

AIOS, CME SERIES (No. 27)



# Legal Aspects in Ophthalmology

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*For any suggestion, please write to:*

**Dr. Lalit Verma**

(Director, Vitreo-Retina Services, Centre for Sight)

Honorary General Secretary, AIOS

Room No. 111 (OPD Block), 1st Floor

Dr. R.P. Centre, A.I.I.M.S., Ansari Nagar

New Delhi 110029 (India)

Tel : 011-26588327; 011-26593135

Email : aiosoffice@yahoo.com; lalitverma@yahoo.com

Website : www.aios.in

# Legal Aspects in Ophthalmology



Author

**Dr. A A Deshpande**

M.S.; D.O.M.S.; LL.B.; PGDHAM; PGDMLS (Pune)

Member Legal Cell AIOS

Member ARC AIOS

Director, Guruprasad Netra Rugnalaya Pvt. Ltd.  
Aurangabad, Maharashtra

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## Foreword

Great strides made in the **'Science & Art'** of Ophthalmology coupled with increasing expectations from the Patient (& Family), have seen increase in number of Law suits against Ophthalmologists.

AIOS office keeps receiving requests from its members for help/ guidance in such matters.

Most of our members are unable to respond appropriately to such events or get caught in Legal hassles – generally for `No Fault` of theirs – having done their best in their circumstances.

Dr Babu Rajendran, Dr Grover & others were instrumental in helping AIOS establish a Legal Cell.

Here, Now comes a booklet by Dr AA Deshpande, who besides being an eminent Ophthalmologist has a degree in law – a rare blend indeed!

He has written, in a very simple & lucid language – all we ought to know about 'Legal Aspects in Ophthalmology'.

A Help for All of Us – lest we get embroiled in CPA matters.

Congratulations to Dr Deshpande for an excellent document & Thanks to Dr Ajit Babu – for the Idea & its facilitation.



Dr Anita Panda  
President, AIOS



Dr Lalit Verma  
Secretary-General, AIOS

# All India Ophthalmological Society

## Academic Research Committee

**Chairman** : Dr Ajit Babu Majji  
ajitbabu2012@gmail.com  
(M) 09391026292

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amitkhosla@hotmail.com  
amitkhosla2009@gmail.com  
(M) 09811060501

**East Zone** : Dr Ashis K Bhattacharya  
ashis.bhattacharya@gmail.com  
(M) 09831019779, 09331016045

**West Zone** : Dr Anant Deshpande  
aawadgaonkar@gmail.com  
deshpande200@gmail.com  
(M) 09850086491

**South Zone** : Dr Sharat Babu Chilukuri  
sharatanu@yahoo.com  
(M) 09849058355

**Central Zone** : Dr Gaurav Luthra  
gaurav.luthra@yahoo.com  
luthrag@yahoo.com  
(M) 09997978479

## Preface

Advances in ophthalmology and medical science in general, has raised the bar of medical care. As the bar is high, so are the chances to have errors. However with high promises by the ophthalmology and increased expectations from the patients, there is a chance for frustration and both parties may end up with law suits.

As there is high consumer awareness and low threshold for tolerance, there is increasing number of law suits against doctors. The need of the hour, is good knowledge about legal aspects that we may have to deal with. To this extent the academic and research committee has planned this CME series.

Dr AA Deshpande, being ophthalmologist with degree in law has put in his experience and brought this CME series. I want to thank Justice V K Barde, Mr. Bhushan Kulkarni and Mr. Avinash R Borulkar for their active contribution and critical review.

Hope this CME help you all in your day to day practice.



Dr Ajit Babu Majji  
Chairman, Academic & Research Committee  
All India Ophthalmological Society  
Medical Director, Centre For Sight  
Ashoka Capitol Building, Road # 2, Banjara Hills  
Hyderabad 500034, India  
E mail: [ajitbabu2012@gmail.com](mailto:ajitbabu2012@gmail.com)  
Mobile:9391026292

# INTRODUCTION

In the medical college there is hardly anything taught to the medical students about the Legal aspects, except jurisprudence which is only useful to govt. Medical officers or such, who deal with Medico legal cases. An ophthalmologist is hardly aware of legal aspects of ophthalmic practice or the laws with which he is concerned in his practice. So whenever he comes across the legal situation he gets fumbled. Particularly in CPA cases or table deaths he loses his peace of mind which may affect his skill and practice. Now it is high time that Legal subject should be added in his syllabus .So we are trying to make them knowledgeable through this CME. We have tried to include maximum situations where an ophthalmologist is concerned to Law. So we have included in this CME the statutory rules concerned with hospital and practice, Legal procedures in the Court, CPA, Case laws and all concerned with Legal matter.

## **Dr AA Deshpande**

Member Legal Cell AIOS

Member ARC AIOS



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# **GLOSSARY**

CPA	–	Consumer Protection Act
Govt.	–	Government
IOL	–	Intra Ocular Implant
OT	–	Operation theater
H/O	–	History of
MOS	–	Maharashtra Ophthalmological Society
OP	–	Opposite Party
CGHS	–	Central Government Health Scheme

## REMEMBER

- LEGAL NOTICE – Do not Refuse to take it, as your refusal will prove that, you were made aware of it
- Notice must be replied. Not replying amounts to admission. Deny each allegation separately
- SUMMONS – It should not be refused. If refused COURT MAY ISSUE WARRANT
- WARRANT – Bailable Warrant-Police can give the Bail. Non bailable Warrant - Court will give the bail
- Police can take statement, but it should not be signed
- Women cannot be called to police station after 6 PM for inquiry or for taking statement
- Documents can be seized by Police if offence is registered
- INFORMATION TO POLICE -Inform the Police If death of the patient occurs within 24 hrs from the admission in the hospital or Where cause of death cannot be certified or During surgical or interventional procedure death occurs
- Cognizable case – (cognizable offence) – means a case in which, a police officer can arrest without warrant
- TO MAKE DOCTOR SAFE – see before operation
  - a) Take physical fitness from a M.D. Physician.
  - b) Always have a qualified stand by Anesthetist
  - c) O.T. should have oxygen cylinder
  - d) Written informed consent in patient's language.
- Table Death - Inform Police. Insist on Post mortem
- The table death is generally inquired under 304-A of Indian Penal Code in which FIR is registered. It is a Bailable offence.
- Supreme court has given guide lines that – Dr. should not be arrested under Section 304-A unless opinion is taken from expert Doctor or committee of doctors expert in that field
- PROTECTION TO DOCTERS & HOSPITALS  
Government of Maharashtra has passed an ordinance No V 2009 Dated 30 March 2009
- Section 88 and 92 of IPC protects doctor in criminal liabilities.
- No consent protects the doctor from CPA but it protects him from criminal liability
- Records OPD papers should be preserved for 2 years; and papers regarding indoor surgical matter should be preserved for 3 years (Sec. 24 A CPA Act 1986)



# Medico legal in Ophthalmology

In practice ophthalmologist has to come across the Medico legal work one or other day. Medico-legal comes in ophthalmology when a legal opinion of ophthalmologist is required as a treating ophthalmologist or expert or the legal proceeding is against the ophthalmologist. It may be as –

## 1) As a third party expert

- i) When an ophthalmic mishap has occurred in the treatment or surgery in the camps, Govt. Hospitals, charitable organizations, corporate hospitals, or private sectors. The mishap may be a cluster infection in the cataract surgery camp or a table death during surgery or procedure in a Govt. hospital or medical college or a trust hospital or in a corporate hospital where the surgeries are done in a large number. Such mishaps are inquired by the Government or by such authority by appointing the enquiry officer or a committee of expert ophthalmic doctors. When an ophthalmologist is appointed as investigating officer by a competent authority, Govt. or court as a individual or part of a committee, he comes across the legal matters and many times he has to report or to depose on oath in the Court of Law.
- ii) When a expert opinion is required by a investigating committee, Govt. court or police on the records provided for giving opinion. Many times court requires such opinion or the complainant or respondent require such opinion. As per Supreme Court decision in civil appeal No. 3541/2002 Martin F. D' Souza Vs Mohd Ashfaq decided 17-02-2009 wherein the Honorable Court has held as under. Whenever a complaint is received against a doctor or hospital by the Consumer Forum or by Criminal Court then before issuing notice to the doctor or hospital the court should first refer the matter to the competent doctor or committee of doctors specialized in the field relating to which the medical negligence is attributed and only after that doctor or committee reports that there is prima facie case of medical negligence then only notice be issued to concerned doctor/hospital.

