

Negligence in Medical and Dental Professionals: A Review

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ABSTRACT

The doctor/dentist–patient relationship has transformed over the last two decades. Health professionals are increasingly viewed as providers of service for consideration. The Consumer Protection Act (CPA) of 1986 was enacted for the better protection of the interest of consumer grievances. In various studies conducted to assess the level of awareness among medical and dental professionals, it was found that doctors/dentists are often ignorant about the law in their profession. Thus the health professionals should be aware of such laws, which will be beneficial to the patients and doctors and as well as the whole society. One of the duties of a doctor towards his patients is to obtain consent amounts to an assaulted patient. Consent is defined as “when two or more persons agree to the same thing in the same sense. This review explores the definition of ‘negligence,’ ‘consumer,’ ‘services,’ ‘consent,’ describing their implications with respect to the civil and criminal liability of dentists. Therefore, doctor/dentist need to update their understanding of consumer protection act and its amendments to be on a legally safer side.

KEYWORDS: Negligence, consumer, Consumer Protection Act, Consent, Services.

INTRODUCTION

The health profession has long been considered as the ‘noble profession.’ The doctor or dentist frequently reduce patient’s distress and, successively saves lives. In the medical and dental professions the impact of health professionals are improving the standards of health and well-being in society. Therefore, the patients can hold senior practitioners as confidants. The trend, however, has changed in recent decades - the doctor/dentist is increasingly looked upon as someone who provides service for consideration (i.e., provides treatment/consultation in return for remuneration). Every doctor either medical /dental must have knowledge of law related to his professional field. There is ethical principal which guide our profession. These ethical principal are:

Autonomy: Patient should have a right to decide what treatment is going to get done and the dentist should respect the patient’s decision. The basis of informed consent and confidential information is formed by this decision. However, patient’s autonomy is not absolute. Various treatment modalities should be explained to the patient so a patient can decide which one will be best for his condition as well as for their pocket.

Sympathy and Beneficence: the dental professionals should have the quality of understanding the suffering of others and to do something to relieve the pain of the patient who comes to him/her for the treatment. The doctor should attend the patient as early as possible. The dentist must not harm the patient. The dentist must refer

the patient to the concerned doctor if the case is beyond his line of expertise.

Competence: the dental/medical professionals should be well qualified to diagnose and treat the patients related to their field and refer the patient when necessary. The doctor should be well known about the new drugs and treatment modalities available in the market.

Integrity: Dentist should act with honour and be courteousness. Be truthful about what treatment is being given to the patient and the different treatment modalities available for the patient’s ailment. Before starting any treatment, the doctor must disclose any complication that may occur.

Justice: Dentist has a duty to treat the patient fairly and delivering dental care without prejudice. The dentist should not refuse to treat the patient on the grounds of patient’s race, religion, gender or nationality.

Professionalism: The professionalism is a skill, status, methods, character or a standard of a professional or a professional organization, and the dental/medical professionals should work together for the betterment of the society oral health.

Tolerance: Dentist should be aware of the various cultures and religious diversities present and should be able to understand and be sensitive to these needs of the patient when dispensing treatment.

Veracity: Honesty is the basis of doctor- patient

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relationship. During diagnosis the doctor relies on the patient's honesty and patient relies on doctor decision that which treatment is best for his health.

WHAT IS NEGLIGENCE?

The word 'negligence' is derived from the Latin word 'Neglego' or neglect professional negligence, medical/dental negligence or mala praxis is an absence of a reasonable degree of care and skill, or negligence of a dental practitioner in the treatment of a patient, which causes injury or death to the patient. Alternatively 'Negligence' is doing something which is not supposed to do (an act of commission) and failing to do something that one is supposed to do (an act of omission).

4'D' of Negligence: The Supreme Court of India has observed that the essential components of negligence are three: 'duty,' 'breach', and 'damage' as stated in the Law of Torts, To establish dental negligence, the following components must be established (4Ds).

