 (1) (g) of Consumer Protection Act. *Marrin F. D'Souza v. Mohd. Ishfaq* ^[10] in this case court held that, the doctor and nursing homes need not be unduly about the performance of their function. The law is watching and not a bloodhound and as long as doctor do their duty with reasonable care duty they will not held liable even if their treatment was unsuccessful.

In *Kidney Stone Center v. Khem Singh Alias Khem Chand* ^[11] the complainant Khem Singh alias Khem Chand was suffering from a stone in 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 remove the stone from the complainant's prostatic urethra. The District Forum ordered the refund of fees of Rs. 10,000/- along with interest.

In *Laxmshmi Rajan v. Malar Hospital Ltd* ^[12] the complainant a married woman aged 40 years, noticed development of a painful lump in her breast. She went to the opposite party hospital for examination, diagnosis and treatment. The lump had no effect on the uterus, but her uterus was removed without any justification. The complainant's hope for child had thereby ended. It was held to be a case of deficiency in service on the part of the doctor, for which he was held liable to pay compensation of Rs. 2, 00,000/- to the complainant. *Geea Sapra v. Dr. B. L. Kapoor Memorial Hospital* ^[13] in this case where ventilator in the hospital was not functioning due to which the patient died, the hospital was held liable to pay compensation for death. Two separate claims of medical negligence and deficiency in service held to be maintainable. In *Indrani Bhattacharjee v. Chief Medical Officer and Others* ^[14] where ECG of the patient was not found normal, failure of the doctor in advising the patient to consult cardiologist and to reduce smoking and dirking, instead giving him medicines for gastric trouble etc. amount to deficiency in service.

In *Indian Medical Association v. Santha* the Supreme Court has decided that the skill of a medical practitioner differs from doctor to doctor and it is incumbent upon the complainant to prove that a doctor was negligent in the line of treatment that resulted in the life of the patient. In other words, doctor would guilty of negligent only when it is proved that he has fallen short of the standard of reasonable medical care. It is the risk of complaint to prove the negligence of the doctor. "Merely because the operation did not succeed, the doctor cannot be said to be negligent" ^[15]. *Dr. Balram Prasad and other v. Dr. Kunal Shah and Others*, ^[16] this case, decided on October 24, 2013, Supreme Court of India awarded highest amount of compensation to the tune of Rs. 6 cores plus interest. As the case was pending for 15 years, even with simple interest of 6% will amount to another Rs. 6 cores, totaling to Rs. 12 cores as the amount of compensation for medical negligence due to which petitioner's wife passed away, in this case hospital along with four other doctors had been held to be guilt of medical negligence. This amount gives and alarm to all medical professionals, hospitals, and their staff that they

should be diligent and careful while treating patients.

Suggestions

Following suggestions may be made to medical practitioners to avoid litigations arising out of deficiency in medical services.

1. To make doctors and their staff well aware about relevant laws applicable to medical service and medical negligence and precautions to be taken while rendering medical service to the patients. This can be done through continuous learning programmers by the Medical Associations.
2. To ensure that noting reading failure to take medicine prescribed, failure to follow instructions by the patient has been specifically mentioned.
3. To make habit of maintaining clinical notes of findings on examination and treatment given to patient from time to time with dates and times.
4. To enhance the communication with the patient and their relatives and inform them about their illness and ongoing treatment. This will help create good bonding between doctors and patient.
5. It is essential to inform patient about the treatment, nature of risk and obtain such informed consent for the same which is otherwise required.
6. To take adequate precautions before administering injections and medicines and keep emergency arrangements ready.
7. To take insurance policies to indemnify him so as to get mental and financial security in case medical negligence is proved against doctors or hospitals. To take appropriate legal advice in such case and think positively for amicable settlement of the dispute.
8. Medical associations can take initiatives to establish platform where patients or members of society and health care professional scan come together and discuss the common issues relevant to the professions.

Conclusion

The Consumer Protection Act, protect the interest of the consumers. It provides simplified procedure for resolving the consumer's grievances. Through this Act consumers can protect their interest against deficiency in services. This Act provides a forum to the victims of negligence or deficiency in medical services by providing cheap, speedy and efficacious remedy. The judges observed that the legal system has to do justice to both patients and doctors. The fear of medical profession should be taken into consideration while the legitimate claims of the patient.

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