But This own decision is overruled by Supreme Court by the decision reported Cpj III 2009 (SC)(17) Malaykumar Ganguly v/s dr. Mukherjee by which now it is not required to have such expert opinion in civil matters. But still the court can ask such opinion in CPA case. Now it is the discretion of the court.

- iii) When called as a expert evidence in front of inquiring committee or Court as a witness. In that case Dr. has to face examination in chief and cross examination in the witness box as expert.

## **2) When he has treated or examined the case as a expert**

### **A) CIVIL MATTERS**

- i) When he has treated the case as a second expert – when Either the patient is referred by first ophthalmologist for opinion or further treatment or the patient has came of his own to the second expert for treatment and the case goes in court under CPA. Then the first or second Doctor treating the case may be called in the court as witness or to provide opinion.
- ii) When the patient is referred or came himself for examination and a Certificate for compensation purposes is required.

If there is loss of vision causing disability or blindness or disfiguration.

- a) Under Employees Compensation Act – when there are damages during the working in the organization. The treating Dr. has to certify the extent of damage to the concerned authority or the Court.
- b) For insurance & reimbursement – in insurance cases the Dr. has to certify the extent of damage to insurance company or the court.
- c) In CPA when he has treated the patient as a second expert doctor and the court requires the extent of damages to calculate the loss and compensation.

- d) As a certifying expert after examination of a case – The Court may send a case for examination and certification of the condition of the patient.

## **B) CRIMINAL MATTERS**

### **I) Accidental Trauma**

When caused in vehicle accident case, doctor may be required to give certificate to court or insurance company indicating amount of loss of function. Record has to be kept for 3 years.

### **II) Trauma by Assault**

- Patient may give history of Assault and when it is taken on record, or when Patient is referred by police or court, the doctor has to note the injuries in detail, in a separate register called as MLC register, it's simple or grievous nature, and amount of loss of function (vision).
- When fracture is suspected X-ray, CT scan or MRI is advised and record is kept for 3 years.
- Certificate of injury is given to patient on demand if injury is simple injury.
- If it is grievous injury it is necessary to inform police done. certificate is given to police or court on demand.
- Record should be kept for 3 years or till case is decided by the court.
- The Grievous injury in Ophthalmology is defined in Section 320 of the Indian Penal Code as the Grievous injury is –
  - a) Permanent privation (loss)of the sight of either eye
  - b) Permanent disfiguration of the head or face  
(Here disfiguration due to injury to lids, orbit, eye ball etc.)
  - c) Fracture or dislocation of a bone or tooth  
(Here Fracture of orbital bones)
  - d) Any hurt which endangers life or which causes the sufferer to be during the space of twenty days in severe body pain or unable to follow his daily routine.

As a legal expert in court of law, when he has treated the case of criminal assault. The patient may come of his own or may be sent by police or court for examination and or treatment and for certificate. If the patient has come on his own and the injury is grievous then the doctor has to inform the police. The injury may be

- a) Mechanical injury
- b) Chemical injury (acid or alkali burn)
- c) Heat or electrical burns.

Doctor has to make a note of every injury in detail on his record and the investigations done with it's record and the treatment given and the results in detail. Doctor has to keep the record and has to give certificate to police or court. Injury should be noted as simple or grievous injury and amount of loss of function (vision).

### **III) Trauma While Working**

- When a worker is referred for a ocular injury sustained while working, one has to keep record of injury and % of loss of function at the end of treatment and period of admission in the hospital
- One has to give certificate to worker, employer, insurance company or Labor Court on demand about % of loss of function or percentage of eye injury
- Appendix to the E.S.I. ACT The Second Schedule Section 2 (15 A and 15 B)

#### **Part I**

- 1) Loss of sight to such an extent as to render the claimant unable to perform any work for which eye sight is essential – 100%
- 2) Very severe facial disfigurement – 100%

#### **Part II**

- 1) Loss of one eye, without complications, the other being normal – 40%
- 2) Loss of vision of one eye, without complications or disfigurement of eye ball the other eye being normal – 30%



#### **IV) From the point of CPA**

- When a patient of injury comes to a Ophthalmologist many times he is in dilemma whether he should take the case or not, because of fear of CPA, particularly when he is a general ophthalmologist. In such cases, when he wants to refer the case, he should give primary treatment and should give a referral letter to the patient and a copy of letter with "received" signature of patient or guardian with date and time should be kept with him.
- He should not afraid of CPA, as the Court expects only that much care and treatment that a "PRUDENT DOCTOR" will give. So in such cases the Doctor should record the injuries in detail with figures or photograph.
- Do necessary investigations and should keep records.
- Should tell relatives the prognosis and take them in confidence.
- Should take informed consent in their mother tongue if surgery is to be done.
- Treat the patient as per the text book norms.
- Refer the patient to higher center if you feel.
- Be transparent and polite with patient and relatives.

### **3) As a Legal Proceeding against the ophthalmologist**

#### **A) Criminal**

- i) Under Organ transplantation Act – Keratoplasty and eye bank  
– If there is violation of organ transplant Act ("Transplantation of Human organ Act 1994") A criminal case can be lodged against the Doctor
- ii) While treating a case if it causes
  - disfiguration of face
  - Treatment causing threatening to life
  - Treatment or procedure causing the death of the patient,A criminal case can be lodged against the doctor under 304 - A of IPC.

Eye Donation, Keratoplasty and eye bank is governed by  
**Transplantation of Human organ Act 1994**  
**(Act No. 42 of 1994)**

An Act to provide for the regulation of Removal, Storage, and Transplantation of human Organs for Therapeutic purposes and for the Prevention of commercial dealing in human organs and for matters concerned there with or incidental thereto.

This act may be called as transplantation of human organs act,1994.

It applies, in the first instance, to the whole of states of Goa, Himachal Pradesh and Maharashtra and to all the Union Territories and it shall also apply to such other state which adopts this act by resolution passed in that behalf under clause (1) of article 252 of the constitution of India.

The Bombay corneal Grafting Act,1957 Bom. Act 33 of 1957 (With Notifications)

- Removal of Eyes of deceased Person Eye donation is an act of donating one's eyes after his/her death under The Bombay corneal Grafting Act, 1957.
  - It is an act of charity, purely for the benefit of the society and is totally voluntary. The eye donation of the deceased can be authorized by the next of kin even if the deceased did not pledged to donate his/her eyes before death.
- 1) If any person either in writing at any time or orally in the presence of two or more witnesses, during his last illness has expressed a request that his eyes be used for therapeutic purposes after his death, the person lawfully in possession of his body after his death may unless he has reason to believe that the request was subsequently withdrawn authorize the removal of the eyes from the body for those purpose.
  - 2) If The deceased person has donated his eyes to any eye bank and The person lawfully in possession of the body and the near relatives has no objection for removal.

- 3) The person lawfully in possession of the body of deceased person may authorize the removal of the eyes from the body unless that a near relative of the deceased objects for removal of eyes.

Near Relative : (Sec 2 (i) – SPOUSE, SON, DAUGHTER, FATHER, MOTHER, BROTHER OR SISTER)

- 4) Removal cannot be done if there is refusal of near relative or by the person lawfully in possession of the body even if the deceased person has donated his eyes when he was alive.

### **Removal of eyes**

- Preferably a written consent for removal should be taken from the person in charge of the body.
- When eyes are to be removed from the body of deceased person, the registered medical practitioner shall satisfy himself, that life is extinct in such body or in case of brain stem death, has been certified under sub-section (6).
- The Medical practitioner will collect blood for serological tests as HIV, Hepatitis–B, Syphilis etc.

### **Authority when not to be given**

- 1) Authority for removal of eyes shall not be given under Section 3 – If inquest is required by a person empowered to give such authority or by police.
- 2) No authority for removal of eyes when body is entrusted to person by another only for cremation.
- 3) In brain stem death, eyes cannot be removed unless such death is certified by Board of Medical experts.
- 4) Removal can not be done from unclaimed bodies in the prison and hospital.
- 5) Removal can not be done from bodies sent for postmortem for medico-legal or pathological purpose.
- 6) Section 10 (1) (a) – No hospital unless registered under this Act shall conduct or associate with or help in the removal, storage, or transplantation of any human organ.

BUT

Section 10(2) – Notwithstanding anything contained in subsection (1), the eyes or the ears may be removed at any place from the dead body of any donor, for therapeutic purposes, by a registered medical practitioner.

### **Offences and Penalties**

- 1) Punishment for removal of human organ without authority –  
Shall be punishable with imprisonment for a term which may extend to FIVE years and with fine which may extend to ten thousand rupees.
  - His name shall be reported to state Medical Council for suspension for two years for first offence and permanently for subsequent offence.
- 2) Punishment for commercial dealings in human organs –  
Shall be punished with imprisonment for a term which shall not be less than TWO years but which may extend to SEVEN years and with fine which shall not be less than Ten Thousand rupees, may extend to Twenty Thousand rupees.

