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Impact of Consumer Protection Act (Cpa) on Medical Negligence-Review Article

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Abstract:

In India this concept is not a new one. The ancient text of Charaka's oath clearly proves it. However, medical negligence and the legal aspects of medicine have acquired great significance in recent period. Awareness among people regarding the fundamental rights guaranteed by the Constitution has increased in last few decades which have brought the medical profession under the scrutiny of both the public and the judiciary. As one act was passed in parliament of India named - Consumer Protection Act in 1986, it has always been a strong tool for consumers in fighting the menace of any service available to them. The Act is a milestone in the history of socio-economic legislation to meet the long felt necessity of protecting the common man from wrongs for which the remedy under the common law for various reasons has become illusory. Medical services is as important as any other service for consumers and like other services, consumers have been facing hardships in this area also. The doctor-patient's relationship has deteriorated significantly and litigation against doctors is increasing day by day[1].

Keywords-consumer protection act,medicalnegligence,landmarks of supreme court,its components .

Introduction:

Since last couples of decade there has been substantial increase in medical negligence and malpractices. The deterioration in the standard of patient care is considered to be due to

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interest in the monetary gains in various terms. In contrary patients have also become more aware of their rights with help of advocates and there have been sudden increase in the number of complaints against doctors of various pathies in the consumer forums. Doctors may commit a mistake by negligence or due to other causes. Thus, the ultimate sufferer is none other than the patient. Earlier the patients aggrieved by medical negligence did not have any effective adjudicative body for getting their grievances redressed, but now the situation has changed. There are provisions in the Civil and Criminal law offering remedies to aggrieved patients.

The Consumer Protection Act was passed in 24th December, 1986 for the better protection of the interest of consumers and to make provisions for the establishment of consumer councils and other authorities for the settlement of consumer's dispute and for matters connected therewith.[2,3,4]

Medical professionals are treated as next to God. They provide humanitarian services and gives solace to individuals suffering from various diseases and disorders. Due to their great service to humanity, the doctors and medical professionals are treated with reverence and since the ancient times the medical profession has been considered as a noble profession.[5]

CONSUMER PROTECTION ACT:

Consumer protection law in India was statutorily codified by the Parliament as the Consumer Protection Act, 1986, referred to henceforth as the Act. The Act was a result of the longstanding demand among consumers to cure the lacuna in the present Indian law and provide better protection to them.The Consumer Protection Act, 1986 has been enacted for the protection to the rights and interests of consumers and for the redressal of consumer disputes. Medical profession has been included within the ambit of the Act.[6]

The section 2(1)(d)(ii) of the Act defines "consumer" as a person who hires or avails of any services for a consideration, while section 2(1)(o) defines "service" to mean service of any description which is made available to potential users. There is no explicit reference to service by medical practitioners to be included under the realm of service under section 2(1) (o). It was initially thought that medical services are not under the ambit of the Act. This controversy was put to rest by the apex court in *Indian Medical Association* v *V. P. Shantha.*[7]

The medical services which are excluded from the purview of Consumer Protection Act are:

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1. Under the contract of personal service, i.e. where a medical professional, in the capacity of an employee renders some professional service to his employer. In other words, wherever there is master and servant relationship between the recipient of the medical treatment and the doctor, the same would fall outside the purview of the definition of service under the Act.
2. At a government or non-government hospital/health centre/dispensary, where charge or what so ever is not collected from any patients, whether rich or poor, would fall outside the purview of service under the Act. It only excluded the medical enterprises which render services free of cost.[8]

MEDICAL NEGLIGENCE:

Negligence in law is a type of tort or civil wrong and can also is a wrong under criminal and consumer law. It is basically an unintentional breach of legal duty that causes an injury to another person. As defined by the Supreme Court in the *Poonam Verma*8 case, the essential constituents of negligence are (1) A legal duty to exercise due care, (2) breach of the said duty; and (3) consequential damages. Medical Negligence is the commission or omission of an act by a medical practitioner or health care provider, deviating from the accepted standards of medical practice, leading an injury to the patient.[9]

The Indian Consumer Forums and judiciary also follow the principle of restoring the patient to his original position while awarding the compensation.

In *Charan Singh* v. *Healing Touch Hospital*, the Supreme Court of India opined that,the quantum of compensation is at thediscretion of the Consumer Forum irrespective of the claim.[10]

Types of Negligence:[11]

A. Civil professional negligence

1. Failure in regard to contractual obligations
2. Investigation
3. Diagnosis/Laboratory test/Procedure(incorrect)
4. Treatment (Delayed, Unnecessary treatment/ prolonged treatment.)
5. Consent. Surgery without consent
6. Issuing wrong or false certificates or reports.

