

DR. AJAY KUMAR
FRCS (Edin.), FIAMS (Uro.), FICS (Uro.)
UROGENITAL SURGEON

President : Urological Society of India
Imm. Past President : Indian Medical Association
Vice President : Commonwealth Medical Association

CPA 1986 & Medical Profession

After The Judgment of Honorable Supreme Court of India dated 13-11-95

It is terribly difficult for a doctor of medicine to face a galaxy of judges and speak the truth fearlessly where one has to point out the deficiency in delivery of judgment. I will try to put forward my submission on behalf of medical profession without any prejudice or malice towards anybody to help in improving the delivery of judgment in consumer courts in relation to our profession. I suppose, this is the aim of this workshop

Everyone, rich or poor, literate or illiterate, urban or rural irrespective, of time and space access the services of medical profession. It is an essential service vital for the health of the nation. A disturbing trend has crept in the age old **doctor – patient relationship** after the decision of Honorable Supreme Court of India to bring medical services under the cover of CPA . An element of suspicion and mistrust has marred this age old relationship. While the consumer seems to be of the view that doctors have become over-cautious, doctors appear to be afraid of frivolous and vexatious litigation. This has resulted in situation where treatment cost have gone up and doctors are afraid of taking risky cases for fear of litigation. We the practioner of modern medicine call it “**Doctor-Patient Mistrust Syndrome**”. **A syndrome means a set of medical symptoms which tend to occur together.**

In Hatcher v. Black [(1954) Times, 2nd July] Lord Denning explained the law on the subject of negligence against doctors and hospitals in the following words: “in a hospital when a person who is ill goes in for treatment, there is always some risk, no ‘matter what care is used. Every surgical operation involves risks. It would be wrong , and indeed bad law, to say that simply because of misadventure or mishap occurred, the hospital and the doctors are thereby liable. It would be disastrous to the community if it were so. It would mean that a doctor examining a patient or a surgeon operating at a table instead of getting on with his work, would be forever looking over shoulder to see if someone was coming up with a dagger.

His professional reputation is as dear to him as his body, perhaps more so, and an action for negligence can wound his reputation as severely as a dagger can his body, you must not, therefore, find him negligent simply because something happens to go wrong; if, for instance, one of the risks inherent in an operation actually takes place or some complication ensues which lessens or takes away the benefits that were hoped for, or if in a matter of opinion he makes an error of judgement. You should only find, him guilty of negligence when he falls short of the standard of a reasonably skillful medical man, in short, when he is deserving of censure for negligence in a medical man is deserving of censure”

In this background I would like to draw your attention towards the constitution of consumer courts.

District consumer forum shall consists of:

a person who is, or has been or is qualified to be a District Judge, who shall be its President, two other members who shall be persons of ability, integrity and standing and have **adequate knowledge or experience of or shown capacity in dealing with problems relating to economics, law, commerce, accountancy, industry, public affairs or administration**, one of whom shall be a woman.

If one looks at the experience of the members of the district consumer court, they need not have background knowledge of medicine / medical practice. One fails to understand how such court will decide the subtle difference between negligence, rashness, malpractice, misjudgement and misadventure in medical practice

It takes the medical professionals decades of training and experience with regular upgradation of knowledge to understand a disease and its management, which is also changing very fast with new inventions and innovations. If we are judged by those who have no exposure and expertise or have the backing of Medical expert opinion, there is definitely going to be misjudgement. **We are more concerned about loss of our reputation which is the basis of our medical practice than monetary loss. Money can be earned again but reputation can not be regained.** It is easy to look at it in hind sight, condemn the event and call it negligence. Sir! look at the world history, the historic judgments the administrative and intelligence lapses which have caused harm to individuals or even wiped out a community. We call all these MISJUDGEMENT and not NEGLIGENCE, where as in the medical profession it is vice versa. I would again quote **Lord Denning in the case of Roe Vs Minister of Health (1954) 2 All ER 131**

It is so easy to be wise after the event and to condemn as negligence that which was only a misadventure. We ought always to be on our guard against it, especially in cases against the hospital and the doctor. Medical science has conferred great benefits on mankind, but these benefits are attended by considerable risks. We cannot take the benefits without taking risks. Every advance in technology is attended by the risks. Doctors, like the rest of us, have to learn by experience, and experience often teaches in a hard way. Something goes wrong and shows up a weakness and then it is put right.

We are always quoted as **“nobler than thee”**. By bringing us in the ambit of CPA we are **‘Traders’** and **‘Patients’** are **‘clients’**. **Medical council of India**, which regulates the medical ethics in the country has laid down certain criteria which do not allow us to be traders. The traders can advertise, solicit, can employ commission agents, put up large sign boards and bargain the price for selling the goods. Medical council of India prohibits doctors from doing such an act.

