

Issues of Medical Negligence in Implimentation of Consumer Protection Act

Abstract

Medical negligence is a global problem which points finger at the noble profession. Expanding private sector and its consumers include all section of the society currently. Negligence of both government and private doctors has affected adversely the quality of medical service. Act of commission and Act of omission are difficult to differentiate. Provision of standard guideline for diagnosis and treatment is exist minimally and not followed .In this context commercial attitude should be restricted by consumer protection Act .Protection of doctor is another challenge which also affect directly and indirectly the service provision. Howeve medical practitioner should uphold the Hippocratic oath in their practice,cooperation of public is also desirable .Government should adopt the balancing approach in the form of different rules and regulation the improve the flow of service and prevent negligence and at the same time protect the doctors as well as scarce public health resource from angry consumers from malhandling.

Keywords Negligence. Consumer. Medical Practitioners

Introduction

Medical negligence is a matter of major concern today not only in India but all over the world.Charaks's oath (1000 B.C) and Hippocratic oath (460 B.C.) illustrates the duties and responsibilities of the persons who adopt the Noble profession of Medicine. "However, the events, which have been taking place in recent times, have raised doubts in the minds of members of society on the sincerity and commitment of those in the profession to adhere to the Hippocratic Oath (460 B.C.)."Doctors are liable under the prevailing laws such as Civil Penal Code, Indian Penal Code, Law of Contractors, Sale of Goods Act, Law of Torts and other specific Legislation. Under S\section 304-A of the Indian Penal Code (IPC), the doctor who commits criminal liability is punishable with imprisonment for a term which may extend up to two years, or with a fine, or both. The CPA was passed by the Indian Parliament to safeguard and protection the interest of consumers. As per the amendment in India the medical services by the doctors falls under the ambit of the Consumer Protection Act, 1986. The patient is considered as a consumer of this service claim against any deficiency in services rendered by the doctor as medical negligence.

Role of Private Medical Practitioner.

Private provision of health care is an important constituent of the health care delivery system in India and its role has increased considerably over time (Bhat 1993)

Utilization studies show that health care services provided by this sector are used not just by the affluent classes; a large number of poor people use them and have exhibited their preferences in approaching private doctors for their health problems (Duggal and Amin 1989). Most of the newly qualified doctors prefer either to start their own private practice or to work in private hospitals. The quality of care provided by this sector is a critical issue. Professional organizations such as the Medical Council of India and local medical associations have remained ineffective in influencing the behaviour of private providers.

The growing dissatisfaction with the services offered by this sector, and increasing medical negligence cases, has attracted the attention of the consumer movement in the country. The recent decision to bring private medical practice under the Consumer Protection Act (COPRA) , 1986 is considered an important step towards regulating the private medical sector &ensuring that patients receive an appropriate quality of care.

Negligence by Medical Practitioner

Fee-splitting, over-prescription of medicines and drugs, inadequate sterilization procedures, and employing untrained personnel, has increased in this sector. The negligent practices cause immediate harm to the patient, because of not following minimum standards or lack of desirable skills. This



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has attracted the attention of consumer movements in India. In most cases private providers do not make the diagnosis information available to their patients. For this reason a patient is not in a position to put together all the necessary information and documents as evidence.

Thus free treatment at a non-government hospital, governmental hospital, health centre, dispensary or nursing home would not be considered a "service" as defined in Section 2 (1) (0) of the Consumer Protection Act, 1986. Doctors are not liable for their services individually or vicariously if they do not charge fees. Doctors in India may be held liable for their services individually or vicariously unless they come within the exceptions specified in the case of Indian Medical Association vs V. P Santha¹.

The Spectrum of Negligence

Civil law defines "negligence" as the breach of a legal duty to care. In the case of the State of Haryana vs Smt Santra, the Supreme Court² held that every doctor "has a duty to act with a reasonable degree of care and skill"

Negligence consists of two acts. The act of not doing (omitting) something, that a reasonable man, under the circumstances, would do (act of omission); and doing something which a reasonable prudent man under the circumstances would not do (act of commission). When an act is done without the requisite care and caution, the act can be labeled as a rash act. Negligence and rashness usually go hand-in-hand and in general denotes carelessness. Section 304-A of the Indian Penal Code of 1860 states that whoever causes the death of a person by a rash or negligent act not amounting to culpable homicide shall be treated as criminal negligence_punishable with imprisonment for a term of two years, or with a fine, or with both. In Poonam Verma vs Ashwin Patel the Supreme Court³ distinguished between negligence, rashness, and recklessness..

A negligent_person is one who inadvertently commits an act of omission and violates a positive duty. A person who is rash knows the consequences but foolishly thinks that they will not occur as a result of her/ his act. A reckless person knows the consequences but does not care whether or not they result from her/ his act. Any conduct falling short of recklessness and deliberate wrongdoing should not be the subject of criminal liability.

Due to increase in public awareness about medical negligence in India increasing number of patients have come forward to file the cases against doctors. As the health event is associated with emotional component, people affected are aggressive, revengeful, & sometimes get consolation by assuming that it is due to negligence of the doctor. A number of legal decisions have been made on what constitutes negligence and what is required to prove it, A doctor can be held liable for negligence only if one can prove that she/ he is guilty of a failure that no doctor with ordinary skills would be guilty of if acting with reasonable care.

