



# **RIGHT TO CONSUMER: A Socio Legal study WITH REFERENCE TO MEDICAL NEGLIGENCE**

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Today Medical profession which was thought to be noblest profession in the world as become a commercialized and suspicious down right sceptical practice. Business motive has come to the force in the place of patient service which has now stood in the last row. Therefore no wonder if a doctor while treating a patient is proved negligence being made liable under the consumer act 1986 however there are divergent opinions to various judgment of the Supreme Court in deciding a medical case regarding negligence of a doctor what amount to medical negligence can be standardized on the basis of Lac of care and caution cause to a patient during the treatment. This has been revalued by a number of landmark judgments as regards negligence of a medical practitioner.

Here we focus on the role of higher judiciary in protecting the right of a patient as consumer support by number of Divergent opinion delivered by Supreme Court of India with respect to Doctors liability for their negligence.

Doctors, who are the pillars of the society, without whose treatment one cannot get cured form ailments, now a days become the victim of circumstances in many cases without any just cause. Presently the people expects much from a Doctor and their expectation is so high that they even consider the Doctor as God. But, this day dream is not possible in reality". A Doctor is also human being, who because of his/her education, experience, knowledge and skill wants to give best of his/her performance while treating a patient and if there is any eternal call in the mid-way, one should not blame the Doctor

unless he/she fails short of standard by sheer negligence. Sometimes Consumers fail to appreciate the limitation of Doctors and without considering the issue in proper perspective put the stigma of “negligent approach” and deficiency in service” on the treatment provided by the Doctor and Nursing Home/Hospital. In some cases the consumers raise protest on alleged negligence in treatment and they also put question on billing alleging the same to be too high. Recent trend shows that they refuse to pay the bills of Hospital and Nursing Home on the plea of excess billing of Medicine and Diagnostic testes even. The role of Media in such cases are very important. Instead of constructive criticism and placing the matter in proper perspective upon hearing the Doctor, Hospital/Nursing Home and patient/party what the Media People do, they create” Masala” stories for their business gain.

### **Negligence**

Commercialization of medical profession as turn into rashness in place of pious duty to take care which has resulted into medical negligence. It was held that a mistake by a medical practitioner which no reasonably competent and careful practitioner would have committed is negligent one.<sup>1</sup> Law does not expect very high and very low standard from a person who renders professional service. 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; and
- 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"<sup>2</sup>.

It will be in the fitness of the things to mention here the following cases of negligence which are :

In a case plaintiff's wife got pain in her abdomen and she was advised operation for appendicitis by the defendant. Appendix was found normal on operation but the defendant then, removed gal bladder without husband's consent. The patient died. It was

<sup>1</sup> A.S. Mittal V/s State of UP, AIR 1989 SC, 1570

<sup>2</sup> Dr. L.B. Joshi V/s T.B. Golbole, AIR 1969 SC 128

held that the patient died owing to rash and negligent act of the surgeon and therefore he was liable for damages.<sup>1</sup>

It was held in a case where defendant's son, aged 20 met with an accident on a sea beach and his left leg got fractured. He was brought to the hospital for treatment. To reduce the fracture, the doctor did not give an anaesthesia and resorted for a single dose morphin injection. He used excessive force in treating the patient as three attendants pulled the leg of the patient to adjust the bone of fractured leg. The patient suffered the shock and ultimately he died. The Supreme Court held the doctor guilty of negligence.<sup>2</sup>

The Kerala High Court laid down that failure to perform emergency operation and death of a patient on account of such failure amounts to negligence on the part of surgeon.<sup>3</sup>

In a case where Santra was having seven children and she came to CMO, Gurgaon for sterilisation which was done in a family planning programme being sponsored by the State Government. She developed pregnancy even after the sterilization operation, she gave birth to a female child increasing extra financial burden on her. The Court held that the Doctor was negligent in performing his duty and he as well as State are liable for the negligence and therefore both State and doctor were liable to pay the damages to the plaintiff.<sup>4</sup>