## **EYE BANK**

- An Eye Bank is a non-profit, organization affiliated to Eye Bank Association of India which is entitled to procure, medically evaluate and distribute eyes (which are donated voluntarily by humanitarian citizens after death) to certified institutions. These eyes are used primarily for corneal transplantation (grafting). Other uses are for sclera reconstruction, research and education
- Eye Donation Centre is a organized body affiliated to Eye Bank Association of India which procures eyes from the donating person and sends these to Eye Bank for further evaluation and distribution. Will the eye bank reveal the information of corneal recipient?

The recipient information is always kept confidential and anonymous. It will not be revealed on any grounds. The donor's family members should be satisfied knowing that the eyes have been used to restore sight to two blind persons.

## **LEGAL PROCEEDINGS**

- 1) **LEGAL NOTICE** – Is Bringing something to the knowledge by Advocate or Court. Do not refuse to take it, as your refusal will prove that, you were made aware of it. Notice must be replied preferably through Legal practitioner. Not replying amounts to admission. Deny each allegation separately. Doctor should use technical knowledge in replying the notice.
- 2) **SUMMONS** – Are issued by the Court, to make the person present in the court, on given date and time, personally or through Advocate. Summons are **SERVED** by post or through belief of Court. The summons should not be refuse. If refused **COURT MAY ISSUE WARRANT**.
- 3) **WARRANT** – The warrant is issued by the Court and is served through Police.

## **It may be**

- 1) **Bailable Warrant** – In this warrant one has to arrange the Bail. Police can give the Bail. If bail is not arranged police will arrest and will keep him in lock up till bail is given or he is presented in the court within 24 hours from the time of arrest.
- 2) **Non bailable Warrant** – In this warrant Police will arrest and will keep in lock up and will produce in the Court within 24 hours from the time of arrest. Court can give bail. This warrant is issued in non bailable offences and when court orders.
- 4) **POLICE STATEMENT** – Police can come to the Hospital and do the inquiry or, can take statement, but it should not be signed. Police can call anybody to police station for enquiry and can take statement but a women cannot be called to police station after 6 PM for inquiry or for recording statement. Police can ask the documents for inspection. Doctor should cooperate. Documents can be seized by Police if offence is registered. If documents are seized, seizure panchanama should be prepared and police has to provide copy panchanama to the doctor. Doctor should retain Xerox copies of seized documents.
- 5) **COGNIZABLE OFFENCE** – Means an offence for which and cognizable case means a case in which, a police officer may arrest without warrant.
- 6) **COMPLAINT** – Means any allegation made orally or in writing to a magistrate with a view to take action under the Criminal Procedure Code 1973 that some person whether known or unknown has committed an offence.
- 7) **JUDICIAL PROCEEDING** – Includes any proceeding in the course of which evidence is or may be legally taken on oath.

# Liabilities of Doctor arising under Statutes

As per existing Laws, cases for medical negligence of the doctors can be filed under following enactments at the option of patients.

- 1) A complaint for deficiency of service can be filed before the consumer forum under the Consumer Protection Act 1986.
- 2) A Civil suit for damages in civil court.
- 3) A complaint under section 304-A of the Indian Penal Code in criminal Court.
- 4) A complaint to the Medical Council of India or The State Medical Council for de-registration of a doctor on account of negligence

Right to Life enshrined in Article 21 of Constitution of India includes Right to Health. So the constitution of India casts obligation on State and Medical professions to preserve life. Every doctor whether at a Govt. hospital or otherwise has the professional obligation to extend his services with due expertise for protecting life. No Law or State action can intervene to avoid or delay the discharge of the paramount obligation cast upon the members of Medical profession.

## **MEDICAL NEGLIGENCE viz . CIVIL OR CRIMINAL WRONG**

Medical negligence is both civil and criminal wrong. It is punishable either by compensation or with imprisonment. To impose criminal liability the commission of an offence made punishable under the Indian penal code or by Special Act. For purpose of criminal law there are degrees of negligence and a very high degree of gross negligence is required to be proved beyond reasonable doubt before the felony is established. Under certain circumstances negligence of the doctor may amount to a criminal offence in case of the death of the patient, a doctor can be charged under Section 304 A of Indian Penal Code.

As opposed to this ordinary negligence, gross negligence is defined by the Supreme Court in Jacob Mathew's case, that negligence must be of high degree i.e. the doctor did something or failed to do something which in the given facts and circumstances no medical professional in his ordinary senses or prudence would have done or failed to do. Ultimately, either gross or ordinary negligence

hinges around “facts and circumstances of each case” and no straight jacket formula or definition can be laid down or is not even deducible. Thus, “negligence” of a doctor is the only foundation on which either criminal cases or civil cases are based. However, if the negligence is not gross, a criminal complaint is not maintainable.

It must be shown and proved that the gross negligence or incompetence of the doctor was beyond civil liability. For example, if the acts of the doctors were in utter disregard of patient’s life and safety, it is gross negligence in such situation criminal liability can be attracted. Thus, the burden of proof and standard of proof is different than one under civil law. Therefore, the burden of proof is strict and beyond reasonable doubt in criminal cases of negligence.

In the criminal law the burden on the person alleging gross negligence on the part of the doctor. There is an exception to the said general rule of discharging the burden of proof by the complainants. Such an exception is known as the “principle of “res ipsa loquitur” i.e. thing must speak for itself. The application of the principle of “res ipsa loquitur” in civil and criminal cases has also considered by the Supreme Court in Jacob Mathew’s case (Paras 27 to 29 of the judgment).

The matter in Jacob Mathew’s case arose before the Supreme Court for consideration of the important question as to whether the doctors should be treated differently than others when prosecutions for offence of negligence under Section 304 A, in the following manner. The Supreme court in case of Dr. Suresh Gupta V/s. Government of NCT of Delhi (2004) (6) SCC. 4442, it is held that “for every mishap or death during medical treatment, the medical man cannot be proceeded against for punishment.”



## **When to Inform the Police**

- 1) Whenever there is a History of criminal assault of grievous nature and you have taken down the history of criminal assault in your record.
- 2) If death of the patient occurs :
  - Within 24 hrs from the admission in the hospital.
  - Where cause of death can not be certified.
  - During surgical or interventional procedure death occurs.

### **TABLE DEATH**

#### **IN SOLO PRACTISE**

- a) Stop the surgery and try to resuscitate with the help of Anesthetist. Call physician or shift to ICU if possible.
- b) Inform Police. Insist on Post mortem.
- c) Inform relations and try to take them in confidence and do consoling.
- d) If possible do not insist on bill payments.

#### **IN CORPORATE, TRUST or GOVERNMENT HOSPITAL APART FROM ABOVE**

Inform Hospital Administrator, Unit in charge and Superintendent of hospital

#### **TO MAKE DOCTOR SAFE**

(Precautions to be taken prior to operation)

- a) Take physical fitness from a M.D. Physician.
- b) Always have a qualified stand by Anesthetist.
- c) O.T. should have oxygen cylinder.
- d) (The evidence of Oxygen is there in the cylinder is Receipt of recently filling of oxygen cylinder). Suction machine, Emergency drugs as per standard list.
- e) Written informed consent in patient's language.

## **IPC 45 OF 1860 – SECTION 304-A**

Section 304 A IPC – Causing death by negligence – Whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

The negligence which would justify a conviction must be culpable or of gross degree and not the negligence founded on a mere error of judgment or defect of intelligence. In a civil suit it is sufficient to prove negligent of duty by consideration of the probabilities of the case but in criminal law it is necessary to prove beyond reasonable doubt the degree of gross negligent act.

Section 88 and 92 of IPC provide for exemption for acts done in good faith for the benefit of a person.

Section 88 I.P.C. – Act not intended to cause death, done by consent in good faith for person's benefit – Nothing which is not intended to cause death is an offence by reason of any harm which it may cause or be intended by the doer to cause or be known by the doer to be likely to cause, any person for whose benefit it is done in good faith, and who has given a consent whether express or implied to suffer that harm.

Section 92 I.P.C. – Act done in good faith for benefit of a person without consent – Nothing is an offence by reason of any harm which it may cause to a person for whose benefit it is done in good faith, even without that person's consent, if the circumstances are such that it is impossible for the person to signify consent, or if that person is incapable of giving consent, and has no guardian or other person in lawful charge of him from whom it is possible to obtain consent in time for the thing to be done with benefit.