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B. **Criminal professional negligence:**

It refer to professional negligence for which, the patient or his relative alleging gross negligence on the part of doctor professional negligence to criminal court, demanding punishment to doctor. The case of usually tried by JMFC, usually under **section 304 A of IPC**, and the punishment is imprisonment up to 2 year.

Laws governing medical practice:

Under Indian law, the remedies available to a person seeking redressal for medical malpractice are:

1. Suits for damages under the Civil Procedure Code,
2. Complaint for negligence under the Criminal Procedure Code,
3. Redressal under the Consumer Protection Act, and
4. Medical council of India for disciplinary action
5. Central council of Indian Medicine (CCIM) & concerned state council

Structure of consumer forum/Commissions and their jurisdictions: [12]

A. National Commission : Original jurisdiction over Rupees 1 Cores
B. State commission :Original jurisdiction over Rupees 20 lacks to 1 Cores
C. District forum :Original jurisdiction up to Rupees 20 lacks

Review of Literature :

Medical professionals either of any pathy are treated as next to God. As all doctors provide humanitarian services and gives solace to individuals suffering from various diseases and disorders. Due to their boundless service to humanity, community and preferably rural people, the doctors and medical professionals are treated with respect and since the ancient times the medical profession has been considered as a noble profession in the community. However with the passageway of time, competition, alertness and awareness of the patients about diseases, there has been a change in the doctor-patient relationship. During the last few decades a number of incidents have come to light in which the patients have suffered due to the error and inadvertent conduct of doctors.

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Due to the increasing conflicts and legal disputes between the doctors and patients, most of the legal systems have developed various rules and principles to deal with such inadvertent behavior of doctors. This has led to the development of a new branch of jurisprudence, i.e. medical negligence or also know known as medico legal cases. Hence, any negligence on part of the medical professional would be treated as either a tort of negligence or a deficiency in service under Consumer Protection Act, 1986.

Generally assessing damages in case of negligence is an easy task. However assessing damages for the pain and other mental suffering is a herculean task. Generally, in medical negligence case there is an involvement of pain and mental suffering. The damages are assessed on the ground of loss suffered by the patient.

In medical negligence cases either under tort of negligence or under Consumer Protection Act, 1986, the remedy is mainly damages. Generally assessing damages in case of negligence is an easy task.

Preface of consumer right:[13,14]

Globally the "World Consumer's Right Day" is celebrated on 15th March every year and the "National Consumer's Right Day" on December 24th each year in India to create awareness among consumers about their rights. Supreme Court verdict in 1995 brought the medical profession under the purview of the Consumer protection Act, 1986.[13,14]

Medical negligence by Authors:

Medical negligence is a branch of medical law and covers all medical activity on the view of carelessness and rashness.Medical negligence is the failure of a medical practitioner to provide proper care and attention and exercise those skills which a prudent, qualified person would do under similar circumstances. Negligence involves behaving in a manner that lacks the legality of protecting other people against foreseeable risks. It is a Tort. Tort is a civil wrong committed by one person on another.

*Winfield*has defined negligence as a tort which is the breach of a legal duty to take care which results in damage, undesired by the defendant to the plaintiff. An act involving the above ingredients is a negligent act.[15]

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Charlesworth defines negligence as a tort which involves a person's breach of duty that is imposed upon him to take care; resulting in damage to the complainant.[16]

History shows that the perception about Medical negligence has shifted from crime to Tort approach. In earlier civilization doctor's hands were cut off if the patient died during operation; Likewise issue of Medical negligence could be found in Islamic law, Charaka Samhita, Sushruta Samhita, Manusmriti, Kautilya'sArthashastra, Yadnyavalka smriti. Medical negligence was considered more as a crime than as a tort. With the progress of civilization, medical negligence was increasingly treated as a tort by the judiciary so that the victim can be provided with damages.

Medical negligence may be further clarified as a lack of rational care and skill in the medical professional with respect to the patients, in history taking, clinical examination, investigation, diagnosis, and treatment that has resulted into injury, death, or an unfavorable outcome. Failure to act in accordance with the medical standards in vogue and failure to exercise due care and diligence are generally considered as medical negligence.[17]Negligence is not the act itself, but the circumstance which defines the character of the act, and makes it a legal wrong.[18]

The elements of a cause of action in tort of negligence are: [19]

(1) A duty to use ordinary care;

(2) breach of that duty;

(3) Approximate causal connection between the negligent conduct and the resulting injury and

(4) Resulting damage

Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.