Duty: refers to the responsibility that is established in a relationship between doctor and patient. The doctors begin to owe a duty towards a patient as soon as he agrees to treat him or and when a patient is in the emergency. But doctor –patient relationship is not formed when patient is not in emergency and the doctor does not agree to treat the patient.

Dereliction of duty: a dereliction of duty has to be established on the part of the doctor, i.e. the doctor should have been negligent toward the patient while performing his duties. Proximate cause refers to the continuous sequence of events, unbroken by any intervening cause, that produces an injury and without which the injury would not have occurred.

Damage: The damage must occur as a result of dereliction, and it must be proximate. Even if a doctor is negligent, a patient cannot sue him for compensation, if no damage has occurred. (But he can sue him criminally u/s 336 IPC.) Aggravation of pre-existent condition, Expenses increased, Pain and suffering, Loss of earning, Loss of potency, reduced enjoyment of life, and reduction in expectation of life.

Direct Causation: Damage must results directly from dereliction, and not from the other cause.

Types of Negligence:

1. Doctors negligence
 - a) Civil negligence
 - b) Criminal negligence
2. Patient negligence
3. Contributory negligence
4. Composite negligence
5. Corporate negligence

DOCTORS NEGLIGENCE

- a) **Civil Negligence:** When patient demands monetary compensation for the damage that has occurred due to the doctor's negligence. Not only the patient, an

even doctor can also bring a civil suit against the patient to recover his fee. The case for negligence either goes to civil court or to consumer forum.

Punishment- Doctor only has to pay whatever compensation court decides, without criminal liability. The patient may complain to the dental council of India or medical council of India for which DCI/MCI may take action against the doctor like the removal of name permanently or temporarily from the dental register. It is the duty of patient to prove negligence.

- b) **Criminal Negligence:** When patient complain to police regarding the misconduct or negligence of the doctor, and police register a case against the doctor.

Punishment- The doctor is prosecuted under the various sections of the IPC, and if found guilty the doctor is liable to pay damage as well as can a sentence be term as a prisoner in jail as per law.

CLASSIFICATION OF CASES OF CRIMINAL NEGLIGENCE

- Section 304A (IPC)- Negligent homicide. A rash driving or negligent act resulting in death, e.g. death in the dental chair.

Punishment- imprisonment of 2 years, or fine (any amount) or both.

- Sec 336 (IPC)- An act endangering the life of a person (even if there is no injury), e.g. extracting a tooth for a patient with valvular heart disease without antibiotic prophylaxis against endocarditis (even if he does not develop endocarditis).

Punishment- imprisonment of 3month, or Rs 250 fine or both.

- Sec 337 (IPC)- A rash driving or negligent act causing simple injury, e.g. pain and swelling after extraction due to negligent extraction.

Punishment- imprisonment of 6month, or Rs 500 fine or both.

- Sec 338 (IPC)- A rash or negligent act resulting in grievous injury, e.g. fracture of the jaw during extraction due to excessive or improper force.

Punishment- imprisonment of 2 years, or Rs 1000 fine or both.

PATIENT NEGLIGENCE

Patient negligence is outright negligence by the patient only. The doctor is not negligent. Patient does not give correct history, Start an alternative form of treatment without informing doctor does not follow doctor instructions, Discontinue treatment. It is the duty of the doctor to prove negligence.

CONTRIBUTORY NEGLIGENCE

A situation where both the doctor and patient are negligent. But the Burden of proof lies on the doctor. The doctrine of comparative (or proportionate) negligence– quantum of injury caused by the court and the

compensation awarded to 80% of his injury, and doctor's negligence is responsible for 20%; a patient would entitle only to 20% of compensation. It is a good defense in civil cases but cannot to be taken as a defense in criminal court. Last clear chance of doctrine – both doctor and the patient are negligent. But if it is shown that the doctor had a “last clear chance” to avert the damage caused to the patient, and if he didn't avail this chance, he loses his defence of contributory negligence.