- The table death is generally inquired under 304-A in which FIR is registered.

But

- Doctor is not arrested though it is a cognizable offence. It is a Bailable offence.

AS

Supreme Court has given guide lines that – Doctor should not be arrested under Section 304-A unless opinion is taken from expert doctor or committee of doctors expert in that field in a land mark judgment.

Jacob Mathew (Dr.) v/s State of Punjab III (2005) cpj 9 (sc) : Supreme Court of India; R.C. Lahoti, c.j.i.; G.P Mathur & P.K Balasubramanyan.

A private complaint may not be entertained unless the complainant has produced prima facie evidence before the court in the form of a credible opinion given by another competent doctor to support the charge of rashness or negligence on the part of the accused doctor.

The investigating officer should before proceeding against the doctor accused of rash or negligent act or omission, obtain an independent and competent medical opinion preferably from a doctor in Govt. service qualified in that branch.

A doctor accused of rashness or negligence may not be arrested in a routine manner unless his arrest is necessary for furthering the investigation or for collecting evidence.

Malay Kumar Ganguly v/s Sukumar Mukherjee (Dr.) & ors. III (2009) CPJ 17 (SC).

Supreme Court of India: S.B. Sinha & Deepak Verma, jj

For negligence to amount to an offence the element of MENS REA must be shown to exist. For an act to amount to criminal negligence, the degree of negligence should be much high degree.

# **The Consumer Protection Act 1986 (No. 68 of 1986) with Amendments of 1991, 1993 and 2002**

An Act to provide for the protection of interests of consumers and for that purpose to make provision for the establishment of consumer councils and other authorities for the settlement of consumer's disputes and for matters connected therewith.

The Medical profession was beyond the reach of consumer protection Act but after the Landmark decision of Supreme Court in III (1995) cpj 1 (SC)

Supreme Court of India. Mr.S.C.Agrawal, Mr.Kuldip Sing & Mr. B.L. Hansaria, JJ.

Indian Medical Association v/s V.P. Shantha & Ors.

Civil Appeal No.688 of 1993

By which the Medical Profession came within the ambit of Consumer Protection Act.

The negligence comes under the CPA for which doctor is held responsible and sued in the Court of CPA.

Service rendered to a patient by a medical practitioner by way of consultation, diagnosis and treatment, both medical and surgical, would fall within the ambit of service as defined in Section 2(1)(0) of the Act and comes under CPA

## **What is Negligence –**

Term "negligence" is not defined in any Act including Indian Penal Code, Consumer Protection Act or General Clauses Act. However, negligence of a doctor gives rise to an action for deficiency in service under the Consumer Protection Act. Thus, the decision of the courts of law either under the Indian Penal Code or the Consumer Protection Act would apply to ascertain and know the meaning of negligence or gross negligence.

The Supreme Court in Para 12 of its recent judgment in Jacob Mathew's case (2001 AIR SCW 3685) referred to three meaning

of negligence as noted by Charles worthy & Percy on Negligence (Tenth Edition,2001). All in all, a doctor who holds himself as ready to give medical treatment undertakes that he is possessed of skill and knowledge of medical science. As a result, a doctor owes certain duties including.

- A duty to decide whether to undertake a case,
- What treatment to be given and
- Administration of that treatment.

All these duties require degree of skill and knowledge and a doctor must also exercise reasonable care. If there is failure to observe the degree of care, precaution and vigilance as demanded by the circumstances for protection of a person, negligence is generated giving rise to an actionable claim.

In fact, the recent judgment of the Supreme court in Jacob Mathew's case, court accepted the presumption that a medical professional would never intentionally commit an act or omission resulting in loss and injury to his patient and also to his reputation and profession and therefore, declared that a doctor cannot be treated as criminal at the first instance unless examination of facts and circumstance of negligence in the case prima facie reveal gross negligence.

In para 22 of the above Supreme Court judgment, the Court has referred to the degree of skill and care required by a medical practitioner as stated in Halsbury's Laws of England (Fourth Edition, Vol. 30 para 35). The meaning of negligence in terms of medical profession is different.

As noted by the Supreme Court in the above judgment, a simple lack of care or an error of judgment or an accident does not constitute "negligence". Similarly, availability of better alternative course or method of treatment was available but not adopted or that the doctor did not possess highest level of expertise or skills in that branch in which he practices does not constitute negligence. Thus, if there is breach or failure in taking that reasonable care, it constitutes negligence. A claim for compensation can arise in case of negligence only if any loss or injury is proved to have been caused to the patient. It has also to be proved that the negligent act

is the direct and proximate cause of the loss or injury. If the doctor has attended on the patient with due care, skill and diligence and in a manner accepted by the medical profession and the patient dies or suffers from any permanent disability, the doctor is not held guilty of negligence.

Skill of medical practitioners differ from doctor to doctor and if after taking due care, skill and diligence the patient does not survive or suffers permanent ailment it would be difficult to hold that the doctor is guilty of negligence.

Jacob Mathew's case the Supreme Court in para" 26.

A mere deviation from normal professional practice is not necessarily evidence of negligence. So also an error of judgment on the part of a professional is not negligence per se. Higher the complication, more are the chances of error of judgment. At times, the professional is confronted with making a choice between the devil and the deep sea and he has to choose the lesser evil. The medical professional is often called upon to adopt a procedure which involves higher element of risk, but which he honestly believes as providing greater chances of success for the patient rather than a procedure involving lesser risk but higher chances of failure. Which course is more appropriate to follow, would depend on the facts and circumstances of a given case. The usual practice prevalent now- a- days is to obtain the consent of the patient or of the person in- charge of the patient if the patient is not in a position to give consent before adopting a given procedure. So long as it can be found that the procedure which was in fact adopted was one which was acceptable to medical science as on that date, the medical practitioner cannot be held negligent merely because he chose to follow one procedure and not another and the result was a failure."

A claim for compensation can arise in case of negligence only if any loss or injury is proved to have been caused to the patient, It has also to be proved that negligent act is the direct and proximate cause of the loss or injury. If the doctor has attended on the patient with due care, skill and diligence and in a manner accepted by the medical profession and the patient dies or suffers from any permanent disability, the doctor is not held guilty of negligence.

The Supreme Court itself has provided the distinctive features. "Contract of personal service" is distinguished from "contract for personal services". To constitute "contract of personal services", the Supreme Court held, it is necessary to show that there exists a relationship of master and servant. For example, employment of the medical officer for the purpose of rendering medical service to the employer is covered under a contract of employment and therefore, outside the purview of "service" within the meaning of section 2(1) (o) of the Act. In all other cases, the services are, therefore, of the nature of contract for personal services covered by the Consumer Protection Act.

- Negligence of doctor is defined as breach of responsibility or duty owed to his patient and which results in actual damage to his patient.
- Negligence is breach of duty arising due to omission of an act or commission of an act which no prudent or reasonable doctor under similar circumstances would do.

## **I) Act of Omission**

### **It is failure to:**

- \* Perform essential tests before surgery as BP record, blood sugar level, IOP record, to rule out ocular pathology as chronic dacriocystitis, RD, conjunctivitis and styte etc. in IOL operation.
- \* Seen that the patient is furnished with detailed information about his clinical condition.
- \* Give appropriate advise to the patient.
- \* Maintain aseptic precautions in the OT and during operation.
- \* Ask drug sensitivity and systemic diseases.

## **II) Act of Commission:**

- For example performing operation when it is not indicated.
- Using drugs when they are contraindicated.

### **The doctor will not be held responsible under negligence if**

- 1) The treatment is as per standard text books and or accepted professional practice and still patient suffers loss or injury.
- 2) Merely because a complication has occurred.

- 3) The medical man is not an insurer, he does not warrant successfulness of treatment or cure of patient.
- 4) Under Sec. 13 of C.P. Act – he is free to choose whom he will serve, however he will respond to emergency

## **Types of Hospitals**

### **1) Where the services are totally free to all patients as in**

Service rendering at a Government hospital / health centre / dispensary where no charge, whatsoever is collected from any person availing the services and all patients, rich and poor, are given free service is outside the purview of the expression 'service' as defined in section 2(1)(o) of the Act. The payment of a token amount for registration purpose only at the hospital/nursing home would not alter (Indian Medical Association v. V.P. Shanta & others, III (1995) CPJ 1 (Supreme Court): 1995 (3) CPR 412.)

- \* This does not come under CPA, even though a token amount of registration charges are charged.
- \* The medical practitioners, consultants and employed medical officers of this hospital do not come under preview of CPA.

