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# LIABILITY OF MEDICAL NEGLIGENCY UNDER THE CONSUMER PROTECTION ACT 1986 : AN OVERVIEW

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**Abstract:**-Particularly in medical profession the law requires a fair and reasonable standard of care and competence by the medical man towards his patients. A doctor who is consulted by a patient owes him certain duties, namely a duty of care in deciding whether to undertake the case, a duty of care in deciding what treatment to give and a duty of care in his administration of that treatment. A breach of any of these duties will support an action for negligence by the patients. The liability of a doctor arises not when the patient has suffered any injury but the when the injury has resulted due to the conduct of the doctor of the doctor which has fallen below that of reasonable care .In other words the doctor is not liable for every injury suffered by a patient. He is liable for only those that are consequence of a breach of his duty and this breach of duty treated as strict liability.

**Keywords:**Medical Negligency , Consumer Protection , criminal intention and criminal activities .

## INTRODUCTION:

Basically the liability of a person in low arose from his illegal activities. Therefore criminal intention and criminal activities are essential for liability, i.e. mens rea. In England there is a cardinal principles of criminal law that there must be a “guilty mind” behind that act, which is sought to be labeled as criminal without the mind of the person committing the act being guilty the person is not guilty. The guilty intent and the act must both concur. But in civil wrong or tortious liability there is no requirement of mens rea or criminal intention for liability. It means a person may be liable for his/her wrongful act without any criminal intention or motive. Generally, the liability of a person in tort emanates from his negligence whether he had criminal intention or not and if a person can prove that he was not negligence in doing his act he is not held liable. But this general principle of liability does not apply to cases which fall in the category of hazardous activities or matters which is related to life and health safety or public order, such as decency and morality, environmental degradation, adulteration etc. and a person is invariably held liable for all the consequences of such act irrespective of the fact whether he was negligent or non-negligent. These matters are called no fault principle, and a person shall be liable without fault or mistake.

Tortious liability arises from the breach of duty, which is primarily fixed by law. This duty is towards person generally and its breach is redressible by an action for unliquidated damages. Negligence as a tort is an actionable wrong which consists in the neglect of the use of ordinary care or 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. 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 a prudent and reasonable man would not do. Actionable negligence consists in the neglect of the use of ordinary care or 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 therefore negligence has consist following constituents:-

(1) A legal duty to exercise due care on the part of the party 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. Cause of action for negligence arises only when damage occurs, for, damage is a necessary ingredient of this tort. Thus, the essential components negligence are three i.e., duty, breach and resulting damage.

The Development of consumer protection regime is fairly young and may be traced to the bill of consumers rights wherein the recognition of consumers rights, commenced at the international level. This bill recognised four important rights of the consumers viz:-

(i)The right to safety
(ii)Right to be informed
(iii)Right to choose and
(iv)The right to be heard.

These rights of the consumers were further strengthened by passing of resolution by U.N. general assembly on April 9, 1985, wherein general guidelines were issued by the United Nation General Assembly which include (i) physical safety (ii) protection and promotion of consumer economic rights (iii) standards for the safety and quality of consumers goods and services (iv) measures enabling consumers to obtain redress (v) measures relating to specific areas like food, water and pharmaceuticals and (v) consumer education and information programmes. Other four rights added in the document are the (i) right to satisfaction of basic needs (ii) right to redress (iii) right to education and (iv) the right to healthy environment. At the domestic front, the consumer movement started with enactment of the consumer protection act 1986 which aims to provide for betterment protection of interest of the consumers and for the establishment of the quasi-judicial authorities for the settlement of the consumer disputes. Section 2(d) of consumer protection act 1986 define the term consumer. According to this section consumer means a person who buys goods or hires or avails of any services for consideration which has been paid or promised to pay or partly paid or partly promised to pay. Thus the term consumer also includes any person who uses the goods with the permission of the buyer though he is not himself a buyer. But any services which seeks without consideration or free of charge excludes from consumer. Medical negligence expressly does not come in to the ambit and dimension of consumer protection. However the higher judiciary of India has interpreted the section 2(d) of consumer protection act. With liberal attitude and held defendant, liable to pay compensation for medical negligency.