In a case newly born baby was suddenly found missing on one night from the bed in the Government Hospital. After hue and cry of the mother for the child, the child was discovered bleeding and with one eye totally gouged out with the eyeball, near the washing basin of the bathroom. The mother of the child contended for the replacement of the child, where as the hospital authorities contended that the child had been taken away by a cat who caused damage to him. The Court held the hospital authorities with negligence and ordered to pay compensation to the parents of the child.<sup>5</sup>

### **The Most Popular Bolam Rule**

Bolam Rule is an authority of determining the standard of care required from a Doctor in this case. This case is a prominent 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

<sup>1</sup> Ram Behari Lal v. Dr. J.N. Srivastava, [AIR 1985 MP 150]

<sup>2</sup> Or. Lakhman Balkishna Joshi v. Thmbak Babu Godbole, [AIR 1969 Sc 128],

<sup>3</sup> TT Thomas v. Elisa, [AIR 1987 Ker. 52],

<sup>4</sup> State of Haiyana v. Santra, [2000 ACJ 1188]

<sup>5</sup> Jasbir Kaul v. State of Punjab, [AIR 1995 P&H 278]

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 had 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 determination the liability of the doctors.<sup>1</sup>

### **Judicial Approach Regarding Medical Profession Liability**

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 favors a limited liability based on 'ordinary professional standard' as laid down in Bolam case. The second line, that favors 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"<sup>2</sup>

In sum of the case the court was preferred to flow liberal approach in the matter of medical negligence. 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."<sup>3</sup>

Just me the unfortunate 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

<sup>1</sup> Bolam V/s Friern Hospital Management Committee 1957, W.L.R. 582

<sup>2</sup> B.B. Pande, 'Why India n Patients do not deserve the Highest Expert Skills from Doctors ? 2009, 4 SCC 21.

<sup>3</sup> Jacob Mathew V/s union of India, 2005, 6 SCC 1

can make errors of judgment but if they are punished for this no doctor can practice his vocation with equanimity.<sup>1</sup>

### **Emerging Trands : In relation to A Doctor & Patient**

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. Through 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.

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.

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.<sup>2</sup> Achuirao Haribhau Khodwa<sup>3</sup>, and Spring Meadows Hospitals v Harjot Ahluwalia<sup>4</sup> 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

<sup>1</sup> Martin F.D. Souza V/s Mohd. Ishaq 2009, 3 SCC 1

<sup>2</sup> Dr. Khusaldas Pammandas, V/s State of MP, AIR 1960 50

<sup>3</sup> Achutrao haribhau Khaodaw v/s State of Maharashtra, 1996, 2 SCC 634

<sup>4</sup> 1998, 4 SCC 39

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*<sup>1</sup> In a historic judgment in *Nizam Institute of Medical Sciences v. Prasanth S. Dhanank*<sup>2</sup> the Supreme Court held that “moreover, in a case involving medical negligence, once the initial burden has been discharged by the 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 i.e hospital to satisfy the Court that there was no lack of care or diligence.

in the case of *V. Kishan Rao*<sup>3</sup>, 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.

The larger Bench decision in *J.J. Merchant* has not been noted in ‘*Souza*. Apart from that, the directions in para 106 in D ‘*Souza* are contrary to the provisions of the governing statute. That is why this Court cannot accept those directions as constituting a binding precedent in case of medical negligence before the Consumer Fora.<sup>4</sup>

## Conclusion

‘Doctors are not above the law. They are certainly answerable for their negligence if at all cropped up while providing treatment to the patient and/or during the course of surgery. The goodwill so built by them after years of faithful sincere practice must not be injured on vexations grounds too. Thus to inculcate strong confidence in consumers, a Doctor should explain the nature of treatment and its future course of action to patient as

<sup>1</sup> 2009, 1 SCC 681

<sup>2</sup> 2009, 6 SCC 1

<sup>3</sup> *V. Kishan Rao V/s Nikhil Super Speciality Hospital*, 2010, 5 SCC 513

<sup>4</sup> *J.J. Merchant (Dr.) V. Shrinath Chatruvedi*, 2002 6 SCC 635

also to patients party in details prior to providing treatment to patient on being fully satisfied upon proper investigation and clinical examination of the patient about the nature of disease. 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 Right to Health' 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.