### **2) Where services are paid services to all patients.**

All the medical practitioners, consultants and employed medical officers of this hospital come under CPA. The staff of this hospital comes under vicarious liability for CPA.

### **3) Where charges are charged to all patients except charity patient who are treated totally free.**

- \* The free patients of this hospital can claim for CPA under section 2(1)(d) of the act.

Because the other patients are paying hence services of this hospital comes under "Services " of the CPA Act.

- A Government servant who receives service under CGHS scheme is not a consumer:  
A Government servant under the Central Government Health Scheme is not a consumer within the meaning of section 2(1) (d) of the Consumer Protection Act 1986 and the services rendered to him under the CGHS does not constitute service



as defined in section 2 (1) (o) of the said Act. (The additional Director, CGHS Pune v. Dr.R.L.Butani, I (1996) CPJ 255 (National Commission): 1996 (1) CPR 136 (National Commission).)

- Railway employee treated free of charge at Railway Hospital are not consumers.

### **Primary responsibilities of Hospital If not carried out amounts to negligence**

- To maintain aseptic precautions all over the hospital especially in OT and for that to do all that is required.
- The hospital has vicarious liability for the whole staff, nurses, doctors, anesthetists and surgeons. It does not matter whether they are permanent, temporary, resident or visiting, full time or part time.
- So there is necessity of employing qualified doctors and nurses. If they are not qualified it itself is negligence and the vicarious liability lies on that hospital.
- A consultant will be negligent if he delegates his responsibility to his junior.

### **Patient beneficiary of services of anesthetist:**

Hospital authorities are vicariously liable for the whole of their staff, not only for the nurses and doctors. But also for the anesthetist and the surgeons. It does not matter whether they are permanent or temporary, resident or visiting, whole time or part-time. The hospital authorities are responsible for all of them. The only exception is the case of the consultants or anesthetists, hospital authorities are vicariously liable for the whole of their staff, not only for the nurses and doctors, but also for the anesthetist and the surgeons. It does not matter whether they are permanent or temporary, resident or visiting, whole time or part-time. The hospital authorities are responsible for all of them. The only exception is the case of the consultants selected and employed by the patient himself.

- Even where the services of anesthetist are hired by the surgeon, the patient for administering anesthesia to whom his services are hired, and who, in fact, pays the bill of the anesthetist also, would be a consumer as beneficiary of those services. (Mumbai Grahak Panchayat v. Dr. (Mrs.) Rashmi B.F.adnavis & others, I (1998) CPJ 49 (National Commission).

# Consents

Consent means to agree the same in the same sense.

The consent can be:

## FREE CONSENT AND CAPACITY TO ENTER INTO CONTRACT

- Where a patient or his guardian gives his assent to the proposal given by the medical expert, he is deemed to have given consent.
- A child is not considered competent enough, i.e., Sui juries to give consent till he or she attains the age of majority.
- Every person is competent to contract if he is a major according to the law to which he is subject, a person of sound mind and is not disqualified from contracting by any law to which he is subject. Thus the three ingredients of competency are the following:
  - a) Age of Majority.
  - b) Person of sound mind.
  - c) Not disqualified from contracting by any law to which he is subject.
- Under Indian Majority Act a minor is one who has not completed 18 years of age. Though a minor generally attains the age of majority when he completes 18 years of age, in case a guardian is appointed by court of law under guardians and wards act before that age such a person attains the age of majority at 21 years.
- Consent is obtained of the patient, in writing wherever surgical operation, major treatment or diagnostic procedure involving interventional procedure are to be done.
- i) Informed Consent – When a patient is informed about the nature, manner of treatment, chances of failure and risk involved etc., prior to obtaining his consent, it can be said that patient has accorded informed consent to the proposed treatment. An informed consent given by a competent person is a valid consent.

- ii) **VALID CONSENT** – A valid consent has to be free from undue influence, coercion etc., and ought to have been obtained when giver of such consent was in sound mental condition. A person is said to be in sound mind when he is in a position to understand the consequences of the act or incidents which will follow his consent on his interest, he is said to be of sound mind. Thus, a person of unsound mind such as a lunatic or a person under the influence of liquor or drugs cannot give valid consent to his doctor in respect of proposed treatment or surgery.
- iii) “Free consent – is one which is not induced by undue influence, coercion, misrepresentation, mistake or fraud etc.”.
- iv) **Implied Consent** – When consent is given by conduct of a person, such consent is considered as implied consent. A patient may signify his consent by his behavior. Sometimes consent is presumed by the circumstances and sequence of events such as where an accident victim who requires emergency treatment is brought to a doctor or a hospital. The fact that an appointment with doctor was arranged at the instance of the patient, patient replied to the queries and submitted to physical examination without any objection constitute a set of circumstances indicating implied consent of the patient to the treatment. However, in case of invasive investigations, treatment having serious side effect and surgical procedure etc., questions may arise whether the risk factors were explained to the patient and whether the patient gave informed consent for the proposed investigation, treatment and/or surgery undertaken by the doctor or hospital.
- v) **Express consent** – consent either given in writing or expressed in words. – such consent protects a doctor. In this type of consent before obtaining the consent patient should be informed about:
- The nature of condition he is suffering from
  - The options of treatment available
  - The advantages and disadvantages, the associated complications and material risks associated with each modality of treatment

vi) Consent is implicit in emergency or critical cases such as road accident cases:

In *Pravat Kumar Mukherjee v. Ruby General Hospital and Ors*<sup>15</sup>, National Commission held that since emergency treatment is required in such cases, there is no question of requiring consent in respect of seriously injured accident victims and consent is implicit in such cases. In case a doctor or hospital denies treatment or surgery in such a case on the ground that there was no consent, the burden of proving refusal to avail treatment or to undergo surgery despite being informed of the consequences there of is on such doctor or hospital.

Section 10 of Contract Act merely refers to requirements of a valid contract in the normal course. But in case of a hospital or a doctor agreeing to provide medical treatment, it is understood that doctors and other medical staff have requisite qualification, capacity, expertise and the hospital has necessary infrastructure facilities for undertaking the same. Further, the requirements relating to investigations / diagnostics tests, employment of qualified doctors, medical and paramedical personnel, well equipped hospital enabling the hospital to provide pre and post operative care are also to be given due attention.

'Free consent' is one of the essentials of a valid contract. It can be said that treating a patient without his consent may create a criminal liability in addition to civil liability. A medical practitioner is advised to obtain 'informed consent' before he embarks of treatment of his patient.

Thus a doctor or hospital should obtain consent of patient and where the same is not possible due to age, injury and / or physical or mental condition, consent of next of kin such as parents, wife, children or close relatives should be taken. But under exceptional circumstances, treatment may be given and even surgery may be conducted without such consent when such treatment is in the interest of patient. However, it is advisable that such a decision is taken by a panel of 2 or more doctors who decide on the plan of action in the best interest of the patient.

Consent obtained by hospital or doctor does not require any stamping or registration.

It is advisable that consent of patient and/or (where patient is not in a position to give his consent) that of his parents / wife /close relatives accompanying the patient should be taken in a language understood by the patient and/or such relatives.

### **Consent Protection to Doctor**

- Consent does not give total immunity from being held negligent. Consent given for the risk associated with procedure for which the consent is obtained. If complication happens or risk materializes due to negligence - The consent will not protect the doctor.
- The valid consent – Not only protects the doctor from civil liability but also from criminal liability – Sec 87 of IPC Act.
- In emergency – Consent may be waved according to the circumstances to save patient. On emergency cases where the surgeon facts that an urgent operation is required but the patients is not willing to consent for the same it is advisable to obtain a written statement from the patient duly attested by his relatives or attendants.
- Any failure to perform an emergency operation for want of consent amounts to negligence.
- It may be that just because the patient has given consent for an operation it does not give total immunity from being held negligent. The consent indicates the readiness of the patient to undergo the operation with the all ending risks.
- In a recent judgment, the National Consumer Disputes Redressal Commission has held that “consent is implicit” in emergency cases where the patient was brought in seriously injured condition and waiting for consent of patient or passer by who brought the patient in hospital is “deficiency in services”(Vide 2005 (II) CPJ 35-Pravat Kumar Mukherjee Vs. Ruby General Hospital.

# Records

## **If kept up to date comes for rescue to doctor in CPA.**

Records should be in legible handwriting i.e. readable to one and all including , other doctors, nurses, chemists and also relatives of the patients. Illegible handwriting may lead to many mistakes on account of misinterpretation of the same.

- The Medical Council of India requires the doctors to preserve the records for a period of three years.