Bolam Test for Medical negligence:

A medical professional is anticipated to have the mandatory degree of skill and knowledge in his subject of experts. The rule in professional negligence is a little different, for professionals such as medical practitioners an additional perspective is added through a test known as the *Bolam*[20] test which is the accepted test in India.

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A doctor is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body or governing council of medical skilled in that particular art.

This approach has been accepted in the judgment of the Indian Supreme Court in the case of Jacob Mathew v. State of Punjab.[21]

The Supreme Court stated the following two-part test for distinguishing between ordinary negligence claims and professional negligence:

Therefore, a court must ask two fundamental questions in determining whether a claim sounds in ordinary negligence or medical malpractice:

1) Whether the claim pertains to an action that occurred within the course of a professional relationship; and
2) Whether the claim raises questions of medical judgment beyond the realm of common knowledge and experience. If both these questions are answered in the affirmative, the action is subject to the procedural and substantive requirements that govern medical malpractice actions.

In ordinary negligence cases, the court is fully competent to lay down what the reasonable man should do in everyday circumstances as judges are aware of and understand everyday circumstances. But in cases of medical negligence, intricacies of medical science are not, generally speaking, within judicial knowledge. The judge may not be able to measure the rationality of medical activity of which he has no great level of understanding. Medicine is possibly the classic example of a profession in which results are not guaranteed and are not expected to be guaranteed.[22]

Landmark of Supreme court decision:

The legal position of medical negligence in India has been described in several leading judgments.

The Supreme Court in *Laxman v. Trimbak,*[23] held

The duties which a doctor owes to his patient are clear. A person who holds himself out ready to give medical advice and treatment impliedly undertakes that he is possessed of skill and knowledge for the purpose. Such a person when consulted by a patient owes him certain duties viz., a duty of care in deciding whether to undertake the case, a duty of care in deciding what

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treatment to give or a duty of care in the administration of that treatment. . The practitioner must bring to his task a reasonable degree of skill and knowledge and must exercise a reasonable degree of care.

In *AchutraoHaribhauKhodwa v.*[24] *State of Maharashtra*, the Supreme Court said-

The skill of medical practitioners differs from doctor to doctor. The very nature of the profession is such that there may be more than one course of treatment which may be advisable for treating a patient. Courts would indeed be slow in attributing negligence on the part of a doctor if he has performed his duties to the best of his ability and with due care and caution. Medical opinion may differ with regard to the course of action to be taken by a doctor treating a patient, but as long as a doctor acts in a manner which is acceptable to the medical profession and the Court finds that he has attended on the patient with due care skill and diligence and if the patient still does not survive or suffers a permanent ailment, it would be difficult to hold the doctor to be guilty of negligence.

In a case Apex Court has specifically laid down the following principles for holding doctors negligent:-

Gross medical mistake will always result in a finding of negligence. Use of wrong drug or wrong gas during the course of an anesthetic will frequently lead to the imposition of liability and in some situations even the principle of *res ipsa loquitur* can be applied. Even delegation of responsibility to another may amount to negligence in certain circumstances. A consultant could be negligent where he delegates the responsibility to his junior with the knowledge that the junior was incapable of performing of his duties properly. We are indicating these principles since in the case in hand certain arguments had been advanced in this regard, which will be dealt with while answering the question posed by us.

Component of medical negligence:

Negligence protects against three types of harm:

(i) Personal injury,

(ii) Damage to property and

(iii) Economic loss

There is some debate as to whether negligence is a tort or a basis of liability. Negligence is a tort which determines legal liability for careless actions or inactions which cause injury. In

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terms of medical malpractice tort law, medical negligence is usually the basis for a lawsuit demanding compensation for an injury caused to a patient by a doctor or other medical professional.A physician has a duty to diagnose and treat his or her patients using the standard of care of other similarly trained physicians in that community. If a physician fails to diagnose cardiac arrest when another physician in that community with similar training would have been expected to diagnose the acute attack of cardiac arrest, that physician may be liable if the delay in diagnosis results in emergency than if the cardiac arrest had been detected and treated at an earliest.

The unsatisfactory outcome of medical treatment in itself is inadequate to provision an allegation that the doctor treating a patient was negligent. Then the patient cannot sue his doctor for medical negligence simply because his illness cannot be cured after a longer duration of treatments. Medical negligence occurs when a medical provider fails to exercise the kind of care and prudence that other providers in the same field of medicine provide.

