

## **A Legal Perspective Of Medical Malpractices In Tamilnadu**

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### **ABSTRACT**

The relation between doctor and patient plays crucial role in the patient treatment. But recently things have changed rapidly with less doctor to patient ratio. Doctors are under burden to look and treat more patients, this has definitely reduced the time exchange between patient and doctor. The issue of patients' rights is relatively unknown in our country but it is often recalled when an incident of death or disability is suspected as being caused by a physician's error. However patients' rights are being violated thousands of times every day in our country. More than these patients' rights' violations, the essential point is the lack of a mechanism to claim those rights and to complain about the practices which violate them. In our country, patients and their relatives are uninformed, powerless and unprotected against physicians and health organizations, and they typically accept whatever happens to them without complaint. Some of the reasons for this are, presumably, an underdeveloped consciousness of patients' rights, an absence of patient organizations, and insufficient ethical and legal regulations on patients' rights. These deficiencies were diminished somewhat by the "Regulation on Patients' Rights," which was prepared by the Ministry of Health in 1998. Another legal draft law referred to as "Responsibilities Due to Malpractice in Medical Services" has been prepared and is in the process of becoming law. This in turn has resulted in malpractice and negligence. So cases of litigations and allegations against doctors are increasing day by day. This article focusses on the precautions which are to be taken for the practicing doctor during the treatment of the patient and various determinants which proves whether the doctor is negligent or not.

**KEY WORDS:** Medical malpractices, Medical Negligence, Medical Ethics.

### **INTRODUCTION**

Anyone who lives in a society is duty bound not to harm other fellow beings. The duty of care may be understood as a legal obligation which is imposed on an individual requiring adherence to a standard of reasonable care while doing any act, particularly when lack of care could cause harm to someone else. Under the Law of Torts, a victim who sustains some injury due to the negligent act of another is eligible to claim compensation from him for the harm caused by way of liquidated damages. This Common Law remedy is available against careless and negligent acts. The duty of care may be regarded as a formalisation of the theory of social contract It implies the responsibilities of individuals towards others within society. It was not a

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requirement that this duty of care be defined by a specific law. Over a period of time, this requirement started developing through common law. In India such careless acts were initially treated either under an action in tort or punished as a crime. With the development of consumer law which contain provisions for handling such actions or inactions as deficiency in services became popular with respect to some categories.

Earlier a consumer who suffered at the hands of a service provider or a seller of goods had to depend only on the judicial wisdom and creativity for relief under the law of tort. Mostly the remedy was at the discretion of the judge concerned. However, as time progressed several areas where the law of un-codified, law of tort operated came to be recognized by specific statutory laws and the Consumer Protection Act is one among them. With some initial difficulties in bringing into the field of consumer protection law, deficiencies in the medical services were also recognized within its jurisdiction. Medical Profession initially was one of the learned professions and later on considered to be a noble profession. The noble profession has its nobility and respectability and responsibility. This necessarily involves a duty of care on such professionals.

During the recent times medical negligence cases are growing and the legal system need to keep a balance between the medical professionals and innocent victims in view of the sensitivity of the issue and its impact on the profession and the society at large.

### **Medical Professional**

A professional in common parlance may be understood as a member of a profession or any person who earns their living from a specific activity like lawyer, engineer or a doctor. The term also describes the standards of education and training that prepare such members of the profession with the particular knowledge and skills necessary to perform the role of that profession. Hence, any reasonable man entering into a profession impliedly assures another person dealing with such professional that the skill which he professes shall be exercised with reasonable degree of care and caution. He may not assure his client of the ultimate result. A physician would not assure the patient full recovery in every case. A surgeon cannot and does not guarantee that the result of a surgery would invariably be beneficial or successful, much less to the extent of cent percent for the person operated up on. While undertaking the performance of the task entrusted to him a medical professional would be duty bound in exercising his skill with reasonable competence.