Sirs! you will agree that the doctors should follow the guidelines laid down by the professional body. If that is so, do we need to be treated like any other trader? I would like to put forward certain facts on **Law of Medical Negligence**.

Negligence in the medical world has assumed great importance in relation to the medical malpractices suits in various countries in Asia, Europe, USA and more so in India.

In Britain, the paternalistic model of the physician-patient relationship has both been a dominant feature in the medical profession since its inception. This has been well emphasized in the modern English law through the famous **“Bolam principle”**, which implies that a doctor is not negligent if he acts in accordance with a practice accepted at the time as proper, by a responsible body of medical opinion even though other doctors adopt a different practice, has been accepted by House of Lords as applicable not only to diagnosis and treatment but also to advice and warning. A doctor is not liable for taking one choice out of two for favouring one school rather than another. He is only liable when he falls below the standard of a reasonable component practitioner in this field, so much so that his conduct may deserve censure.

The courts in India have generally followed the decisions and practices of the English law. The cases of negligence in India are directly related to existing facilities, infrastructure and level of acumen of medical professionals. In many cases doctors have been held liable for negligent acts, such as removal of a wrong eye or a kidney, based on pecuniary interest or where minimum facilities were available. In this regard, an important example is of eye camps or health camps where operations are performed without proper facilities.. **In the Lions Club eye camp conducted at Khurja, in the State of U P 108 patients were operated out of which 84 patients’ eyes were damaged due to post-operation infection of the**

intra-ocular cavity of the operated eyes. This was due to a common contaminating source. The Supreme Court held the doctors liable for negligence and directed that, in addition to the sum of Rs 5 000/- already paid as interim relief, the state government shall pay a sum of Rs 12 500/- to each victim. The question of standard care was highlighted by the Supreme Court in **Dr Laxman Balkrishna Joshi v. Dr Trambak Babu Godbole**. In this case, Anand, the son of the respondent, died due to shock resulting from reduction of fracture attempted by the doctor without taking the elementary caution of giving anaesthesia to the patient. The Bombay High Court, and later the Supreme Court of India, held that the doctor was negligent in the performance of his medical duty. **The Supreme Court held that the duty of a doctor will include (a) a duty of care in deciding whether to undertake a case and (b) a duty of care in deciding what treatment to give or a duty of care in administration of that treatment.** Any breach of these duties gives a cause of action for negligent acts towards the patient. The Court also observed that the doctor has the discretion in choosing the treatment, which he proposes to give to the patient in one way or the other. The discretion of the doctor is relatively wider in cases of emergency. In this way the Supreme Court of India has affirmed the English law on the subject, viz. that the breach of duty of care is the basis for liability for negligence and secondly it lays down the standard of care i.e. the doctor must bring to his task a reasonable degree of skill and knowledge and must exercise a reasonable degree of care.

In a recent verdict in the **Dr Suresh Gupta v. Government of NCT of Delhi**, the Supreme Court of India held that an error of judgment on the part of the doctor does not make him criminally liable. This came as a relief to the medical community in India. In the instant case, the appellant a doctor (plastic surgeon) was in the dock as an accused on the charge under Section 304 of the Indian Penal Code (IPC) for causing death of his patient, who was operated by him for removing his nasal deformity. The patient died during the course of the surgical operation.

The Supreme Court very clearly and categorically made the following observations on the law of negligence:---- **The legal position is almost firmly established that where a patient dies due to the negligent medical treatment by the doctor, the doctor can be made liable in civil law for paying compensation and damages in tort and at the same time, if the degree of negligence is so gross and his act was reckless as to endanger the life of the patient, he would also be made criminally liable for offence under Section 304-A of the Indian Penal Code (IPC).**

The apex court said that for fixing the criminal liability of the doctor or the surgeon, the standard of negligence should first be provided whether it is "gross negligence or recklessness". The mere lack of necessary care, attention and skill will not constitute "gross negligence or recklessness". **The Supreme Court relied on the House of Lords, decision in R. V. Adomako** in which the principle is well elucidated:

The laws of negligence apply to ascertain whether or not the defendant has been in breach of a duty of care towards the victim who has died. If such breach of duty is established, the next question is whether that breach of duty caused the death of the victim. If so, the jury must go on to consider whether that breach of duty should be characterized as gross negligence and, therefore, a crime. This will depend on the seriousness of the breach of duty committed by the defendant in all the circumstances in which the defendant was placed when it occurred.