To establish that a provider's negligence was malpractice, a claimant must establish the following:

a. The healthcare provider owed a duty to the plaintiff;

b. The healthcare provider breached the duty;

c. The healthcare provider's breach caused the injury; and

d. The patient suffered damages because of the defendant's negligence.

Medical negligence occurs when a physician, surgeon dentist, nurse, or any other medical professional performs his job in a way that deviates from the accepted medical standard of care.

Breach of duty:

A doctor or any medical profession has a legal duty to take care of his patient. If there is a breach of that duty and if it results in injury or damage, the doctor will be held liable. The doctor must exercise a reasonable degree of care and skill in his treatment; but at the same time he does not and cannot guarantee cure of disease.In other words, a doctor is only required to ensure due care in treating the patient.

There can be no liability in negligence without establishing both duty of care and that there has been a breach of that duty, the standard of care is reasonable conduct under the circumstances. Liability in case of medical negligence arises not when the patient has suffered an

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injury but when the injury has resulted due to the conduct of the doctor which has fallen below the standard of reasonable care.As long as the doctor acts in a manner which is acceptable to the medical profession and he treats the patient with due care and skill, the doctor will not be guilty of negligence even if the patient does not survive or suffers a permanent ailment. [25]The test of breach of duty is generally objective; however, there may be slight variations to this. In determining whether a reasonable person would have taken precautions against a risk of harm, the court is to consider the following;

(a) The probability that the harm would occur if care was not taken,

(b) The likely seriousness of the harm,

(c) The burden of taking precautions to avoid the risk of harm,

(d) The social utility of the activity that creates the risk of harm.

Omissions:

There are two types of omissions. Firstly, a person may fail to take appropriate precautions, which would be regarded as a negligent act. Secondly, it may refer to passive inaction where a person does not take any action. The general rule is that there is no duty on a person to take action in order to prevent harm befalling others. One always has a duty to refrain from taking actions that endanger the safety of others, but usually one does not have a duty to render aid or prevent harm to a person from an independent cause.Generally, no duty of care may arise in relation to pure omissions; acts which if taken would minimize or prevent harm to another individual. However, where an individual creates a dangerous situation, even if blamelessly a duty of care may arise to protect others from being harmed.There are however certain circumstances in which an individual may be liable for omissions, where a prior special relationship exists.

In tort, it is enough for the defendant to show that the standard of care and the skill attained was that of the ordinary competent medical practitioner exercising an ordinary degree of professional skill. The fact that a defendant charged with negligence acted in accord with the general and approved practice is enough to clear him of the charge.

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Error of judgments:

Error of judgment on the part of a doctor (e.g. wrongful diagnosis, wrong treatment) would tantamount to negligence if it is an error which would not have been made by a reasonably competent professional medical person. The true position is that an error of judgment may or may not be negligent; it depends on the nature of the error. In M/S Spring *Meadows Hospital v. Harjot Ahluwalia* [26] the Supreme Court observed that gross medical mistake would always result in a finding of negligence. A consultant can be negligent where he delegates the responsibility to his junior with the knowledge that the junior was incapable of performing his duties properly.

In *AchutraoHaribhauKhodwa* v. *State of Maharashtra*[27]a mop was left inside the lady patient‟s abdomen during an operation. Peritonitis developed which led to a second surgery being performed on her, but she could not survive.Liability for negligence was fastened on the surgeon because no valid explanation was forthcoming for the mop having been left inside the abdomen of the lady.

In *Laxman Balkrishna Joshi's* [28]case the death of the patient was caused due to shock resulting from reduction of the fracture attempted by the doctor without taking the elementary precaution of giving anesthesia to the patient. The doctor was held guilty of negligence and liable to pay damages.

In *Vinitha Ashok* v. *Lakshmi* [29] *Hospital* removal of pregnancy was done without ultrasonography and uterus of the patient had to be removed. There was expert evidence to indicate that ultrasonography would not have established ectopic pregnancy but some text books indicated otherwise. The general practice in the area in which the doctor practiced was not to have ultrasonography done. Therefore no negligence was attributed on this ground even if two views could be possible.

Thus, a doctor who is charged with negligence can absolve himself from liability if he can prove that he acted in accordance with the general and approved practice.

Consent:

Consent is a written documents in the language of patient and in the context of a doctor-patient relationship, means the grant of permission by the patient for an act to be carried out by the doctor, such as a diagnostic, surgical or therapeutic procedure.[30]

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Informed consent is the process by which a fully informed patient can participate in choices about his health care. It originates from the legal and ethical right the patient has to direct what happens to his body and from the ethical duty of the physician to involve the patient in his health care.