**MEDICAL PROFESSIONALS AND NEGLIGENCE**

In law of negligence the professionals such as lawyers, doctors, architects and others are included in the category of persons professing some special skill or skilled persons generally. According to the oxford dictionary professional means a person who works in a job that needs a high level of training, skill, and or education. In English language a professional is a person doing or practising something as a full time occupation or for payment or to a make a living and that person knows the special conventions forms of politeness, etc. associated with a certain profession. Professional is contrasted with amateur a person who does something for pleasure and not for payment. A professional may be held liable for negligence on one of the two findings:- one, either he was not possessed of the requisite skill which he professed to have, or two, that he did not exercise with reasonable competence in a given case, the skill which he did profess. Doctors generally have certain duties towards their patients. Some of the important duties include (i) to exercise a reasonable degree of skill and knowledge and a reasonable care, (ii) to exercise reasonable care in deciding whether to undertake the case and also in deciding what treatment to give and how to administer that treatment (iii) to extend his service with due expertise for protecting the life of the patient and to stabilize his condition in emergency situations (iv) to attend to his patient when required and not to withdraw his, services without giving him sufficient notice (v) to study the symptoms and complaints of the patient carefully and to administer standard treatment (vi) to carry out necessary investigations through appropriate laboratory tests wherever required to arrive at a proper diagnosis. (vii) to advise and assist the patient to get a second opinion and call a specialist if necessary,(viii) to obtain informed consent from the patient for procedures with inherent risks to life. (ix) to take appropriated precautionary measures before administering injections and medicines and to meet emergency situations. (x) to inform the patient or to his relatives the relevant facts about his illness (xi) to keep secret the confidential information received from the patient in the course of his professional engagement and (xii) to notify the appropriate authorities of dangerous and communicable diseases.

Generally 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 skilled in that particular art. A man need not posses the highest skill, it is sufficient if he exercises the ordinary competent man exercising that particular art. In the case of a medical professional, negligence means failure to act in accordance with the standards of competent reasonable man at the

time. There may be one or more perfectly proper standards, and if it conforms with one of those proper standards then he is not negligent. Thus a surgeon or a doctor will be judged by the standard of an average practitioner of class to which he belongs or holds himself out to belong. However in case of a specialist, a higher degree of skill is needed.

Halsburys laws of England define medical negligence as under:- negligence means duties owed to patient. A person who holds himself out as ready to give medical advice or treatment impliedly undertakes that he is possessed of skill and knowledge for the purpose. Such a person whether he is registered medical partitioner or not, who is consulted by a patient, owes him certain duties, namely a duty of care in deciding whether to undertake the case, a duty of care in deciding what treatment to give and a duty of care in his administration of that treatment. A breach of any of these duties will support an action for negligence by the patient.

In a celebrated and off-cited judgment in Bolam v. Friern hospital management committee. M.C. Nair, L. J. observed that:- "I must explain what in law we mean by negligence. In the ordinary case which does not involve any special skill negligence in law means" some failure to do some act which a reasonable man in the circumstances would do, or the doing of some act which a reasonable man in the circumstance would not do, and if that failure or the doing of that act results in injury, then there is a cause of action. The medical profession cannot be held liable for negligence merely because a better alternative course or method of treatment was also available or simply because a more skilled doctor would not have chosen to follow or resort to that practice or procedure which the accused followed. Suppose any professional or doctor saying that "I do not believe in anaesthetics. I do not believe in antiseptics I am going to continue to do my surgery in the way it was done in the eighteenth century" that clearly would be wrong. Besides this obtain the consent from the patient for administering particular kind of treatment or investigation is mandatory. Failure to obtain consent from the patient or administering of treatment or investigation such as clinical test or X-ray , MRI, TMT etc. would be can offence of trespass. However, it may be pointed out that soon the doctor's visits to the patient, it is deemed that the patient has impliedly consented for being examined, investigated and treated. But at times, the patient may be required to undergo surgery or other investigation wherein his consent would be expressly needed. The law emphasizes on informed consent which signifies that the consent of the patient should be obtained after disclosure of information regarding the diagnosis, alternative methods of treatment with their relative risks and benefits and known material risks of procedure.