COMPOSITE NEGLIGENCE

When a patient has injury as a result of the combined negligence of two or more doctors. Damages are not distributed; only the total sum is awarded. It's the sufferer who, if he wishes can even claim all the damage from a single person. If a specialist feels he has been asked to pay more than justified, he can claim contributory from another specialist.

CORPORATE NEGLIGENCE

Negligence of corporation (hospital). The individual doctor may or may not necessary be liable in this case. Hospital uses defective or poorly maintained equipment or drugs, incompetent employee, does not maintain sterile OT.

Examples of Dental negligence: It is virtually impossible to give an exhaustive list of instances of dental negligence. These are as follows:

1. When the patient makes a request to doctor: Failure to attend to a patient in an emergency, Failure to admit patients requiring urgent hospitalization, Failure to attend the patient in time, If the patient refuses treatment then failure to inform him about risks of refusal.
2. In doctor's clinic: Making a wrong diagnosis due to absence of skill and care, Failure to obtain informed consent, Examine the patient itself, Failure to order X-ray in case where the history suggest impacted tooth, broken file in tooth, Failure to conduct hypersensitivity reaction of a drug before administration, Performing more task than the patient consent for.
3. Special test and consultation: Unprofessionally performing procedure. mercury poisoning while doing dental filling, Failure to Read X-ray film correctly, Have an X-ray, CT, MRI or Ultrasound interpreted from a competent person, Obtain consultation from a competent specialist where appropriate
4. Before patient leave clinic: Failure to give proper instruction, warn the patient of side-effect
5. Admitted patients: Failure to isolate patients with an infectious disease, to delegate the duty of treating or operating upon a patient to another doctor without the consent of the patient, experimenting on a patient without consent, Giving poisonous medicine carelessly, prematurely discharging the patient.

6. During operation: Procedures conducted with negligence, Continuing a dangerous procedure, despite it having been proved wrong time and again
7. Post-operative, post discharge: Failure to give post-operative care, Failure to inform the patient of the possible side effect of the long use of drug, Failure to keep the adverse reaction caused by long term usage of the drug.
8. Prevention: Failure to immunize, Failure to perform sensitivity tests
9. General: Failure to provide a substitute during his absence, Failure to keep himself well-informed of advances in medical sciences, Fetal and neonatal death in utero caused by drugs administration to the pregnant mother.

The liabilities that a Doctor can face are:

- Tortious liability: This is a classic example of civil liability. It can incurred when one party owed a duty to the other and failed to implement that duty.
- Vicarious liability: As per law, a man may become liable/responsible for paying damage for an act of negligence committed by his servant's or agent in the course of their employment or agency. For vicarious liability following point must be proved. A Negligent act was done in the course of carrying out his duty. The person was his or her agent. For example, employer is being held responsible for the acts of his employee.

CORPORATE NEGLIGENCE

It is voluntary agreement, permission or approval without any compulsion, given freely, willingly and truly. Consent is defined as ‘when two or more person agree upon the same thing in the same sense’ under civil law.

Consent in dentistry follows the same basic principles as in other disciplines of medicine.

A dentist must explain the proposed treatment to the patient, the risks involved, and the possibility of any alternative treatment and ensure that appropriate consent is obtained. The dentist must ensure that all necessary information and explanations have been given, before the procedure, the patient must be given clear pre-operative and post-operative instructions in writing and written consent must be obtained.

Implied Consent: The fact that a patient comes to a doctor for a treatment implies that he is agreeable to the medical examination or physical examination.

Expressed Consent: Expressed consent is also known as **tacit consent**, which are stated in distinct and explicit language. This may be either oral or written.

Informed Consent: When expressed by a patient in writing. All information must be explained in non-medical terms preferably in local language about Diagnosis, Nature of treatment, Risk & Benefit involved, Prospects of success and prognosis. Must obtain in

surgeries, administration of anesthesia.