### **Duties of a Professional Medical Practitioner**

The duties of a medical professional are generally understood to cover:

1. Duty of care in deciding what treatment is to be given
2. Duty to take care in administering of the treatment identified

Breach of any of these duties may lead to an action for negligence by the patient. There are three possibilities to fix the responsibility and taking action against the defaulter:

1. Under Common Law – Tort
2. Under Criminal Law for Gross Negligence or Rash and Negligent act
3. Under the Consumer Protection Act for deficiency in service

### **Liability of Medical professionals under the Consumer Protection Act**

The Consumer Protection Act, 1986 takes into its fold instances of deficiency of service. There are several situations where alleged instances of professional negligence cases have been

examined by the judiciary. However, all such cases may first fall into the category of negligence.

In the law of negligence, professionals including medical professionals as mentioned earlier, are persons professing some special skill or skilled persons generally. Any task which is required to be performed with a special skill would generally be undertaken to be performed only if the person possesses the requisite skill for performing that task. Any reasonable man entering into a profession which requires a particular level of learning to be called a professional of that branch, impliedly assures the person dealing with him that the skill which he professes to possess shall be exercised with reasonable degree of care and caution. The only assurance which a professional can give or can be understood to have given by implication is that he is possessed of the requisite skill in that branch of profession which he is practising and while undertaking the performance of the task he would be exercising his skill with reasonable competence. This is all what a person approaching the professional can expect. Judged by this standard, a professional may be held liable for negligence on one of the following two findings. One, he was not possessed of the requisite skill which he professed to have possessed, or, two, he did not exercise, with reasonable competence in the given case, the skill which he did possess.

#### **Consumer under the Consumer Protection Act**

A consumer is a person who hires or avails of any services for a consideration that has been paid or promised or partly paid and partly promised or under any system of deferred payment and includes any beneficiary of such services other than the person hires or avails of the services for consideration paid or promised, or under any system of deferred payment, when such services are availed of with the approval of the first mentioned person.

buy hires or avails of any services for a consideration which has been paid or promised or partly paid or partly promised, or under any system of deferred payment and includes any beneficiary of such services other than the person who hires or avails of the services for consideration paid or promised, or partly paid and partly promised or under any system of deferred payment, when such services are availed of with the approval of the first-mentioned person but does not include a person who avails of such services for any commercial purpose any goods for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any user of such goods other than the person who buys such goods for consideration paid or partly paid or partly promised, or under any system of deferred payment when such use is made with the approval of such person, but does not include a person who obtains such goods for resale or any commercial purpose.

#### **THE LEGAL AND ETHICAL ASPECTS OF MEDICAL MALPRACTICE IN TAMILNADU**

Medical malpractice exists when the physician does not provide adequate service and care in available conditions; does not reach the performance that an experienced physician could do under the same conditions; departs from the requirements of accepted practice and is below standards; and hence causes harm and loss. Malpractice is a service that deviates from acceptable limits that could be provided in normal conditions. In a broader sense, medical malpractice occurs when an individual, who received medical care, is harmed because of wrong or improper practices of professionals who work in medical or related fields. Since medical knowledge is increasing exponentially every day and new medical technology is being developed with a rise in the number of physicians that

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use this technology, physicians are being required to do some practices that they never did in the past.

In addition, because these practices generally carry high risks, the number of complaints and claims of malpractice is rising. The term 'malpractice' is multi-faceted and multi-dimensional.

In a broader view, improper medical practice exists as a result of negligence, lack of care, ignorance, incapability and inadequacy in patient care. Thus, now let us define the sub-concepts:

Ignorance relates to the situation when a physician does not perform medical care and treatment in available conditions that an experienced physician could do in the same conditions. Moreover, it means deviating from the requirements of accepted practice, and being below standards. While ignorance could be explained as not doing the things that should be done necessarily; carelessness is doing the things that should never be done. A physician who gives medical treatment to a patient should have knowledge and skills adequate enough to be accepted by other colleagues. It may be assumed that physicians have different levels of knowledge and ability, every physician ought to know about developments in his or her field to some extent, and be able to provide medical services using methods and treatments that have been tested and proven to be effective. A physician is not expected to guarantee a good result, however, an inferior result should be justifiable by the physician. A physician is deemed guilty solely on the grounds of neglecting or abuse of the requirements of his or her profession. In summary, malpractice exists when a health service that could be provided in available conditions deviates from acceptable limits. When investigating claims of medical malpractice, the facts should be scrutinized in three points of view: in terms of law, ethics and standard care. The conditions in which the harm that is claimed to be existed, the profession of the practitioner, the average level of knowledge and ability that the practitioner should have acquired to conduct his or her profession, any deviations from this level, any deviations from the level of medical care that is acceptable for the country in question, whether the harm is the result of the malpractice claimed are all areas that should be considered.