Proper documentation and recording of minute details of medical treatment is pre-requisite for avoiding the charge of negligence.

- All records, charts, forms, reports, consent letters and all documents required to be maintained under the act and rule shall be preserved for a period of 2 years or till disposal of the proceedings in criminal cases.
- OPD papers should be preserved for 2 years.
- Papers should be preserved for 3 years for indoor/surgical matters Maharashtra Govt. has issued a GR No. JJH-29-66/49733, which states that OPD papers should be kept for 3 years - Indoor for 5 years and in cases of legal complications for 30 years.
- Prescription should have name of patient and date and should be on own letter head and should be legible and signed.
- Computer records may not be believed hence print out copy of it should be kept on record.
- Oxygen cylinder filling receipts, ECG monitor and pulse oxymeter receipts proves existence of these equipment and hence should be preserved.

## **Records to be kept are :**

- ◆ Informed consent
- ◆ Chronological order of progress of disease and treatment  
Details of procedure or surgery or anesthesia given
- ◆ Record of investigations as Radiological, pathological or reports of CT or MRI or any other opinion of specialist or consultant.

- ◆ Record includes record of refusal of treatment or investigation or surgery.
- ◆ Record of adult patient should be maintained for 3 years and children's for 21 years (3+18 years).

What MLC Records should be kept –

MLC Register which maintains - all MLC cases with date, time, finding and description of injury - simple or grievous

- Record of investigations- x-ray, USG, CT scan and MRI
- Certificate should be issued to police or court on demand or in grievous injury it should be issued even without demand to police or Court.

Written consent of the concerned patient is to be obtained by the doctor before disclosing or allowing access to or giving copies of record of patient's medical history, diseases and treatment to others. There may be exceptional emergency circumstances, situations or cases where such prior written consent cannot be obtained. One of such exceptions may be that such information or record is required by courts of law.

Medical Information of a patient is protected by the Code of Professional Conduct framed under Section 33(m) read with Section 20-A of the Indian Medical Council Act. 1956. There is an exception to the general rule of maintaining confidentiality of information of the patient, in as much as, such information can be disclosed in public interest or disclosure is solicited by the court of law. In AIR 1999 SC 495 (Mr. 'X' versus Hospital 'Z').

Hospital records are quite exhaustive. They include –

- 1) Registration and administrative data
  - i. Name, sex, age, occupation etc.
  - ii. Date and time of admission
- 2) Medical records relating to:
  - i. Diagnosis, investigations and operation, clinical notes, progress details.
  - ii. Condition on discharge & final Diagnosis.

- iii. Causes of death, date and time of death.
- iv. Investigation done and treatment given.

This part of the medical record is included in case papers – O.P.D. & Indoor

- v. Investigations & reports
- vi. ULTRA SONOGRAPHY reports
- vii. Consent notes
- viii. Operation notes
- ix. Referral notes
- x. Discharge summary etc.

Hospitals are also to maintain the following registers

- i. O.P.D. register
- ii. Indoor register
- iii. Operation theatre register
- iv. Delivery register
- v. Birth & Death register
- vi. Lab register
- vii. Radiology including imaging register
- viii. Nurses GOB register & night report
- ix. MLC register

Various certificates issued by the doctors, also from a part of medical record.

With advancement of modern science, hi-tech records like computerized records, video tape of various operations, electronic pulse, B.P, and Oxygen, saturation records, F.H.R monitoring record charts, E.C.G monitoring records etc., make important value addition to the list of records referred above.

**Investigation Reports:** Investigation Reports form important part of patient records. Proper preoperative investigation also can help in proving fulfillment of duty of care on the part of the doctor. Investigations also help in proving the diagnosis and soundness of the treatment, X-rays, ultra sound pictures, ECG records &



histopathological reports are irrefutable proof of proper diagnosis & treatment and hence are extremely important medico-legally.

**Discharge Cards:** Because they are carried by the patients, they constitute an important piece of evidence against the concerned doctor. It is important to give due importance to writing discharge summary and train the concerned staff on how the discharge summary is written. It is important that discharge summary should always co-relate and mirror the case notes of the patient. The discharge cards should always include the instructions to be followed by the patient after his discharge. It should also include the instructions about the follow up visits and in what circumstances the patients should report to the doctor earlier than the routine follow-up.

**Referral Notes:** also are part & parcel of patient's records. The referral note should always include date & time of issue, the patient's general conditions, cause of reference and expected course of action to be followed.

It is always wise to keep duplicate copy of the referral note with patient's signature on the same.

A doctor must provide copies of patients case papers to the patient on request.

## **Pecuniary Jurisdiction of Consumer Forum (As per Amendments of 2002)**

Name	Area of working	Jurisdiction
1) District forum	----- District -----	Up to Rs. 20 Lac
2) State commission	----- State -----	Rs. 20 Lac to 1 crore & Appellate & Revisional Jurisdiction
3) National Commission	----- At New Delhi -----	Above Rs 1 crore & National level Appellate & Revisional jurisdiction

### **Limitation:**

Limitation period for filing a case – is maximum upto 3 years under the limitation act, where as Section 24-A of the Consumer Protection Act, 1986, provides for limitation of two years for filing a complaint from the date on which the cause of action has arisen. It is a bar on the Consumer Forum from entertaining the complaint if it is filed after expiry of two years from the date on which cause of action has arisen. However, there is power vested in the Consumer Forum to condone the delay and entertain the complaint. For this purpose, the consumer has to make an application for condonation of delay in filing the complaint and it is only after the said application is allowed after hearing the other side that the complaint is entertained.

However this limitation period starts only after the patient comes to know the effect of the alleged negligence on the part of doctor. An extreme example is 21 years – child becoming major and then 3 years 18+3.

2002 amendment of CPA has amplified the requirement of sufficient cause for delay in filing the complaint as follows – provided that no such complaint shall be entertained unless the National or State Commission or district forum records condoning such delay. For condonation of delay in filing the complaint and it is only after the said application is allowed after hearing the other side that the complaint is entertained.

- Quantum of compensation will depend on the extent of loss suffered by patient compensation will include loss of future earning, cost of medical treatment including future treatment if any required , even deprivation of companionship and mental and physical anguish caused to the patient and/or his parents/ spouses or guardians will have a bearing on the quantum of compensation.
- Amendment Sec 26 empowers the Redressal agencies not only to dismiss frivolous or vexatious complaints but also to saddle complainants with costs up to 10,000 Rs under Section 27 (modified in 1993) the complainant shall be liable for punishment too.
- ❖ Bombay High court decision – The CPA patients has to pay court fees to file a case against the doctor
- ❖ The burden to prove negligence of a doctor is always on the person alleging the same and the said principle applies to all proceedings- civil and criminal.
- ❖ (Para 13) – Under section 13 (4) of the Act, the Commission or the Forum is empowered to exercise the powers vested in Civil Court for discovery and production of any document, the reception of evidence on affidavit and of issuing of any commission qua examination of any witness. The Commission can always insist on production of all documents relied upon by the parties along with the complaint and the defense version. (Para 13, 16, 17)

## **Locus standi**

The questions of locus standi of the complainant to file and maintain a complaint against the doctor is also very important. It is held that when wife and son of deceased patient are alive, a consumer complaint filed by the brother of deceased is not maintainable (*Parimal Kumar Acharya vs. Dr. Tapan Kumar Chakraborty*, 2005 (1) Consumer Protection Reporter 474). Similarly, a consumer complaint filed by wife of deceased alleging negligence of doctor in treatment of her deceased husband, filed after her remarriage is not maintainable (2005 1) Consumer Protection Reporter 493/ (2005 (1) CPJ 792 (*Shantha V. Gowda versus Kempegowda Institute of Medical Sciences and others*)). However, in *Dr. PB Lal versus Suresh Chandra Roy* (2006(2)CPR 1), Bihar State Consumer Disputes Redressal Commissioner has held that complaint of husband in respect of loss of eye-sight of wife is maintainable on the ground that not only the victim but also beneficiary of services is entitled to file such complaint. There is, therefore, no strait-jacket formula of law or principle to find out locus standi of a complainant. It has to be ascertained from the facts of each case. As a result, it is necessary to verify locus standi of the complainant to file such a complaint with reference to the facts of the case and to take appropriate defense/ plea in the written statement / say of the doctors.

# PLEADINGS

## Procedural sequence

- **Where can the patient complain**

- Consumer Court
- Police
- criminal court
- Civil court
- Medical council

## 1) Statutory Notices

- Whenever Statutory or Legal Notice is received – Contact the claim Agent of Indemnity Insurance with whom you are having indemnity Insurance and take claim Number
  - All papers of the concerned case are to be kept in safe & custody.

