REVIEW ARTICLE

Actionable 'Deficiencies' in Medical Practice

Gopinath N Shenoy

Obstetrician-Gynaecologist and Medico Legal Consultant, Consumer Courts, Medical Councils, India

ABSTRACT

Services provided by healthcare providers have been the subject matter of judicial review time and again. The Consumer Disputes Redressal Commissions have laid down decisively what is and what is not 'deficiency' in the services provided by a healthcare provider. 'Deficiency' means, any fault, imperfection, shortcoming or inadequacy in the quality, nature, and manner of performance that is required to be maintained by or under any law for the time being in force or has been undertaken to be performed by a person in pursuance of a contract or otherwise, in relation to any service.

Key words: Negligence and rashness, contributory negligence, error of judgement

Services provided by healthcare providers have been the subject matter of judicial review time and again. The Consumer Disputes Redressal Commissions have laid down decisively what is and what is not 'deficiency' in the services provided by a healthcare provider.

Section 2(1)(o) of the Consumer Protection Act, 1986, defines the word service thus: 'Service' means service of any description that is made available to potential users and includes the provision of facilities in connection with banking, financing, insurance, transport, processing, supply of electrical or other energy, boarding or lodging or both, housing construction, entertainment, amusement or 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.[1] The Supreme Court has held that the services provided by the healthcare providers fall within the ambit of the word 'service' as defined by Section 2(1)(o) of the Consumer Protection Act, 1986.[2]

The word 'deficiency' has been defined by Section 2(1)(g) of the Consumer Protection Act, 1986, thus: 'Deficiency' means, any fault, imperfection, shortcoming or inadequacy in the quality, nature, and manner of performance that is required to be maintained by or under any law for the time being in force or has been undertaken to be performed by a person in pursuance of a contract or otherwise, in relation to any service.[3] Thus, deficient service provided by a healthcare provider is actionable.

Address for correspondence:
Dr. Gopinath N Shenoy,
Obstetrician-Gynaecologist and Medico Legal, Consultant, Consumer Courts, Medical Councils, India.
E-mail: drgnshenoy@yahoo.com

NEGLIGENCE AND RASHNESS

Negligence and rashness on the part of a healthcare provider, while treating a patient, is considered by law as 'deficiency in services'. Negligence is the opposite of diligence. An act is said to be performed negligently when it is performed without due diligence. That is to say, that the standard of care exhibited while performing the act is below par. When an act is undertaken without the requisite care and caution, the act is labeled as a rash act. Negligence and rashness usually go hand-in-hand and in general denote carelessness.

In India as in England, it is well settled that professional malpractice cases are governed by the general principles of the Law of Torts. Before the enforcement of the Consumer

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Protection Act, medical negligence was inevitably governed by the Law of Torts. Alderson B defined negligence thus: "Negligence is the omission to do something which a reasonable man, guided upon those considerations which regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do."[4] Salmond in his authoritative treatise on the Law of Torts (Nineteenth edition) referred to this definition.[5]

Negligence has many manifestations — it may be active negligence, collateral negligence, comparative negligence, concurrent negligence, continued negligence, criminal negligence, gross negligence, hazardous negligence, active or passive negligence, willful or reckless negligence, administrative negligence or negligence *'per se'*.[6] It is also observed that where a person is guilty of negligence *per se*, no further proof is needed.[7]

An action for negligence proceeds upon the idea of a duty or an obligation on the part of the healthcare provider to use the required care and caution. The breech of this duty may result in an injury to a patient. There cannot, therefore, be a liability for negligence unless there is a breach of some duty. Hence, no case of actionable negligence will arise unless the 'duty to be careful' exists. Negligence is simply neglect of some care, which the healthcare provider is bound by law to exercise toward his patients.

Not handing over the certified copies of treatment records amounts to deficiency in services; not mentioning the true status of the treatment given on the treatment summary card amounts to deficiency in services.[8]

CONTRIBUTORY NEGLIGENCE

Contributory negligence is negligence in not avoiding the consequence arising from the negligence of the healthcare provider, when the means and opportunity are afforded to do so. It is the non-exercise by the patient of such ordinary care, diligence, and skill so as to avoid the consequence of the healthcare provider's negligence. Not following the advice with respect to the diet in the postoperative period amounts to contributory negligence.[9]

DUTY OF CARE AND STANDARD OF CARE

A healthcare provider cannot be sued for negligence unless he has violated some 'duty he had to take care of'. The violation of this duty must inflict some damage to the person to whom this duty is owed.