In recent years in Tamilnadu, the number of claims regarding the professional responsibilities of physicians has clearly increased. Most of these claims are due to cases in which a medical treatment was not required or when unavoidable results occurred. The most reliable defense against these claims is to agree on protocols for diagnosis and treatment that establish standards, and to adapt them in practice. Standard care and treatment are procedures that are done in a way that is appropriate for accepted medical practice. To declare a practice as malpractice, which causes harm as a result of not practicing a standard procedure, there should be predefined national and international standards first. However, what are the criteria for malpractice when standard diagnosis-treatment protocols and pre-defined care and treatment standards do not exist? For example, in our country, these kinds of standards for every field of medicine have not been defined yet. Several specialty organizations have recently prepared studies for their individual specialties. Tamilnadu Medical Association and Ministry of Health have been considered to be late in their concern for the priority of this issue. Studies initiated by Tamilnadu Medical Association and several specialty associations regarding establishing professional standards are supposed to assist physicians and specialized institutions in establishing standards and making decisions.

### MEDICAL ETHICS PERSPECTIVE OF MALPRACTICE

In this section we would like to discuss the negative results, in our opinion, of having the issue of patient's rights considered with the case of malpractice in our country. When "patient's rights issues" are verbalized and defended against only in "malpractice and physician error" cases, as it is generally considered to be in our country, or in other words only legal aspects of the issue are taken into consideration and the aspects regarding medical ethics are neglected, the way that leads to the solution is blocked in advance, and the issue will be restricted to the narrow limits of the field of law, and be left unproductive. This is because the field of law is more stable, contrary to medical ethics that is variable and dynamic. Ethical principles can be discussed and priorities can be changed for each and every case. On the other hand, legal rules are to be obeyed to the extent that they are valid. The patient's rights issue, which is one of the aspects of the patient-physician relationship that is one of the basic issues in medical ethics, and that was regulated again from ethics towards law, covers several rights that competent groups have been agreeing upon and have been trying to express in a much more detailed manner. When "fundamental patient's rights", which were stated in Lisbon and Bali Declarations of the Union of World Physicians, are scrutinized, the perspective of medical ethics may be seen much more clearly. The aim should be disseminating this view throughout Tamilnadu society.

The increasing role of physicians in developing and disseminating the principles of professional ethics when they practice their profession, is resulting in the issue of malpractice, an issue which is known to be unpopular with physicians, and is discussed by them more and more. In our country, this issue is being put on agendas and argued in medical associations and physician organizations.

In the Marbella Declaration, which was on "medical malpractice", the view of the Union of World Physicians regarding malpractice can be seen. The measures to decrease the number of malpractice cases were declared in this Declaration, and ethical liabilities of the stakeholders were stressed 5, 6, and 7. It is important to maintain a sensitivity and awareness regarding ethical responsibilities among physicians and other health personnel in our country. The education of medical ethics has been revised to reflect this point of view

### CONCLUSION

Physicians in our country are required to take second jobs to make a living, and they estrange their profession and themselves from patients. In particular, a physician who works in a state hospital is required to see 50-60 patients or more a day. If the conditions are that there is insufficient physical environment, technical equipment that is not provided, administrative problems that are not solved, unqualified health personnel, physicians who are struggling to make a living, being overloaded and sleepless are added to this, it can be seen that practicing without a mistake is almost impossible. In our country, studies regarding modifying working conditions and personnel rights have not been initiated unfortunately.

When unsustainable health politics that are amended by every government are making physicians estrange their profession on one hand, the gap between physician and patient on the other hand is widening. The physicians and the patients should not be considered as two groups that are opposite each other, but they should be thought of as groups fighting for common interests. Medical ethicists have tried to give this message to the community, however, the media, which are negative in nature and result in getting physicians opposed to patients, are becoming more popular. The batch of problems is getting bigger every day, and the unsolvable nature of the matter makes us feel hopeless. Nevertheless in this country,

inspite of these negativities, a lot of physicians, who have ethical sensitivity, keep fighting in order to provide decent service.

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