## ❖ The complaint

- Written statement

## ❖ Procedure of law

- Principles
- Rejoinder
- Sur Rejoinder

## ❖ Documentary evidence

- Laws and rules
- Text books
- Expert evidence
- Guidelines from professional bodies
- Examination and cross examination
- Oral and written arguments
- Cross examination
- Refreshing the memory

❖ **Out of court settlement**

- Settle it officially

❖ **Death of one of the party**

Case can be continued with the Legal hires if the decided

❖ **Appeal**

- Inform insurance company

**1) Notice –**

- Notice is not a legal document but Court gives waightage to the Notice
- Advocate Notice may be the starting point of the litigations
- It is a important document to starts the litigation
- There is no compulsion to answer the notice.
- But when it is decided to answer, it is essential that before giving parawise reply to the contents/allegations/averments of the complaint in relation negligence, the doctor shall give details of his qualifications, experience, standing, expertise, etc; It is also advisable to refer to the facilities available in his hospital for the information of the Court. These details are necessary since the Court/Forum would be able to form an opinion about the capability of a doctor in the matter of treatment given to the patient. After giving reference to the above details, of his visit or stay in the hospital and also written consent of the patient as to inherent/special risks in his treatment, if found necessary. The doctor may also quote books showing accepted norms of treatment. The doctor may also refer to contributory negligence of the patient, in case the patient does not observe his advice. The record, if available may support these averments with the doctors.

2) The District Forum shall, if the complaint received by it under Section 12 relates to services will start proceedings under Consumer Protection Act (1986), section 13, 17, 21- Speedy disposal of complaint – Procedure to be adopted by Commission.

From section 13 it is apparent that on receipt of the complaint, the OP is required to be given notice directing him to give his version of the case within a period of 30 days or such extended period not exceeding 15 days as may be granted by the District Forum or the Commission. For having speedy trial, this legislative mandate of not giving more than 45 days in submitting the written statement or the version of the case is required to be adhered. If this is not adhered, the legislative mandate of disposing of the cases within three or five months would be defeated.

It is true that it is the discretion of the Commission to examine the experts if required in appropriate matter. It is equally true and in cases where it is deemed fit to examine experts, recording of evidence before a Commission may consume time. The Act specifically empowers the Consumer Forum to follow the procedure which may not require more time or delay the proceedings. Only caution required is to follow the said procedure strictly. Under the Act, while trying a complaint, evidence could be taken on affidavits [under section 13(4) (iii)]. It also empowers such Forums to issue any commission for examination of any witness [under section 13(4) (v)]. It is also to be stated that Rule 4 in Order XVIII of C.P.C. is substituted which inter alia provides that in every case, the examination-in-chief of a witness shall be on affidavit and copies thereof shall be supplied to the OP by the party who calls him for evidence. It also provides that witness could be examined by the court or the commissioner appointed by it. The Commission is also empowered to follow the said procedure. The affidavits of the experts including the doctors can be taken as evidence. Thereafter, if cross-examination is sought for by the other side and commission finds it proper, it can easily evolve a procedure permitting the party who intends to cross-examine by putting certain questions in writing and those questions also could be replied by such experts including doctors on affidavits. In case where stakes are very high and still party intends to cross-examine such doctors or experts, where the OP on receipt of a complaint referred to him under clause (a) denies or disputes the allegations contained in the complaint, or omits or fails to take any action to represent his case within the time given by the District Forum. The District Forum shall proceed to settle the consumer dispute in the manner specified in clauses (c) to (g);

(c) to (g).....

- 1) The District Forum shall, if the complaint received by it under Section 12 relates to service in respect of which the procedure specified in sub-section (1) cannot be followed, or if the complaint relates to any services;
  - a) refer a copy of such complaint to the OP directing him to give his version of the case within a period of thirty days or such extended period not exceeding fifteen days as may be granted by the District Forum.
  - b) Where the OP, on receipt of copy of the complaint referred to him under clause (a) denies or disputes the allegations contained in the complaint, or omits or fails to take any action to represent his case within the time given by the District Forum, the District Forum shall proceed to settle the consumer disputes.
    - i) On the basis of evidence brought to its notice by the complainant and the OP where the OP denies or disputes the allegations contained in the complaint, or
    - ii) On the basis of evidence brought to its notice by complainant where the OP omits or fails to take any action to represent his case within the time give by the Forum.
- 2) No proceedings complying with the procedure laid down in sub-sections (1) and (2) shall be called in question in any court on the ground that principles of natural justice have not been complied with.
- 3) For the purposes of this section, the District Forum shall have the same powers as are vested in a civil court under the code of civil procedure, 1908 while trying a suit in respect of the following matters, namely;
  - i. The summoning and enforcing the attendance of any defendant or witness and examining the witness on oath;
  - ii. The discovery and production of any document or other material object producible as evidence;
  - iii. The reception of evidence on affidavit;
  - iv. Issuing of any commission for the examination of any witness; and
  - v. Any other manner which may be prescribed."



## **Witness**

A witness may be someone who is aware of the facts and circumstances relating to the case. A witness may be an ordinary person who is so connected or a medical person like a doctor, nurse or a consultant. Examination in chief is done by way of affidavit of the witness. Other side has the right of cross examination or seeks replies to specific interrogatories.

## **Appeal**

Depositing of prescribed amount as a pre-condition to registration/ admission of Appeal:

- i) Proviso to Section 19, inserted by 2002 amendment provides that no appeal by a person who is required to pay any amount in terms of the order of State Commission shall be entertained , unless Appellant has deposited in the prescribed manner 50% of the amount or Rs 35,000/- whichever is less.
- ii) Appeal to Supreme Court Section 23 of the Act provides that a person aggrieved by the order of National Commission may prefer an appeal against such order to Supreme Court within a period of 30 days from the date of the order.

This right of appeal is limited to original complaints filed directly before National Commission.

Depositing of prescribed amount as a pre-condition to registration/ admission of Appeal:

Proviso to Section 23, inserted by 2002 amendment provides that no appeal by a person who is required to pay any amount in terms of the order of National Commission shall be entertained , unless Appellant has deposited in the prescribed manner 50% of the amount or Rs 50,000/- whichever is less.

### iii) Commencement of Period of Limitation

Though it appears from our reading of Section 15, 19 and 23 that the period of 30 days commences from the date of the order actual commencement of this period has been subject matter of many disputes.

## INSURANCE

Insurance of the doctor is essential to cover the professional indemnity and also to meet the claim of compensation if awarded by the court. However, many a times the patients/consumers do not add the insurance company as a party respondent to the complaints. As a result, it is just and essential in the interests of the doctors that the first step taken by them on receipt of the complaints is to inform the Insurance Company and also to furnish copy of the complaint. Thus intimation and service of copy of the complaint is essential even in cases where the Insurance Company is made party by the complainant and copy is already sent by the forum to such company. Moreover, if the Insurance Company is not a party to the complaint, thereafter, the doctors can move the forum to add insurance company as a party respondent to the complaint. In fact, the question whether the Insurance Company is a necessary or proper party or not is answered by the National Consumer Disputes Redressal Forum that it is a proper party and it would be appropriate if it is made a co-respondent so that the complainant would not face difficulty to get amount of compensation if awarded. So the application of the doctor is allowed to implead the insurance company as respondent.

If a doctor does not take care of disclosing the details of insurance company and also does not produce policy details to the Forum, the consequences are serious and fatal. As pointed out by Karnataka State Consumer Disputes Redressal Commission (D. Philip versus Narayana Netralaya and another- 2005 [IV] CPJ 351) that since the hospital did not produce the insurance policy and also did not implead the insurance company, its claim that the compensation should be indemnified from the company was not accepted. It is held in the said case that the hospital can pursue its claim against Insurance Company separately. This was only because of inaction or failure of the hospital to take appropriate steps in right earnest. Such a result is fatal, in as much as, a doctor or the hospital would be required first to pay the compensation to the complainant and then to claim it from the Insurance Company in a separate proceeding to be initiated by the doctor. In order to avoid loss of valuable time and money it is essential to disclose all the details of insurance including production of insurance policy and also to take steps for impeding

Company as a party respondent to the complaint if not already made.