A healthcare provider has to evince a reasonable degree of skill and knowledge and must exercise a reasonable degree of care while practicing his profession. He cannot be expected to apply the ideal or the highest degree of skill and care when handling a case.[10] The duty of a healthcare provider is based on the fact that he is handling a human being and is likely to cause physical damage unless proper care and skill is applied. A healthcare provider who diagnoses and treats a person for a disease or performs a procedure on a patient to remove or rectify a defect is presumably giving an undertaking that he possesses the required skill and knowledge for that purpose. He is duty bound in two respects, namely, he owes a primary duty of care in deciding whether he should undertake the case, and after having undertaken the case the next duty cast on him is the duty of care in the administration of treatment, wherein he should use diligence, care, knowledge, and caution. His failure to perform either of these two duties, if proved, will offer a reasonable and valid ground to fasten negligence on him.[11] He need not be expected to possess the highest or a very high standard nor should he have a very low standard.[12] The law requires a fair and reasonable standard of care and competence. Every healthcare provider who enters into the medical profession thus has a duty to act with a reasonable degree of care and skill.

A healthcare provider who professes to have some special skill is judged, not by the standards of an ordinary man but by the standards of his peers. The test is the standard of the ordinary skilled healthcare provider exercising and professing to have that special skill. A man need not possess the highest expert skill at the risk of being found negligent. It is a well-established law that it is sufficient if he exercises the ordinary skill of an ordinary healthcare provider exercising that particular art.[13]

A prudent man is the man who has acquired the skill to carry out the act that he undertakes. If a man has not acquired the skill to carry out a particular act that he undertakes, then he is imprudent, however careful he may be, and however great his skill may be in other things. The degree of care that a healthcare provider is required to use in a particular situation varies with the obviousness of the risk. If the danger of injuring a person by the pursuance of a certain line of treatment is great, great care is necessary. If the danger is slight, only a slight amount of care is required. Thus, healthcare providers must not act in a manner that will cause injury to his patients. The care that will be required of him will be the care that an ordinary prudent healthcare provider is bound to exercise. However, healthcare providers who profess to have special skills, or who have voluntarily undertaken a higher degree of duty, are bound to exercise more care than an ordinary prudent healthcare provider.

The court will not expect a healthcare provider working in extreme conditions to achieve the same results as his colleague operating within the confines of a hospital and will not judge the healthcare provider's conduct too harshly, simply because, with hindsight, a different course would have been adopted had the situation not been an emergency. In case of emergency, the operating healthcare provider has a wider discretion about the treatment. Where the operation is a race against time, the court will make greater allowance for mistakes on the part of the healthcare provider or his assistants taking into consideration the 'Risk Benefit Test.'

ACCEPTED PRACTICES AND PROCEDURES

A healthcare provider is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of professional men skilled in that particular art. Accepted practice means practice accepted as proper by the healthcare provider's peers. If the healthcare provider has complied with this practice then that is strong evidence that he is not negligent; if he does not comply then it is possible that he will be negligent.[14]

DEVIATION FROM ACCEPTED PRACTICES

A healthcare provider may be held liable for negligence if he departs from the accepted practices. Departure from approved practices is in itself not negligence. If a healthcare provider departs from the approved practice, and he is able to justify his actions he will not be negligent, but if he cannot justify his departure from the accepted practice, the patient will have little difficulty in establishing negligence.[15] The negligent performance of an approved practice will also constitute a departure.

ACCIDENTS, MISADVENTURES, MISHAPS

Courts have held that it would be wrong, and indeed bad law, to state that simply because a misadventure or mishap occurred, the hospital and the healthcare providers are thereby liable. It would be disastrous to the community if it were so.[16]

A healthcare provider is not an insurer; he does not warrant that his treatment will succeed or that he will perform a cure.[17] Naturally he will not be liable if, a treatment which in ordinary circumstances would be sound, has unforeseen results. The standard of care that the law requires is not insurance against accident slips. It is not every slip or mistake that imports negligence. The law recognizes the dangers that are inherent in surgical operations. Mistakes will occur on occasions despite the exercise of reasonable skill and care.[18]

ERROR OF JUDGEMENT

An error of judgement does not in itself amount to negligence.[19] The law allows errors of judgement, which do not by themselves amount to negligence. The House of Lords in England held that some errors of judgement may be negligent and some may not. The error of judgement committed by a healthcare provider may or may not be indicative of negligence, but the proper test to be applied is whether he abided by the standards laid down by his peers (Bolam's Test).