The doctrine of informed consent has developed in law as the primary means of protecting a patient's right to control his or her medical treatment. Under this doctrine, no medical procedure may be undertaken without patient's consent obtained after the patient has been provided with sufficient information to evaluate the risks and benefits of the proposed treatment and other available options. It may be further noted that the doctor who performs a medical procedure without having first furnished the patient with the information needed to obtain an informed consent will have infringed the patient's right to control the course of his/her medical care, and will be liable in battery even though the procedure was performed with a high degree of skill and actually benefited the patient. In M. Chinnaiyan v. Sri Gokulam hospital & Anr. The complainant approached to the defendant hospital with abdominal pain and was advised to undergo hysterectomy for which the consent was obtained from the complainant. However, the complainant suffered from bleeding of uterus as a result two units of blood was transfused after the operation. The blood units so transfused, were not tested for contamination. The patient suffered with HIV-AIDS after three and a half year of the transfusion and died. The hospital was held liable. It was noted that the consent of the patient was required for transfusion of blood. It was clear from the records that the complainant had given consent only for hysterectomy operation and not for transfusion of blood. One of the most forward-looking decision of the National Commission in Dr. Sathy M. Pillai & Anr., V. S. Sharma & Anr. has further strengthened the necessity of informed consent . It was held that, where informed consent is taken on the printed form without any specific mention about the name of the Surgery, or Signatures are taken from patient/relative in mechanical fashion, much in advance of the date Scheduled for surgery, such forms can't be considered as informed consent.

**LIABILITY OF A DOCTOR UNDER CONSUMER PROTECTION ACT**

Although the act of a doctor does'nt come in to the ambit of consumer protection act. However the National consumer Disputes redresssal commission and supreme court of India has held liable to a doctor for Negligence under Consumer Protection Act in their various cases. In one of the earliest significant ruling in Vasantha P. Nair V . Smt. V.P. Nair, the national commission upholding the decision of Kerala state commission had held that .. patient is a "consumer" and the Medical assistance was a. service and therefore, in the event of any deficiency in the performance of Medical service the consumer courts can have the jurisdiction. It was further observed that the Medical officer's service was not a personal service so as to constitute an exception to the application of the consumer protection Act. In Laxman Balakrishana joshi v. Trimbak Babu Godbole the apex court has stated that "a person (doctor) who holds himself out ready to give medical advice and treatment impliedly undertake that (i) he is possessed of skill and knowledge for that purpose. (ii) he owes a duty of care in deciding whether to undertake the case, (iii) a duty of care in deciding what treatment to give or (iv) a duty of care in the administration of that treatment. Further a breach of any of these duties would give a right of action for Negligence to the patient. Ever since the consumer protection act 1986 has come into force, the Medical professionals have been up in arms, although

unsuccessfully, to exclude themselves from the purview of the Act. No other professional like lawyers architects, engineers, accountants, has made such a hue and cry. The argument advanced by medical professionals against interference by the courts and consumer forums has been that on account of extensive judicial scrutiny, doctors would resort to defensive treatment which will escalate the medical costs and also make medical services inaccessible to many. However, the courts in India on one hand have vehemently rejected this argument but at the same time have also clearly stated that doctors are not the guarantors of life. The supreme court has put an end to this controversy and has held that patients aggrieved by any deficiency in treatment from both private clinics and government hospitals are entilled to seek protection under the consumer protection act 1986. A few important principals laid down in this case include:-