- ❖ Civil Cases – all charges are taken care by the Insurance company
- ❖ Criminal cases – payment of lawyer charge are only done by insurance company if Acquittal is there
- ❖ Cost of Traveling of expert is done by insurance company
- ❖ Advocate – may be of company or Own
- ❖ Out of court settlements may be a clauses in the Insurance clauses
- ❖ Accreditation helps but should be renewed

# Case Laws of State and National Commission of CPA

## Which protects the Doctor

It is not a negligence if :

- The nucleus drop occurs and if removal is not feasible a delay of several days or even week may be done.
- It is not possible to determine the exact power of IOL before surgery so postoperatively in 90% cases additional number of glasses will be required.
- If dislocation of IOL takes place.
- If the patient does not follow the instructions of doctor and as a result benefits of operation are reduced or modified or given rise to complications.
- As per Section 88 IPC - A eye surgeon performing YAG Laser to rectify the vision defect causes RD.
- If patient gets heart attack while doing minor operation.

## Criteria for Doctor

- It is duty cast upon the doctor to provide the fact that no sort of negligence took place inside the OT.
- How much to charge on fee for medical services is the choice of the medical practitioner.
- Doctor is not entitled to approach consumer forum for recovery of his professional fees.
- Fees paid for operation also includes post operative care.

## Doctor is not negligent

- If a drug is prescribed in the appropriate dose for a appropriate condition and patient develops a reaction to the drug, the doctor is not responsible. BUT If reaction is not identified and managed in time may amount to negligence.
- If a patient is injured on account of usage of manufacturer's product in the form in which it reaches, manufacturer will be liable if negligence is proved.

So

- All sterile materials, solutions, lenses and all such products used during surgery or treatment are found faulty and because of it patient is injured. The manufacturer is negligent and not the doctor If it is proved by the doctor.
- Then he can ask compensation for his patients in CPA court by putting a case (2002 amendment)

### **Doctor is negligent**

- If B scan is not done or not written on paper and after surgery patient claims that R.D. was due to surgery – It was accepted by the court. Sourindra Mohan Ghosh v. Dr. D.V.Pahwa, II (2002) CPJ 243 (CDRC West Bengal): 2001 (1) CPR 200.
- If not written on paper the 'Date of next visit and on any day when patient feels to consult in between'.
- Recording is not done of vision, IOP, sac condition, BP, blood sugar, physical fitness.
- If he prescribes any medicine other than allopathic it is negligence without any further proof or argument.

### **PROTECTION TO DOCTORS & HOSPITALS**

Govt. of Maharashtra has passed an ordinance No V 2009 Dated 30 March 2009.

Any Act of violence against a Medicare service person or damage or loss to any property –

- Is punished – with imprisonment up to 3 years and with a fine up to 50,000 Rs.
- The offence shall be cognizable and non-bailable in addition to the punishment the offender shall be liable to pay compensation of twice the amount of damage or loss caused to the property.

## Cases

1.	<p>Indian Medical Association v/s V.P.Shantha &amp; Ors. III (1995) CPJ 1 (SC) SUPREME COURT OF INDIA Mr. S.C.Agrawal, Mr.Kuldip Singh &amp; Mr.B.L. Hansaria, JJ.</p>	III (1995)CPJ 1 (SC)
2.	<p>Achutrao Haribhau Khodwa &amp; Ors. v/s State of Maharashtra &amp; Ors IV (2006) CPJ 8 (SC) SUPREME COURT OF INDIA S.P.Bharucha &amp; B.N. Kirpal, JJ.</p>	IV (2006) CPJ 8 (SC)
3.	<p>Spring Meadows Hospital &amp; Anr. v/s Harjol Ahluwalia. K.S. Ahluwalia I (1998) CPJ 1 (SC) SUPREME COURT OF INDIA S.Saghir Ahmad &amp; G.B.Pattanaik, JJ.</p>	I (1998) CPJ 1 (SC)
4.	<p>Dr. J.J. Merchant v/s Shrinath Caturvedi III (2002) CPJ 8 (SC) SUPREME COURT OF INDIA M.B.Ahah, Bisheshwar Prasad Singh &amp; H.K.Sema, JJ.</p>	III (2002) CPJ 8 (SC)
5.	<p>Smt. Savita Garg v/s The Director, National Heart Institute IV (2004) CPJ 40 (SC) SUPREME COURT OF INDIA B.N.Agrawal &amp; A.K.Mathur, JJ</p>	IV (2004) CPJ 40 (SC)
6.	<p>Jacob Mathew (Dr.) v/s State of Punjab &amp; Anr. III (2005) CPJ 9 (SC) SUPREME COURT OF INDIA R.C Lahoti, C.J.I.; G.P Mathur &amp; P.K. Balasubramanyan, JJ.</p>	III (2005) CPJ 9 (SC)

7.	State of Punjab v/s Shiv Ram & Ors. IV (2005) CPJ 14 (SC) SUPREME COURT OF INDIA R.C Lahoti, C.J.I.; C.K.Thakker P.K.Balasubramanian, JJ.	IV (2005) CPJ 14 (SC)
8.	Samira Kohli v/s PrabhaManchanda & Anr. I (2008) CPJ 56 (SC) SUPREME COURT OF INDIA B.N.Agrawal, P.P.Naolekar & R.V.Raveendran, JJ.	I (2008) CPJ 56 (SC)
9.	Ins. Malhotra v/s Dr. A.Kriplani & Ors. II (2009) CPJ 18 (SC) SUPREME COURT OF INDIA Lokeshwar Singh Panta & B.Sudershan Reddy, JJ.	II (2009) CPJ 18 (SC)
10.	C.P. Sreekumar (Dr.) v/s S.Ramanujam II (2009) CPJ 48 (SC) SUPREME COURT OF INDIA DalveerBhandari & H.S.Bedi, JJ.	II (2009) CPJ 48 (SC)
11.	Nizam Institute of Medical Sciences v/s Prasanth S.Dhananka & Ors. II (2009) CPJ 61 (SC) SUPREME COURT OF INDIA B.N.Agrawal, H.S.Bedi & G.S.Singhvi, JJ.	II (2009) CPJ 61 (SC)
12.	Malay Kumar Ganguly v/s Sukumar Mukherjee (Dr.) & Ors. III (2009) CPJ 17 (SC) SUPREME COURT OF INDIA S.B.Sinha& Deepak Verma, JJ.	III (2009) CPJ 17 (SC)
13.	Kusum Sharma & Ors. V/s Batra Hospital & Medical Research Centre & Ors. I (2010) CPJ 29 (SC) SUPREME COURT OF INDIA DalveerBhandari & H.S.Bedi, JJ.	I (2010) CPJ 29 (SC)

14.	Martin F.D'Souza v/s Mohd. Ishfaq I (2009) CPJ 32 (SC) SUPREME COURT OF INDIA Markandeya Katju & R.M. Lodha, JJ.	I (2009) CPJ 32 (SC)
15.	V.KishanRao v/s Nikhil Super Speciality Hospital & Anr. III (2010) CPJ 1 (SC) SUPREME COURT OF INDIA G.S.Singhvi & Ashok Kumar Ganguly, JJ.	III (2010) CPJ 1 (SC)





**Justice V K Barde**

*Retd. Judge Bombay High Court*

CME prepared by Dr. AA Deshpande touching the medico legal aspects in ophthalmology is outstanding. Through this CME, attempt made by the author for providing legal knowledge to practicing ophthalmologist would be achieved rapidly and expediently. The CME not only takes care of critical legal situation but also deals with routine issues which crops up in day to day practice of ophthalmology. In the CME every legal issue is addressed with minute details based on recent pronouncements of Hon'ble Supreme Court. I appreciate the work done by author on this CME.

Justice V K Barde



**Bhushan Kulkarni**  
*Advocate High Court Bench  
at Aurangabad*

The present attempt of Dr. AA Deshpande making aware an ophthalmologist to Law is not only valuable for an ophthalmologist but it is equally advantageous for all concerned including Bar, Bench & litigant. The efforts taken appears to be supported by all most all necessary pronouncements of Hon'ble Supreme Court of India & considering practical aspect/difficulties which occurs during the complaints before Forums constituted under Consumer Protection Act. I congratulate Dr. AA Deshpande for preparing such beautiful & handy workbook.

Bhushan Kulkarni  
Advocate High Court Mumbai



**Avinash R Borulkar**  
*Advocate High Court, Mumbai*

I gone through the CME written by Dr. AA Deshpande. I admire his diligence and dedication, his analytical abilities and systematizing aptitude and his deep and tenacious interest/knowledge in ophthalmology and legal subjects, so he could write such a useful CME. Of course, the author is not only learned doctor but also great philanthropist. All the judgments of courts and cases referred by the author in CME will enrich the knowledge in medico legal matters. I am sure that this CME definitely going to guide doctors and lawyers.

Avinash R Borulkar  
Advocate High Court, Mumbai

FROM DARKNESS TO LIGHT

