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CONSUMER PROTECTION IN DIGITAL ERA:NEW CHALLENGES

MEDICAL NEGLIGENCE AND CONSUMER PROTECTION ACT, 1986

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Abstract

Though lately but positively people are gaining awareness for their rights as a consumer. Say it the field of insurance, market or medical people are trying to find more and more of their benefits and are getting aware of their rights. 'The Consumer Protection Act', is the answer and remedy to all problems of a consumer as it provides the redress to a consumer when the goods purchased or hired are defective or the services provided are subject to same deficiency.

Before coming up to 'The Consumer Protection Act', the basic concepts have to be understood.

Who is Consumer: - A consumer is a person who hires or avails of any services for a consideration that 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 hires or avails of the services for consideration paid or promised, or under any system of deferred payment, when such services are availed of with the approval of the first mentioned person.

What is a complaint: - A complaint is an allegation in writing made by a Complainant, who has sustain loss or damage as a result of any deficiency of goods and service.

What is deficiency of service: - Deficiency of service means any fault, imperfection, shortcoming, or inadequacy in the quality, nature, or 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.

MEDICAL NEGLIGENCE

Negligence is simply the failure to exercise due care. The three ingredients of negligence duty of care, breach of duty and injury suffered due to breach of duty.

The duty owed by a doctor towards his patient, is that he confers reasonable care and competence. A doctor is nowhere bound to cure each and every patient but nowhere he can drive out of his duty of due care.

At this stage, it may be necessary to note the distinction between the standard of care and the degree of care. The standard of care is constant whereas degree of care is variable and it changes upon the circumstances. It is used to refer to what actually amounts to reasonableness in a given situation.

MAIN PAPER

What Constitutes Medical Negligence

Negligence does not constitute any failure in operation or any side effects. The mere allegation will not make out a case of negligence, unless it is proved by reliable evidence and is supported by expert evidence. It is true that the operation has been performed. It is agreed that the Complainant has many expenses but unless the negligence of the doctor is proved, doctor is not entitled to any compensation.

In a case that led to visual impairment as a side effect, the following observations were made. The literature with regard to Lariago (medicine) clearly mentioned that the side effect of this medicine if taken for a longer duration can effect eyesight but this is not a fact in this case. Besides, there is no expert evidence on record to show that use of this medicine caused damage to the patient's eyesight. Even for argument's sake, if it is accepted that this medicine caused damage to the patient's eyesight, if the Respondent-doctor is one who has advised his patient to use this medicine after an examination in which he found the patient to be suffering from malaria, in that case as well the doctor-Respondent cannot be held guilty of negligence or deficient in his service. However, as stated above in this case the medicine has been used by the patient in low doses for a few days and there is no expert evidence to show that the use of medicine has affected his eyesight. Therefore, the Complainant-Appellant has failed to prove that the Respondent was negligent and deficient in his duty as a doctor.

It has been held in different judgments by the National Commission and by the Hon'ble Supreme Court that a charge of professional negligence against a doctor stood on a different footing from a charge of negligence against a driver of a vehicle. The burden of proof is correspondingly greater on the person who alleges negligence against a doctor. It is a known fact that even with a doctor with the best skills, things sometimes go wrong during medical treatment or in a surgery. A doctor is not to be