The Supreme Court of India in its classic judgment reasoned that in every mishap or death during medical treatment, the medical man cannot be made criminally liable for punishment. ***In the absence of adequate medical opinion, putting guilt on the medical man would be doing great harm or disservice to the medical community at large. "Every mishap or misfortune in the hospital or clinic of a doctor is not a gross act of negligence to try him for an offence of culpable negligence.*** Therefore, the Supreme Court relied on the English authorities, Alan Merry and Alexander McCall Smith, on their views that blame – a powerful weapon – should be used in an appropriate manner with defensible criteria as it has an indispensable role in human affairs. Some of the misfortunes or wrongs are merely accidents for which no one should be held responsible. Some instances are of culpable conduct, which constitute the basis for compensation

and, at times, for punishment. **To be able to distinguish, different categories of wrongs or carelessness, calls for “careful, morally sensitive and scientifically informed analysis”.**

The Supreme Court quashed the criminal proceedings against the doctor and set aside the orders of the magistrate and of the High Court of Delhi and categorically said:

“We find that no recklessness or gross negligence has been made out against the doctor to compel him to face the trial for the offence under section 304A of IPC.”

Indian Medical Association, the largest body of medical professionals in the world has always been striving for “better patient care “and “better health care “in this country for more than six decades. This is a fact, least known by the people. In the aims and objectives of our association, it is clearly mentioned that we will protect the rights of doctors, strive for continuing medical education to our members to update their knowledge and act as ‘**watchdog**’ of the country in matter of “**Health of the people (“health is a human right “)**. In recent past, we have been working together with “**Consumer Cordination council “** to find ways and means to improve “**Doctor–Patients Relationship”** and make efforts to recommend and suggest ways and means to improve medicare in the country resulting in minimization of ‘litigation’ . We have also made recommendations about a better system for dealing with consumer cases against doctors.

The first National Workshop on “**Accessibilty & Affordability of Quality Health Services in India”** held at Trivandrum on 10-12 September 2004. The subsequent workshops were conducted at Ahmedabad (29th July 2007) and Varanasi (1st September 2007) to evolve “Patient Grievances Redressal mechanism “ and recommend for better patients –doctors relationships.

I have annexed the operative parts of recommendations for your perusal.

I would like to apprise you with few facts relevant to “Consumer Redressal Mechanism “ in relation to our profession

1. TRIVANDRUM DECLARATION

When a case is filed in a consumer forum for medical negligence, before admitting the case it should be screened by a committee consisting of senior medical experts in the speciality in consultation with IMA and CCC.

When the medical negligence case is heard in the consumer forum, a specialist should be included among the members to hear the case and proper consideration should be given to the expert opinion.

2. AHMEDABAD RECOMMENDATION-

- Abundance of **fake drugs** and **quacks** are deplored . Strong action is needed to eliminate the menace, which is harming the public and also cause unfair criticism against Doctors who are doing great service to the people.
- A code of conduct should also be developed for patients and relatives , to ensure that medical negligence cases are kept at the minimum possible level.
- There should be a committee to go into the grievances of patients and doctors in every hospital
- Alternate dispute redressal should be restored to before approaching the consumer courts in medical negligence cases.

3. VARANASI RECOMMENDATIONS

- CCC and IMA should jointly work out a suitable code of conduct both for doctors and the patients .
- Nexus, if any, between doctors and medical representatives and/ or Pharma companies and also diagnostic laboratories must be exposed.
- Corporate social responsibility should be promoted in Pharmaceuticals companies .
- Efforts should be made for setting up an alternative redressal mechanism for out of court settlement in Medical negligence cases.
- Data should be collected regarding all pending cases of medical negligence in various consumer courts and efforts should be made to resolve them through intervention of IMA and the proposed mechanism.
- Citizen's Charter for patients and hospitals should be circulated to all health care providers for adoption
- A reward and recognition system should be developed to encourage modern practices in doctor-patient relationship.

“TO ERR IS HUMAN” is my submission at the conclusion of the talk. In the modern world, Battle of Vietnam, Insurgency in Kashmir, Emergence of Taliban, Invasion of Iraq and terror of Osama are few examples of “Error of Judgement” somewhere by somebody which has resulted in misfortune for vast sea of humanity. I stand here to pray that any allegation against medical profession should be thoroughly looked into with complete backing of “expert opinion”,before declaring us ‘negligent’ and provider of deficient service. I reiterate that we are more worried about our ‘reputation’ which comes from goodwill of patients than financial loss. More reputed doctors are bound to get more complicated cases and more vested interests working against them to malign their image.

Plagued by its own ‘throat cut’ competition the news hungry media is all out to find soft and popular targets for one upmanship. Medical profession is the ‘goat’ most suitable for sacrifice to fulfill their desire. Under such circumstances the responsibility of judiciary towards us increases manifold.

Thank You