1:-Service rendered to a patient by a medical practitioner (except where the doctor renders service 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) (0) of the consumer protection act.
2:-The fact that medical practitioners belong to medical profession and are subject to disciplinary control of the medical council of India and or the state medical councils would not exclude the service rendered by them from the ambit of the consumer protection act.
3:-A service rendered free of charge to everyday would not be service as defined in the act. However any defect of service such as any fault, imperfaction, shortcoming or inadequacy etc. shall be amount as negligence and liability would be arise, whether it is free of charge or not.
4:-The hospital and doctors cannot claim it to be a free service if the expenses have been borne by an insurance company under medical care or by one's employer the service. Conditions from the above judgement. There are two things clear, one that medical service within the ambit of the consumer protection act and two that service rendered free of charge are excluded from the purview of the consumer protection act. But not excluded from other law i.e. torts for negligence. However, there are a few other grey areas which need our attention at this junction viz. what legally constitutes medical negligence, whether medical negligence is a tort perse or crime or both, significance of consent in fixation of liability, what is the criterion to determine medical negligence as a crime etc. It is simply that negligence is a liability both civil and criminal. Lord Atkin in his speech in Andrews v. Director public prosecution. Stated.... simple lack of care such as will constitute civil liability is not enough for purposes of the criminal law, there are degrees of negligence and a very high degree of negligence is required to be proved before the felony is established. Thus for negligence to be an offence the element of mens rea (guilty mind) must be shown to exist and the negligence should be gross or of very high degree. In criminal law, negligence or recklessness must be of such a high degree as to be held gross. The apex court in Jacob Mathew v. state of Punjab has explained "the expression rash and negligence act occurring in sec. 304-A of the Indian penal code should be qualified by the word grossly. From the above it may be inferred that the distinction between civil and criminal liability in medical negligence lies in the conduct of the doctor which should be of gross or reckless or of a very high degree and that where two views are possible relating criminal liability of the offender (the doctor) the view. Which favours the accused shall be adopt because in criminal law, it is the duty of the prosecution to prove the guilt beyond reasonable doubt which is not the case in civil liability.

**WHEN DOES THE LIABILITY ARISE**

The liability of a doctor arises not when the patient has suffered any injury, but when the injury has resulted due to the conduct of the doctor, which has fallen below that of reasonable care. In other words, the doctor is not liable for every injury suffered by a patient. He is liable for only those that are consequence of a breach of his duty. Hence, one the existence of a duty has been established, the plaintiff must still prove the breach of duty and the causation. In case there is no breach or the breach did not cause the damage, the doctor will not be liable. In order to show the breach of duty, the burden on the plaintiff would be to first, show what is considered as reasonable under those circumstances and then the conduct of the doctor was below this degree. It must be noted that it is not sufficient to prove a breach, to merely show that there exists a body of opinion which goes against the practice/conduct of the doctor, with regard to causation it must be shown that of all the injury, the breach of duty of the doctors was the most probable cause. Hence, if the possible causes of an injury are the negligence of the third party, an accident or a breach of duty care of the doctor, then it must be established that the breach of duty of care of the doctor was the most probable cause of the injury to discharge the burden of proof on the plaintiff. Normally, the liability arises only when the liability arises only when the plaintiff is able to discharge the burden on him on proving negligence. However in some cases like a swab left over the abdomen of a patient or the leg amputated instead of being put in a cast to treat the fracture, the principle of "res ipsa Laquitur"(meaning thereby "the things speaks itself) might come in to play. The following are the necessary conditions of this principle.

1. Complete control rests with the doctor.
2.It is the general experience of mankind that then accident in question does not happen without negligence. This

principle is often misunderstood as a rule of evidence, which is not. It is a principle in the law of torts. When this principal is applied, the burden is on the doctor/defendant to explain how the incidence could have occurred without negligence. In the absence of any such explanation, liability of doctor arises.

