

## HEALTH AND LAW

# Medical negligence and doctors' liability

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It is estimated that 98,000 people die every year in the United States because of mistakes committed by medical professionals (1). One can well imagine the figures in India. However, the law does not aim to punish all acts of a doctor that caused injury to a patient. It is concerned only with negligent acts. Medical negligence arises from an act or omission by a medical practitioner, which no reasonably competent and careful practitioner would have committed. What is expected of a medical practitioner is 'reasonably skilful behaviour' adopting the 'ordinary skills' and practices of the profession with 'ordinary care' (2). There is, however, room for ambiguity, and judicial interpretation as what is 'reasonable' and 'ordinary' is a question of fact. Essentially, doctors are generally bound to exercise an ordinary degree of care and not the highest possible degree of care. If a medical practitioner has taken reasonable care, then he cannot be held liable. A mere difference in opinion is not a ground for fastening liability on doctor (3).

Doctors' duties to their patients are clear. They must decide whether or not to undertake the case; they must decide what treatment to give, and they must take care in the administration of that treatment (4). A breach of any of these duties gives the patient a right to action for negligence.

### Liability under the Consumer Protection Act

In 1995, the Supreme Court decision in *Indian Medical Association v VP Shantha* brought the medical profession within the ambit of a 'service' as defined in the Consumer Protection Act, 1986 (5). This defined the relationship between patients and medical professionals as contractual. Patients who had sustained injuries in the course of treatment could now sue doctors in 'procedure-free' consumer protection courts for compensation.

The Court held that even though services rendered by medical practitioners are of a personal nature they cannot be treated as contracts of personal service (which are excluded from the Consumer Protection Act). They are contracts for service, under which a doctor too can be sued in Consumer Protection Courts.

A 'contract for service' implies a contract whereby one party undertakes to render services (such as professional or technical services) to another, in which the service provider is not subjected to a detailed direction and control. The provider exercises professional or technical skill and uses his or her own knowledge and discretion. A 'contract of service' implies a relationship of master and servant and involves an obligation to obey orders in the work to be performed and as to its mode

and manner of performance. The 'contract of service' is beyond the ambit of the Consumer Protection Act, 1986, under Section 2(1)(o) of the Act.

The Consumer Protection Act will not come to the rescue of patients if the service is rendered free of charge, or if they have paid only a nominal registration fee. However, if patients' charges are waived because of their incapacity to pay, they are considered to be consumers and can sue under the Consumer Protection Act.

### Liability under tort law

Under civil laws, at a point where the Consumer Protection Act ends, the law of torts takes over and protects the interests of patients. This applies even if medical professionals provide free services. In cases where the services offered by the doctor or hospital do not fall in the ambit of 'service' as defined in the Consumer Protection Act, patients can take recourse to the law relating to negligence under the law of torts and successfully claim compensation. The onus is on the patient to prove that the doctor was negligent and that the injury was a consequence of the doctor's negligence (6). Such cases of negligence may include transfusion of blood of incorrect blood groups (7), leaving a mop in the patient's abdomen after operating (8), unsuccessful sterilisation resulting in the birth of a child (9), removal of organs without taking consent (10), operating on a patient without giving anaesthesia (11), administering wrong medicine resulting in injury (12), etc.

### Liability under criminal law

In certain cases, negligence is so blatant that it invites criminal proceedings. A doctor can be punished under Section 304A of the Indian Penal Code (IPC) for causing death by a rash or negligent act, say in a case where death of a patient is caused during operation by a doctor not qualified to operate. According to a recent Supreme Court decision (13), the standard of negligence required to be proved against a doctor in cases of criminal negligence (especially that under Section 304A of the IPC) should be so high that it can be described as 'gross negligence' or 'recklessness', not merely lack of necessary care. Criminal liability will not be attracted if the patient dies due to error in judgment or accident. Every civil negligence is not criminal negligence, and for civil negligence to become criminal it should be of such a nature that it could be termed as gross negligence.

Very rarely can a doctor be prosecuted for murder or attempt to

murder as doctors never intend to kill their patients, and hence do not possess the required level of guilty intention. When doctors administer a treatment involving the risk of death, they do so in good faith and for the patient's benefit. A doctor can also be punished for causing hurt or grievous hurt under the IPC. However, Sections 87, 88, 89 and 92 of the IPC provide immunity from criminal prosecutions to doctors who act in good faith and for the patient's benefit. But the defence must prove that the doctor acted in good faith and for the patient's benefit. For example, a doctor who consciously or knowingly did not use sterilised equipment for an operation cannot be said to have acted in good faith.

### Conclusion

The very nature of the medical profession makes it vulnerable to civil and criminal suits. Many suits are filed to harass doctors, or are filed to evade the payment of bills. In the post V P Shantha era it is difficult for doctors to shun responsibility. It is also easier for people to force negligent doctors to Consumer Protection Forums.

It is important to punish guilty doctors. It is also important to

protect doctors who act in good faith from harassment. The courts must strike a perfect balance. The Supreme Court (14) once observed that the doctor's job is to protect life and the courts should assist in this cause as far as possible. It is also the duty of the courts to see that doctors are not harassed in the course of performance of such duty.

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