held negligent simply because something went wrong. It is an admitted fact that the Complainant's eyesight was not restored after the operation was conducted by the Appellant but on this ground alone a doctor cannot be held negligent because even after adopting all necessary precautions and care the result of the operation may not be satisfactory since it depends on various other factors. The contention of the Appellant was that the patient was suffering from diabetes and blood pressure and in many such cases eyesight is not restored after the operation however carefully it is done. In this case, there is nothing on record to show that something went wrong due to an act of the Appellant-doctor. There is no evidence to come to the conclusion that the Appellant fell below the standard of a reasonably competent practitioner in their field, so much so that their conduct might be deserving of censure. The Appellant cannot be liable for negligence because someone else of better skill or knowledge would have prescribed a different method of operation in different way. The evidence suggests that the Appellant has performed the operation and acted in accordance with the practice regularly accepted and adopted by him in this hospital and several patients are regularly treated for their eye problems. The Hon'ble Supreme Court in the case of Dr. Laxman Balkrishna *vs*. Dr. Triambak, AIR 1969 Supreme Court page 128 has held the above view and this view has been further confirmed in the case of the Indian Medical Association *vs*. Santha. The Apex Court and the National Commission has held that the skill of a medical practitioner differs from doctor to doctor and it is an incumbent upon the Complainant to prove that the Appellant was negligent in the line of treatment that resulted in the loss of eyesight. A Judge can find a doctor guilty only when it is proved that he has fallen short of a standard of reasonable medical care. “Allegation of medical negligence is a serious issue and it is for the person who sets up the case to prove negligence based on material on record or by way of evidence”. The complaint of medical negligence was dismissed because the applicant failed to establish and prove any instance of medical negligence”. “Merely because the operation did not succeed, the doctor cannot be said to be negligent” and the appeal of the doctor was allowed. “A mere allegation will not make a case of negligence unless it is proved by reliable evidence and is supported by expert evidence” and the appeal was dismissed. “The commission cannot constitute itself into an expert body and contradict the statement of the doctor unless there is something contrary on the record by way of an expert opinion or there is any medical treatise on which reliance could be based” and the Revision petition of the doctor was allowed. In another case, an X-ray report indicated a small opacity that similar to an opaque shadow that becomes visible for many causes other than a calculus. It could not be assumed that still stone existed in the right kidney that had not been operated upon. Under the circumstances, we do not think that any case of negligence has been made by the Complainant. This petition is, therefore, allowed.

The Need for Expert Evidence in Medical Negligence Cases

The Commission cannot constitute itself into an expert body and contradict the statement of the doctor unless there is something contrary on the record by way of an expert opinion or there is any medical treatise on which reliance could be based. In this case there was a false allegation of urinary stone not being removed as shown by a shadow in the x-ray "The burden of proving the negligent act or wrong diagnosis was on the Complainant" and the appeal was dismissed in another case of alleged medical negligence as no expert evidence was produced. The case discussed below is not a case of apparent negligence on the part of the surgeon in conducting the operation, but about the quality of the plate used for fixing the bone. In the present case, the Complainant has not produced any expert witnesses to prove that there was any fault in the performance of the operations. Fixation of the bones by using plates is one of the recognized modes of treatment in the case of fracture of the bones. If the opposite party has adopted the aforesaid method, though subsequently the plate broke, negligence cannot be attributed to the doctor. This is not a case where the wounds of the operation were infected or any other complication arose. Breaking of the plate approximately 6 months after it was placed cannot be attributed towards a negligent act of the doctor in performing the operation. The District Forum rightly held that the Complainant had failed to prove his case.

In medical negligence cases, it is for the patient to establish his case against the medical professional and not for the medical professional to prove that he acted with sufficient care and skill. Refer to the decision of the Madhya Pradesh High Court in the case of Smt. Sudha Gupta and Ors. *vs*. State of M.P. and Ors., 1999 (2) MPLJ 259. The National commission has also taken the same view observing that a mishap during operation cannot be said to be deficiency or negligence in medical services. Negligence has to be established and cannot be presumed.

The Complainant does not examine any expert on the subject to establish his allegation of negligence on the part of the doctor. Unfortunate though the incident is, the Complainant needs to establish negligence on the part of the doctor to succeed in a case like this. We may observe that there is hardly any cogent material to substantiate the allegation contained in the petition of Complainant. Under the circumstances, we cannot but hold that the Complainant has failed to prove the allegations against the opposite parties. As held by the National Commission in Sethuraman Subramaniam Iyer *vs*. Triveni Nursing Home and anr., 1998 CTJ7, in the absence of such evidence regarding the cause of death and absence of any expert medical evidence, the Complainants have failed to prove negligence on the part of the opposite parties.