A doctor is not necessarily liable in all cases where a patient has suffered an injury. This may either be due to the fact that he has a valid defense or that he has not breached the duty of care. Error of judgement can either be a mere error of judgement or error of judgement only in the case of the former it has been recognised by the courts of care. It can be described as the recognition in law of the human fallibility in all spheres of life. A mere error of judgement occurs when a doctor makes a decision that turns out to be wrong. It is situation in which only in retrospect can we say there was an error. At the time when the decision was made, it did not seem wrong. If however, due consideration of all the factors was not taken then it would amount to an error of judgement to negligence. The English case relating to medical negligence known as Bolam's test states that 'if a doctor reaches the standard of a responsible body of medical opinion, he is not negligent. In one of the most recent decision in Kusum Sharma v. Batra hospital the hon'ble supreme court has settled the law relating medical negligence Mr. Dalveer Bhandari, J. scrutinizing the case of medical negligence both in India and abroad specially that of the United Kingdom has laid down certain basic principles to be kept in view while deciding the cases of medical negligence. According to the court while deciding whether the medical professional is guilty of medical negligence" the following well known principle must be kept in view:-

1:-Negligence is the breach of a duty exercised by omission to do something which a reasonable man, guided by those consideration which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.
2:- Negligence is an essential ingredient of the offence. The negligence to be established by prosecution must be culpable or gross and not the negligence based upon the error of judgment.
3:-The medical professional is expected to bring a reasonable degree of skill and knowledge and must exercise a reasonable degree. Neither very highest or a very low degree care and competence judged in the light of the particular circumstances of each case is what the law requires.
4:- A medical practitioner would be liable only where his conduct fell below that of the standards of a reasonably competent practitioner in this field.
5:- In the realm of diagnosis and treatment there is scope for genuine difference of opinion and one professional doctor is clearly not negligent merely because his conclusion differs from that of the other professional doctor.
6:- The medical professional is often called upon to adopt a procedure which involves higher element of risk, but which he honestly believes as providing greater chances of success for the patient rather than a procedure involving lesser risk but higher chance of failure. Just because a professional looking to the gravity of illness has taken higher element of risk to redeem the patient out of his/her suffering which did not yield the desired result may not amount to negligence.
7:-Negligence cannot be attributed to a doctor so long as he performs his duties with reasonable skill and competence. Merely because the doctor chooses one course of action in preference to the other one available he would not be liable if the course of action chosen by him was acceptable to the medical profession.
8:-It is our burden duty and obligation of the civil society to ensure that medical professionals are not unnecessarily harassed or humiliated so that they can perform their professional duties without fear and apprehension
9:- The medical practitioners at times have to be saved from such a class of complainants which use criminal process as a tool for pressurizing the medical professional/hospital, particularly private hospitals or clinics for extracting uncalled for compensation. Such malicious proceedings deserve to be discarded against the medical practitioners.
10:- The medical professional are entitled to get protection so long as they perform their duties with reasonable skill and competence and in the interest of the plaints. The interest and welfare of the patients have to be paramount for the medical professionals.

The court did rest the case here i.e. by laying down eleven principles for determining the breach of duty by medical professionals/ hospitals, but went a step ahead by observing that in our considered view the aforementioned principles must be kept in view while deciding the case of medical negligence. The court further adds a word of caution by stating that : we should not be understood to have held that doctors can never be prosecuted for medical negligence. As Long as the doctors have performed their duties and exercised an ordinary degree of professional skill and competence, they cannot be held guilty of Medical negligence. It is imperative that the doctors must be able to perform their professional duty with free mind. Thus the above principles must be taken as : law of the land on medical negligence, on one hand, these principles provide adequate protection to the doctors and hospitals provided they have exercised a …. reasonable degree of care which is neither the highest nor a very low degree of care and competence judged in the light of the particular circumstances of each case. They give free hand to the doctors to choose from various available alternate courses of treatment/diagnosis, the best course of action which is in the interest and wellbeing of the patient (consumer). On the other hand, they did provide that the medical practitioner would be liable only where his conduct fell below of the standards of a reasonably competent practitioner.