As in the case of Dr Laxman Balkrishna Joshi vs Dr Trimbak Bapu Godbole, the Supreme Court⁴ held that if a doctor has adopted a practice that is considered "proper" by a reasonable body of medical professionals who are skilled in that particular field, he

or she will not be held negligent only because something went wrong.

An error of judgment constitutes negligence only if a reasonably competent professional with the standard skills that the defendant professes to have, and acting with ordinary care, would *not* have made the same error .It is not possible to make a distinction between mistaken diagnosis, negligent behavior and cause of death. How important are uncertainties and imperfections in medical interventions and procedures.

In some situations the complainant can invoke the principle of *res ipsa loquitur* or "the thing speaks for itself". In certain circumstances no proof of negligence is required beyond the accident itself.

Difficulties Faced by Consumers

Complainants faced problems in getting qualified medical practitioners to testify on their behalf. The complainants face difficulties in mobilizing expert pinion/support to plead their case as this support has to come from the doctor fraternity. Getting doctors to testify and explain the finer points of medical jargon may be difficult in cases of medical negligence. Judgment of non-technical persons is influenced by expert opinion;

Whoever can mobilize expert opinion in his/her favour will have the advantage. Filing a complaint of medical negligence may prove to be a costly business for a patient. It certainly requires financial and other resources to put together the minimum amount of evidence and witnesses.

Protection to Doctors

Sections 80 and 88 of the Indian Penal Code contain defenses for doctors accused of criminal liability. The National Consumer Disputes Redressal Commission and the Supreme Court have held, in several decisions, that a doctor is not liable for negligence or medical deficiency if some wrong is caused in her/ his treatment or in her/ his diagnosis if she/ he has acted in accordance with the practice accepted as proper by a reasonable body of medical professionals skilled in that particular art, though the result may be wrong.

In Suresh Gupta's case the Supreme Court⁵ distinguished between an error of judgement and culpable negligence. It held that criminal prosecution of doctors without adequate medical opinion pointing to their guilt would do great disservice to the community. A doctor cannot be tried for culpable or criminal negligence in all cases of medical mishaps or misfortunes.

Hence the complaint against the doctor must show negligence or rashness of such a degree as to indicate a mental state that can be described as totally apathetic towards the patient. Such gross negligence alone is punishable.

A private complaint of rashness or negligence against a doctor may not be entertained without prima facie evidence in the form of a credible opinion of another competent doctor supporting the charge. In addition, the investigating officer should give an independent opinion, preferably of a government doctor. Finally, a doctor may be arrested only if the investigating officer believes that she/ he would not be available for prosecution unless arrested.

Considerations While Punishing Doctors

The lines between error of judgment, unforeseen complications and negligence are blurred. Even if the doctor has acted according to general and approved practice, his action may still cause loss to the patient. All medical interventions and procedures have inherent risks, A patient willingly takes such a risk as part of the doctor-patient relationship and the attendant mutual trust. Doctors face a considerable amount of uncertainty. The nature of a patient's problem and its outcome contribute to the uncertainty. Medical profession, for any procedure (including accepted diagnostic techniques) and intervention there is always some small probability of adverse consequences.

A large number of patients derive advantage from a procedure; a small percentage may be affected adversely. It may not be possible for the physician to eliminate this possibility completely and to predict the potential sufferer and the loss it may cause. A mistaken diagnosis is not necessarily a negligent diagnosis.

Views of Doctor's Community

The medical associations have also argued that the introduction of COPRA is a step towards expensive, daunting and needless litigation

Dr Duru Shah ,past president of Mumbai obstetric &gynecological Society (MOGS) mentioned 'if doctors are criminally liable ,then it would encourage defense medicine ,a practice of ordering medical test, procedure, or consultation of doubtful value in order to protect the prescribing physician from malpractice suits⁶.

Reportedly defense medicine is on rise in India, after doctors were included in the ambit of CPA.

However, the legislation does have a number of adverse consequences, including: increases in fees charged by doctors , increases in the prescription of medicines and diagnostics, adverse impacts on emergency care.

Firstly, one major problem envisaged is the emergence of a defensive medical culture which will lead to a considerable increase in the cost of care.

Secondly, the Act, at present, has no provision for punishing people who file false cases.

There is strong apprehension among providers that the number of false cases will increase and that the legislation will be used for harassing and blackmailing the providers. Leaving health care to market forces does not lead to an effective and efficient healthcare system (Bennett et al. 1994).

Recommendation

The effective implementation of COPRA presumes certain conditions, the most important being the availability of standards. Besides this, greater involvement of professional organizations is needed to ensure appropriate quality in private practice, since health and medical cases are very different from other goods and services. To minimize the misuse of the legislation, the formation of a screening committee has been suggested to review cases before they are formally taken before the consumer forums. Where the screening committee finds serious problems with the quality of care, the matter should be referred to the medical council. Medical professionals be given greater representation in order that a fair view of

medical negligence cases can be obtained. There should be an orientation programme for newly graduated doctors who want to start private practice.

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