Proxy Consent: Consent given by parent, guardian or close relative is known as a substitute or proxy consent.

Blanket Consent: It is a consent taken on a printed form that covers (like a blanket) almost everything a doctor or a hospital might do to a patient, without mentioning anything specifically. Blanket consent is legally inadequate for any procedure that has risks or alternatives

Who Can Give Consent? Consent can be given by any person who is conscious, mentally sound [for the clinical examination, diagnosis and treatment], and

- Patient > 12 Years [for general physical examination].
- >18Years [for surgery]. In a case of a child, consent from the guardian who should be >18 years.

When Is Consent Not Valid? When a person having unsound mental condition, who is under 12 years of age is not valid for giving consent. Consent given under fear, fraud or any misrepresentation of facts or by, who is ignorant of implications of consent.

CONSUMER PROTECTION ACT

- The Consumer Protection Act was passed on 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.
- The most progressive and comprehensive pieces of legislation enacted for protection consumers.
- The main objective of the act is to provide for the better protection of the consumers. The act is intended to provide simple, speedy and inexpensive redresses to the consumer's grievances and relief of a specific nature and award of compensation wherever appropriate to the consumer.
- Amended in 1993 and in 2002 – extend its coverage and scope and to enhance the powers of the redresses machinery.

Who is a consumer? a) CPA defines a consumer as any person who: a) buys any goods for a consideration which has been paid or promised or partly paid and partly promised.

b) A person hires or avails of any services for a consideration which has been paid and partly promised for any services.

What is services? CPA defines as services means service of any description which is made available to potential users and includes the provision of facilities in connection with banking financing, transport, processing, supply of electrical or other energy, board or lodging or both, housing construction, entertainment, amusement, or the purveying of news or other information, but does not include the rendering of any service free of charge or under a contract of personal service.

The structure of the consumer forums/commission:

The Consumer Protection (Amendment) Act, 2002 has increased the claim amount at different levels as,

- District consumer : Redressal forum
- Original Jurisdiction up to Rs. 5,00,000
- State consumer: redressal forum
- Appellate Authority for District Forums Revision Original Jurisdiction over Rs. 5,00,000 up to Rs. 20,00,000
- National consumer: redressal forum
- Appellate Authority over State Commission Original Jurisdiction Over Rs.20 lakh up to Rs. 1 crore
- Supreme court: final appeal

Professional indemnity: Indemnity by the insurance companies gives a sense of mental security to the doctor/hospital and if any medical negligence is proved the company takes care of it.

Support groups: By forming societies like the Indian Medical Association, Medical college teachers Welfare Society, doctors not only get a type of social security but regular fellowship will prohibit the doctors speaking foul against their own colleague.

Defenses: Doctors/Hospitals should always make all possible points in defense the first instance of making a reply to the complainant.

Technical defence: The medical service rendered was free of charge, Concurrent adjudication in another court, the court does not have territorial jurisdiction, and Complaint is time-barred.

CONCLUSION

Mistakes occur in every profession, as it does in life. It is probably every individual's duty to avoid errors and foresee the potential for mistake but, on occasions, it simply may become unavoidable. Unfortunately, in the health profession mistakes could result in serious consequences for the patient and, in turn, lead to the doctor/dentist being made answerable. The dentist has a duty to explain the patient about the risks inherent in the treatment procedure. The professionals should carefully decide that what line of treatment to be adopted. In the lawsuit records are the most important factors needed to prevail. In a negligent lawsuit, the only guidelines which are deliberated is written records, including medical and dental history, chart notes, radiographs, photographs and models, All records must be signed and dated.

It is concluded that the negligent actions exist against dentist the potential for civil lawsuits against dentists for negligent actions is existent, although the prospect of a dentist being held liable for criminal negligence is low

The legal process is difficult and distressing to navigate, so it is best to avoid this when possible. A dental practitioner needs the help of a competent attorney who specializes in such litigation. The best defense is avoiding the lawsuit in the first place.

CONCLUSION

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