In the case of Laxman Balkrishna Joshi V. Dr. Trimak Bapu Godbole the Doctor operated the patient for fracture (caused by accident) without taking the preliminary pre-causation of administering anaesthesia which caused him nervous shock and he subsequently died of it. The apex court held that the doctor committed a breach of duty to take proper care of his patient and was therefore liable for negligence.

In State of Gujrat and another V. Babubhai Ukabhai Sarvaiya and others the patient (the deceased wife of the plaintiff) died due to vasovagal shock caused while administering anaesthesia by a doctor who was not himself qualified as an anesthesist. He was therefore held liable for damage to the wife of the deceased for failure on his part to exercise reasonable care and diligence expected from a person of medical profession. The deceased prabhaben the wife of plaintiff succumbed to death while being operated on 23rd February, 1993 for family planning.

In Malaya Kumar Ganguly V. Sukumar Mukherjee and others the Supreme Court has categorically stated that the doctor cannot be held guilty only because something has gone wrong with the patient. The charge of professional negligence on a medical person is a serious one as it affects his professional status and reputation and as such the burden of proof would be more onerous. A doctor cannot be held liable for mischance or misadventure or for an error of judgement in making a choice when two options are available. The mistake in diagnosis is not necessarily a negligent diagnosis. Under the Law of torts a medical practitioner can only be held liable in respect of an erroneous diagnosis if his error is so palpably wrong as to prove by itself that it was negligently arrived at or it was the result of absence of reasonable skill and care on his part regard being had to the ordinary level of skill in the profession. The court in its, "obiler" noted that death is the ultimate result of all serious ailments and the doctors are there to save the patients (victims) from such ailments. Experience and expertise of a doctor are utilised for the recovery of the ailing patient. But it cannot be expected that a doctor can give guarantee of cure in case of all ailments. Therefore for fastening criminal liability and punishing the doctor under section 304-A of IPC a very high degree of such negligence is required to be proved.

In Bholi Devi v. State of J&K the Govt. doctor instead of giving intramuscular injection to the patient gave him intraventions injection with the result the patient died. The defendant was held liable for negligence and breach of duty and Rs.90,000/- were awarded to the plaintiff (i.e. deceased's wife) as compensation.

In the State of Punjab v. Shiv Ram and others the supreme court held that cause of action for claiming compensation in cases of failed sterilization operation on account of negligence of the surgeon and not on account of child birth. Therefore, failure due to natural causes would not provide any ground for claim. It is for the woman who has conceived even after sterilization operation is to go or not to go for medical termination of pregnancy. If the couple opts for bearing the child, it ceases to be an unwanted child and therefore, compensation for maintenance and upbringing of such child cannot be claimed.

In the case of Smt. Laxmi Devi V. State of M.P. and others the plaintiff gave birth to a child despite sterilization operation. She was duly explained about the consequences and chances of failure of operation and had given consent of the prescribed form. Even after sterilization she conceived but neither complained about it to the surgeon nor opted for termination of pregnancy. She conceived because of accident opening of knot of fallopian tube. Held the surgeon was not liable as there was no negligence or gross negligence on his part .

## CONCLUSION

It is well known that a doctor owes a duty of care to his patient. This duty can either be a contractual duty or duty arising out of tort of Law. The Law requires fair and reasonable standard of care and competence buy the medical man towards his profession. A medical professional who is consulted by a patient, owes him certain duties, namely, a duty of care in deciding whether to undertake the case, a duty of care in deciding what treatment to give, and a duty of care in his administration of that treatment. A breach of any of these duties will support action for negligence by the patient and a doctor shall liable to pay compensation under the law of consumer protection act 1986. The doctor must exercise reasonable skill and care measured by the standard of what is reasonable to be expected from the ordinarily competent practitioner of his class. The standard of care which the law requires is not insurance against accidental slips, it is such a degree of care as a normally skilful member of the profession may reasonably be expected to exercise in the actual circumstances of the case in question. It is not every slip or mistake with imports negligence. If a medical man does not use reasonable skill and care he is liable.

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