In order to decide whether negligence is established in any particular case, the alleged act, omission, or course of conduct that is the subject of the complaint must be judged not by ideal standards nor in

the abstract but against the background of the circumstances in which the treatment in question was given. The true test for establishing negligence on the part of a doctor is as to whether he has been proven guilty of such failure as no doctor with ordinary skills would be guilty of if acting with reasonable care. Merely because a medical procedure fails, it cannot be stated that the medical practitioner is guilty of negligence unless it is proved that the medical practitioner did not act with sufficient care and skill and the burden of proving this rests upon the person who asserts it. The duty of a medical practitioner arises from the fact that he does something to a human being that is likely to cause physical damage unless it is not done with proper care and skill. There is no question of warranty, undertaking, or profession of a skill. The standard of care and skill to satisfy the duty in tort is that of the ordinary competent medical practitioner exercising an ordinary degree of professional skill. As per the law, a defendant charged with negligence can clear himself if he shows that he acted in accordance with the general and approved practice. It is not required in the discharge of his duty of care that he should use the highest degree of skill, since this may never be acquired. Even a deviation from normal professional practice is not necessary in all cases evident of negligence.

SUPREME COURT'S JUDGMENT

The recent judgment pronounced in Martin F. D'Souza V. Mohd. Ishfaq by the Hon'ble Supreme Court of India quite explicitly addresses the concerns of medical professionals regarding the adjudicatory process that is to be adopted by Courts and Forums in cases of alleged medical negligence filed against Doctors.

In March 1991, the Respondent who was suffering from chronic renal failure was referred by the Director of Health Services to the Nanavati Hospital in Mumbai for the purpose of a kidney transplant. At that stage, the Respondent was undergoing hemodialysis twice a week and was awaiting a suitable kidney donor. The Respondent approached the Appellant doctor with a high fever, but he refused hospitalization despite the advice of the Appellant. The Respondent as his high fewer was not subsided agreed to get admitted into the hospital due to his serious condition. The reports of the urine culture and sensitivity showed a severe urinary tract infection due to Klebsiella species (1 lac/ml) sensitive only to Amikacin and Methenamine Mandelate. Methnamine Mandelate cannot be used in patients suffering from renal failure. Since the urinary infection was sensitive only to Amikacin, an injection of Amikacin was administered to the Respondent for 3 days upon treatment, the temperature of the Respondent rapidly subsided. The Respondent who presented to the hemodialysis unit complained to the Appellant that he had slight tinnitus (ringing in the ear). The Appellant has alleged that he immediately told the Respondent to stop taking the Amikacin and

Augmentin and scored out the treatment on the discharge card. However, despite express instructions from the Appellant, the Respondent continued taking Amikacin. Thereafter, the Respondent was not under the treatment of the Appellant. Later, the Respondent received hemodialysis at Nanavati Hospital and allegedly did not complain of deafness during this period. The Respondent, on his own accord got, admitted to Prince Aly Khan Hospital. After getting discharged from Prince Aly Khan Hospital the Respondent returned to Delhi.

The Respondent filed a complaint before the National Consumer Disputes Redressal Commission, New Delhi claiming compensation of an amount of Rs.12,00,000/- as his hearing had been affected. The Appellant filed his reply stating, inter alia, that there was no material brought on record by the Respondent to show any co-relationship between the drugs prescribed and the state of his health. The National Consumer Disputes Redressal Commission passed an order on October 6, 1993 directing the nomination of an expert from the All India Institute of Medical Sciences, New Delhi (AIIMS) to examine the complaint and give an unbiased and neutral opinion. AIIMS nominated Dr. P. Ghosh who was of the opinion that the drug Amikacin was administered by the Appellant as a life-saving measure and was rightly used. It is submitted by the Appellant that the said report further makes it clear that there has been no negligence on the part of the Appellant. However, the National Commission has come to the conclusion that the Doctor was negligent.