This should be a knowledgeable and informed waiver, i.e. patients should be made aware that they have a right to receive the information, to designate a substitute to receive the information, or to be informed at a later date. It means that a patient should be conscious of what will happen to his health by taking treatment. Information which physician must inform to his patients originates from the legal and ethical right.

The earliest expression of this fundamental principle, based on autonomy, is found in the Nuremberg Code of 1947.The Nuremberg Code was adopted immediately after World War II in response to medical and experimental in various research studies. The code makes it mandatory to obtain voluntary and informed consent of human subjects.[31] similarly, the Declaration of Helsinki adopted by the World Medical Association in 1964 emphasizes the importance of obtaining freely given informed consent for medical research by adequately informing the subjects of the aims, methods, anticipated benefits, potential hazards, and discomforts that the study may entail.[32]

If a surgeon who performs an operation without his patient's consent, commits an assault, for which he is liable in damages[33].The informed consent process allows the patient or his legal guardian to participate in and retain autonomy over the medical service received. The treatment of a patient without his or her consent has been viewed as battery and can invoke legal action.[34]

It is generally accepted that complete informed consent includes a discussion of the following elements:[35]

1. The nature of the decision and procedure
2. Reasonable alternatives to the proposed intervention
3. The relevant risks, benefits, and uncertainties related to each alternative
4. Assessment of patient understanding
5. The acceptance of the intervention by the patient

The elements of consent are defined with reference to the patient and a consent is considered to be valid and ‘real’ when-[36]

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(i) The patient gives it voluntarily without any coercion;

(ii) The patient has the capacity and competence to give consent; and

(iii) The patient has the minimum of adequate level of information about the nature of the procedure to which he is consenting to. The capacity to give valid consent is an essential element of informed Consent.

As a general rule, medical treatment, even of a minor nature, should not proceed unless the doctor has first obtained the patient's consent. This consent may be expressed or it may by implied, as it is when the patient, present himself to the doctor for examination and acquiesces in the suggested routine. In order for the patient's consent to be valid, he must be considered competent to make the decision at hand and his consent must be voluntary.

As per the definition of consent given in section 13 of Indian Contract Act, 1872, When two or more persons agree upon the same thing in the same sense they are said to consent. This Act, however also provides under Section 11 that only those persons who are of and above 18 years of age are competent to enter into a contract. In accordance with the Indian Majority Act Parties are generally competent where;

(i) If they have attained the age of 18,

(ii) Are of sound mind, and

(iv) Are not disqualified by any law to which they are subject to.

Under section 92 of Indian Penal Code treating without consent of patient is permissible if patient is unconscious and seriously injured, mentally ill or gravely sick. When the time required for disclosure would create an extensive risk of harm to the patient or third parties, full disclosure requirements may not apply.

Discussion :

The ancient text of Charaka's oath clearly proves the ethics of human being in medical profession. However, medical negligence and the legal aspects of medicine have acquired great significance in recent period. Awareness among people regarding the fundamental rights guaranteed by the Constitution has increased in last few decades which have brought the medical profession under the scrutiny of both the public and the judiciary.

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In recent days events on violence among doctors by relatives of patients are raised. As one act was passed in parliament of India named -Consumer Protection Act in 1986, it has always been a strong tool for consumers in fighting the menace of any service available to them. General society are more aware about it and if sometimes any adverse event took places and whole blame was put on doctors or hospital managements. Due to all these reasons the doctor-patient's relationship has deteriorated significantly and litigation against doctors is increasing day by day. So to know the magnitude of medical negligence cases and judgments delivered against such cases is need of hour. This study aims and also refresh the medico- legal knowledge and create the further understanding in handling such cases in courts.

Conclusion:

The concept of medical negligence as we have seen is simply one the principle of which is deeply engrained in Tort Law. The present legal position in regard to Criminal Liability of a doctor is that it cannot be fixed upon the doctor unless there is a prima facie of gross negligence and recklessness. On the basis of the interpretation of the judicial decisions of the Supreme Court certain principle have been provided which can, if implemented effectively help the courts to develop the law on medical negligence which at the present is faced with many obstacles and has seen frequent deadlocks in several cases. The Consumer Protection Act provides an inexpensive and speedy remedy for adjudication of such claims. No court fee is needed for any claim made before the consumer courts. Thus poor person who have been given deficient services by medical practitioners, hospitals or nursing homes can conveniently seek redress.

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