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CERTIFICATE

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This is to certify that Prof./Dr./Mr./Mrs./Ms. **Dr. Mahendra L.Pachadkar**

Of **Prahladrai Dalmia Lions College of Commerce and Economics- Affiliated to University of Mumbai.**

has published a paper on..... **Medical Negligence: Liability under Consumer Protection Act- A Case Study Review.**

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Medical Negligence: Liability under Consumer Protection Act- A Case Study Review.

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Abstract:

Public awareness of medical negligence in India is increasing day by day. The management of Hospitals are continuously facing complaints regarding the facilities, including standards of professional competence, and the appropriateness of their therapeutic and diagnostic methods. Legal cases doctors have been started filing after enactment of consumer protection act 1986 against that, have established that the doctors were negligent in their medical service, and have claimed and received compensation. Section 304A 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 punished with imprisonment for a term of two years, or with a fine, or with both.

The burden of proof of negligence, carelessness, or insufficiency generally lies with the complainant. The law requires a higher standard of evidence than otherwise, to support an allegation of negligence against a doctor. In cases of medical negligence the patient must establish his claim against the doctor.

Keywords: Medical negligence, consumer protection act, negligence, reasonable care, CIVIL LAW AND NEGLIGENCE

Negligence is the breach of a legal duty to care. It means carelessness in a matter in which the law mandates carefulness. A breach of this duty gives a patient the right to initiate action against negligence. Persons who offer medical advice and treatment implicitly state that they have the skill and knowledge to do so, that they have the skill to decide whether to take a case, to decide the treatment, and to administer that treatment. This is known as an "implied undertaking" on the part of a medical professional. In the case of the **State of Haryana vs Smt Santra**, the Supreme Court held that every doctor "has a duty to act with a reasonable degree of care and skill". 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 Santha**. Doctors are not liable for their services individually or vicariously if they do not charge fees. Thus free treatment at a non-government hospital, governmental hospital, health centre, dispensary or nursing home would not be Electronic copy.

Considering a "service" as defined in Section 2 (1)(o) of the Consumer Protection Act, 1986. However, no human being is perfect and even the most renowned specialist could make a mistake in detecting or diagnosing the true nature of a disease. A doctor can be held liable for negligence only if one can prove that he is guilty of a failure that no doctor with ordinary skills would be guilty of if acting with reasonable care. An error of judgement 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. In a key decision on

this matter in the case ² In the case of **Laxman Balkrishna Joshi V/s Trimbak Godbole AIR 128,1969 (SCR) (1) 206**

Facts of the Case: A person who hold himself ready to give medical advice and treatment impliedly and quite satisfied that he is capable of giving medical treatment to the needy and if any person who consult such person in his difficult time it is the duty of that person to use his expertise and knowledge to treat injured and to administered treatment accordingly; a breach of any duty can be result in right of action of negligence against such person. It is in the discretion of the medical practitioner what type of treatment and the mode of administration of the treatment to be given to his patient and he is the right person to decide it. But while deciding factor is concerned he must bring to his task a reasonable degree of knowledge and must exercise a degree of reasonable care according to circumstances of the cases.

In the present case the son of first respondent suffered from a fracture of his left leg. The local aid was given by the local doctors of the same village. As the leg of the boy was fully immobilized he was taken to the appellant's hospital in Pune which was 200 miles away from a taxi after a journey of about eleven hours they reached to the respondent hospital. The patient then had a treatment by first respondent in the operation theatre and he was instructed to his junior doctors to inject Morphia Inaction, but only one was available and he administered only one Injection by that time patient was out of danger and respondent no 1 assured to respondent no 2 that everything will be alright by 5.30 and he left to Dhod where he is practicing as a Medical Practitioner. After 7 o'clock the patient was came out of the effect of morphia injection and his conditions got deteriorated and by 9'o'clock he died. The appellant issued a certificate the cause of death was 'fat embolism'. Respondent no 2 has filed a complaint against respondent no1 for his negligent act while treating his son for damages accordingly. The Trial Court and High Court in appeal held that the appellant was guilty of negligent of his duty, as while performing the operation on the child no anesthesia was administered to him and under the erosion of the Morphia Injection patient was under embolism which was the proximate cause of death of the said child. Hence the compensation of Rs. 3000/- were awarded to his father.

Reasonable degree of care and skill means that degree of care that an "ordinary competent member of the profession who professes to have those skills would exercise in the circumstance in question." In this connection it is important to note that it is necessary to differentiate the term standard of care and the degree of care. The standard of care means it will be constant and remains in all the time irrespective of the cases. It is the essential that the conduct of the doctor be reasonable and need not essential to conform to the highest degree of care of the lower degree of possible care. The degree of care is the subject and variable changes or depends according to circumstance change.

Hence the standard as stated clearly herein before that the doctor acquires reasonable knowledge. To conclude any act that require interaction with patient has to be consented by the patient. A duty of care is forced on the doctors in taking patient's consent. Naturally, a question arises as to what is this duty of care.

As far as the Consumer Protection Act is concerned the liability of doctor arises not when the patient has meet an injury, but when the injury has resulted due to the conduct of the doctor, which has comes in to a purview of reasonable care. In other words the doctor is not liable for every injury suffered by a patient. He is liable for only those act or consequences of breach of his

² <https://indiankanoon.org/doc/297399/> Accessed on 4.8.2016



Only breach of duty of the doctor was the most apparent cause. Once the existence of a duty has been established, the petitioner must still to prove the breach of duty and its elements. In case there is no breach or breach did not cause any loss, the doctor will not be liable. In other words when if there is breach of duty and if there is no damage as to the patients health then doctor is not liable.

Section 304A of Indian Penal Code 1860 states that whoever causes the death of person by negligent act not amounting to culpable homicide shall be punished with the imprisonment for the period of two years or fine or with both

CRIMINAL NEGLIGENCE

Section 304A 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 punished with imprisonment for a term of two years, or with a fine, or with both. In the Santra case, the Supreme Court has pointed out that liability in civil law is based upon the amount of damages incurred, in criminal law, the amount and degree of negligence is a factor in determining liability. However, certain elements must be established to determine criminal liability in any particular case, the motive of the offence, the magnitude of the offence, and the character of the offender. In Poonam Verma vs Ashwin Patel the Supreme Court 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.

Thus a doctor cannot be held criminally responsible for a patient's death unless it is shown that he was negligent or incompetent, with such disregard for the life and safety of his patient that it amounted to a crime against the State. Sections 80 and 88 of the Indian Penal Code contain defences for doctors accused of criminal liability.

According to Section 88, a person cannot be accused of an offence if he performs an act in good faith for the other's benefit, does not intend to cause harm even if there is a risk, and the patient has explicitly or implicitly given consent.

CONCLUSION:

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.

⁴The Hon'ble Mr. Justice Markendeya Katju has done yeoman service for society by rendering this judgment. On one hand, it sets at rest the speculative nature of our judicial adjudication of medical negligence liability and on the other, it abundantly clarifies that unless there is prima facie evidence indicating medical negligence, notice either to a doctor or hospital cannot be issued. At the same time, the core essence of the judgment makes it very clear that there cannot be an assumption that doctors cannot be negligent while rendering care and treatment. I think this timely intervention should be disseminated at a popular level so that the mandated Supreme Court's prescription will be observed more in practice than in breach.

³ MEDICAL NEGLIGENCE AND CONSUMER PROTECTION LAW Prashant R. Dahat, National Law Institute University (NLU),
⁴ <https://www.ncti.nln.nlu.gov/pmc/articles/PMC2779962/>