According to Hon'ble Supreme Court, civil, criminal and consumer cases are often filed against medical practitioners and hospitals complaining of medical negligence against doctors, hospitals, or nursing homes, hence the quantum of liability of the medical need to be recognized. The general principles on this subject have been lucidly and elaborately explained in the three Judge Bench decisions of this Court in Jacob Mathew *vs*. State of Punjab and Anr. (2005) 6 SCC 1. What is reasonable and what is unreasonable is a matter on which even experts may disagree. Also, they may disagree on what is a high level of care and what is a low level of care. For civil liability only, damages can be imposed by the Court but for criminal liability the Doctor can also be sent to jail (apart from damages that may be imposed on him in a civil suit or by the Consumer Fora). However, what is simple negligence and what is gross negligence may be a matter of dispute even among experts.

The law, like medicine, is an inexact science. One cannot predict with certainty an outcome in many cases. It depends on the particular facts and circumstances of the case, and also the personal notions of the Judge who is hearing the case. However, the broad and general legal principles relating to

medical negligence need to be understood. Before dealing with these principles two things have to be kept in mind:

1. Judges are not experts in medical science, rather they are laymen. This fact often makes it difficult to decide upon the medical negligence cases. Moreover, Judges usually have to rely on the testimonies of other doctors, which may not be objective in all cases. The tendency of the people from same profession to save their colleagues cause a gross injustice to the complainant. and
2. balance has to be struck in such cases. While doctors who cause death or agony due to medical negligence should certainly be penalized, but due to this penalizing it would affect the performance of other doctors and they would avoid handling serious and unusual cases. Indiscriminate proceedings and decisions against doctors are counterproductive and are no good for society.

To give an example, earlier when a patient who had a symptom of having a heart attack would come to a doctor, the doctor would immediately inject him with Morphia or Pethidine injection before sending him to the Cardiac Care Unit (CCU) because in cases of heart attack time is the essence of the matter. However, in some cases the patient died before he reached the hospital. After the medical profession was brought under the Consumer Protection Act vide Indian Medical Association *vs*. V.P. Shantha 1995 (6) SCC 651 doctors who administer the Morphia or Pethidine injection are often blamed and cases of medical negligence are filed against them. The result is that many doctors have stopped giving (even as family physicians) Morphia or Pethidine injections even in emergencies despite the fact that from the symptoms the doctor honestly thought the patient was having a heart attack. This was out of fear that if the patient died the doctor would have to face legal proceedings. Similarly, in cases of head injuries (which are very common in road side accidents in Delhi and other cities) earlier the doctor who was first approached would started giving first aid and apply stitches to stop the bleeding. However, now what is often seen is that doctors out of fear of facing legal proceedings do not give first aid to the patient, and instead tell him to proceed to the hospital by which time the patient may develop other complications.

It may be mentioned that the All India Institute of Sciences has been doing outstanding research in Stem Cell Therapy for the last 8 years for treating patients suffering from paralysis, terminal cardiac condition, parkinsonism, etc., though not yet with very notable success. This does not mean that the work of Stem Cell Therapy should stop, otherwise science cannot progress.

Therefore it is expected that a committee need to established to investigate the medical negligence before issuing notice to the doctor or hospital against whom the complaint was made the Consumer Forum 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 a notice be issued to the concerned doctor/hospital. This is necessary to avoid harassment to doctors who may not be ultimately found to be negligent.

CONCLUSION

The role of doctor and hospital in the life of mankind is very important. The medical is very noble profession usually the doctors are very serious about their duties and ethics so before charging with medical negligence we need to be very cautious. But however we should not go unseen the doctors which really are negligent about this profession.