The courts have held that, "No human being is infallible and in the present state of science even the most eminent specialist may be at fault in detecting the true nature of the diseased condition. A practitioner can only be liable in this respect if his diagnosis is so palpably wrong as to prove negligence, that is to say, if his mistake is of such a nature as to imply the absence of reasonable skill and care on his part, regard being had to the ordinary level of skill in the practitioner."[20]

With regard to junior healthcare providers, inexperience is no defense. He must meet the standard of care expected of his rank and status.[21]

INHERENT RISKS OF TREATMENT

Every procedure has its own risk factors. Just because one of these factors becomes manifest does not mean that the healthcare provider is negligent and his services defective. He can be held negligent only when the standard of care exhibited by him falls below the standards expected of a reasonable prudent healthcare provider, practicing under the circumstances he is placed in.[22]

CHOICE OF TREATMENT — DISCRETION

Many medical problems can be managed or treated in more than one ways. Healthcare providers have the discretion to choose the line of treatment they wish to adopt, and can be faulted for the same, only if their choice is palpably wrong and / or dangerous to the patient. When there are two genuinely responsible schools of thought about the management of a clinical situation, the courts could do no greater disservice to the community or the advancement of medical science than to place the hall-mark of legality upon one form of treatment.[23] A healthcare provider is not liable for taking one choice out of two or for favoring one school rather than another.[24] He is only liable when he falls below the standard of a reasonably competent practitioner in his field. In the realm of diagnosis and

treatment there is ample scope for a genuine difference of opinion and a healthcare provider is clearly not negligent merely because his conclusion differs from that of other professional men, or because he has displayed less skill or knowledge than others would have shown. If a healthcare provider has followed a course of treatment or procedures accepted by and followed by a responsible section of the profession, he would not be guilty of negligence even if another section of the profession does not subscribe to that practice and follows a different course.[25] A healthcare provider has the discretion to choose the treatment which he proposes to give to the patient and such discretion is wider in the case of an emergency, but he must bring to his task a reasonable degree of skill and knowledge and must exercise a reasonable degree of care according to the circumstances of each case.[26]

GUARANTEE AND WARRANTY

The law does not expect healthcare providers to guarantee the results of their services. In any treatment, it is never claimed by the healthcare providers that every person who receives the treatment must and should be benefited by the same. This is because the benefit of a particular type of therapy or operation or medicine depends on a number of factors, which are beyond the control of the healthcare provider.

One type of treatment may not be suitable to one, but may be suitable to another. A patient may respond to one medicine, another may not respond to the same medicine. Merely because the patient was not relieved from the pain, one cannot jump to the conclusion that the therapy is bad or that the healthcare provider has not given proper treatment. If everyone has to be benefited by a particular medicine or operation, then nobody will die of disease.

VICARIOUS LIABILITY

Liability that is incurred for, or instead of, another can be defined as vicarious liability. Every person is responsible for his own acts or omissions, but there are circumstances where for the acts committed by a person, the liability comes to lie, not on that person, but on someone else. A master is liable for the acts or omissions of his servant and the principal is accountable for the acts of his agent. The hospital authorities are responsible for the whole of their staff, not only for the nurses and the doctors, but also for the anesthetists and the surgeons. It does not matter whether they are permanent or temporary, resident or visiting, whole-time or part-time. The hospital authority is responsible for all of them. The reason is because even if they are not servants, they are the agents of the hospital who give the treatment. The only exception is the case of consultants and anesthetists selected and employed by the patient himself.[27]

DEFICIENCIES IN STATUTORY REQUIREMENTS

To practice medicine without proper registration with the State Medical Council or the Medical Council of India would violate the provisions of law.[28] So also, employing staff that is unqualified will violate the provisions of the Indian Medical Council (Professional conduct, Etiquette, and Ethics) Regulations, 2002, as formulated by the Medical Council of India. Institutions where medical termination of pregnancy is undertaken must also be registered with the Appropriate Authority under the Medical Termination of Pregnancy Act, 1971.[29] Ratios of judge-made laws or precedents are also applicable and binding on the healthcare providers, and violation of the same also constitutes an offense that is actionable. Cross-pathy practice, that is, an allopathic practitioner prescribing ayurvedic drugs is bad according to the law.[30] Cross-speciality practice, that is, a surgeon undertaking a hysterectomy is also considered improper. Undertaking a tube ligation without the consent of the spouse is similarly actionable.[31]

Lord Justice Denning explained the law on the subject of negligence against healthcare providers and hospitals in the following words: "Before I consider the individual facts, I ought to explain to you the law on this matter of negligence against doctors and hospitals. Mr. Marvan Evertt sought to liken the case against a hospital to a motor car accident or to an accident in a factory. That is the wrong approach. In the case of accident on the road, there ought not to be any accident if everyone used proper care; and the same applies in a factory; but 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 a 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; for an action for negligence against a doctor is for him like a dagger. His professional reputation is as dear to him as his body, perhaps more so, and 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 skilful medical man".[32]

Prof. Gopinath N. Shenoy is a medico-legal consultant and specializes in the defense of doctors in the Consumer Forums / Commissions. He is an Ex-Judge of the Consumer Court - Mumbai, Government of Maharashtra. For any queries or assistance, contact Dr. G. N. Shenoy on 24927403 at N. A. Shenoy Memorial Shenoy Nursing Home, 199, G. K, Marg, Lower Parel, Mumbai 400 013.

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