



THE NATIONAL UNIVERSITY OF ADVANCED LEGAL STUDIES

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CENTRE FOR CONSUMER PROTECTION LAW AND POLICY

SEMINAR REPORT

One day National Seminar on

Shifting Frontiers of Law of Medical Negligence in Consumer Protection Law.

The Centre for Consumer Protection Law & Policy, NUALS held a One day National Seminar on Tuesday, 14th October 2014 in the NUALS Campus at Kalamassery on the topic “Shifting frontiers of law of medical negligence in Consumer Protection law”. The inaugural session started at 9.30 A.M. with Sri. Hari S Nayar, the Director (i/c) of the Centre welcoming the gathering.

FIRST TECHNICAL SESSION

The First Technical Session of the seminar dealt with the topic ‘Medical mishaps in India and the Consumer Protection Act, 1986 and legal and ethical standards of medical care - Issues faced by consumers, medical professionals, hospitals and other stakeholders’..

In his introductory address, Sri. C. Jayachandran, Member Secretary, KELSA & District Judge, spoke about the ethical standards of medical care. He maintained that doctors should not be afraid of legal consequences while performing duty but should do his duty in peace. Mishaps are bound to happen. He analysed why the standard of medical care is deteriorating and turning into an entrepreneurial venture by stating that young doctors find it a way to recoup the expenditure on studying. He also discussed various cases and situations wherein the questions of who a consumer is arose. He also dealt with certain provision of the Evidence Act and also the summary nature of proceedings in cases of medical negligence.

He also pointed out that since most of the complaints are civil in nature and claim damages, it should be prosecuted in a Civil Court instead of the forum. This will also help in providing a platform for doctors to defend themselves.

He also spoke about Section 304A of the Indian Penal Code and about the different standards applied in civil and criminal suits. It is the standard of ordinary skill man having reasonable ordinary care that a person skilled in the area has to take.

Speaking about *res ipsa loquitor*, he said doctors should not be threatened by legal action and the degree of negligence should be gross if it should fall under criminal liability. Whether an error is

negligent depends on the nature of error. Medical experts should be there to assist lawyers and Judges.

This was followed by a special address delivered by Prof. Dr. Umadethan B, Clinical Professor and Head (Forensic Medicine), AIMS. He highlighted the sad state of affairs in the medical field and pointed out that more than medical negligence malpractice is happening. He said that, both in case of accidents and in case of negligence, Section 304A of the Indian Penal Code is attracted. He spoke majorly on the elements of Section 88 of the Indian Penal Code, that is, benefit, good faith and consent.

He emphasized on the importance of communication between doctors and patients and the need to make informed consent after knowing details regarding the treatment and procedure. With the help of various real life situations, he explained the need for the same. He also pointed out that patient should not have contributed to the damage while asking for damages.

He spoke about the defenses like contributory negligence, inherent risks, duty discharged properly, *novus actus interveniens*, corporate negligence, vicarious liability etc.

The First Technical Session was chaired by Dr. V.R.Jayadevan, Professor, NUALS.

SECOND TECHNICAL SESSION

The Second Technical Session of the Seminar dealing with Factors affecting summariness of consumer fora proceedings – Challenges and issues was chaired by Dr. Balakrishnan K., Associate Professor, NUALS.

Dr. George Moolayil, Pediatrician and Consultant in medical law, spoke on the topic “Medical Negligence in the context of Consumer Protection Act. He also talked about the need of an informed consent. He pointed out that in the case of *IMA v V.P Shanta*, medical profession as a service came under purview of the Consumer Protection Act. He explained how Consumer Protection Act is silent regarding doctors who gave free services.

He also talked about the need for looking at medical negligence cases within specific time limit. He pointed out that 90% of the medical negligence cases fall outside consumer courts due to a Supreme Court ruling. He also spoke about the need for opinion in medical negligence cases. He recommended the need for a screening committee before medical negligence cases to be taken up for that he suggested amendment for Consumer Protection Act. He also recommended that Medical Council of India should be given sufficient powers and should include a judicially qualified person.

Adv. D. Samuel Abraham, Senior Legal Officer, CMC Vellore, spoke about summary proceedings under the Consumer Protection Act. He distinguished between tribunals and courts and the procedure followed in consumer courts. He also talked about external and internal Factors affecting procedure in consumer courts. He recommended that sitting judges should be

made part of consumer forums and commissions and also in order to avoid delay in expert opinion there should be constituted medical board of permanent character consisting of experts.

THIRD TECHNICAL SESSION

The third Technical Session of the seminar dealt with the topic 'Advisability of different standards of proof in consumer, civil and criminal proceedings related to medical negligence & Frivolous and vexatious medical negligence proceedings – Need for safeguards including proposal for a medical tribunal or alternative medical bodies'. The Session was chaired by Dr. Anil R Nair, Assistant Professor, NUALS.

Adv. Shyam Padman, Advocate, Supreme Court of India, laid down his opinion that there need not be a separate or special board or panel of medical professionals to deal with consumer cases dealing with medical matters including medical negligence, as then it would lead to every other group of professionals raising a need for separate boards to deal with their cases too. He went on to point out how various medical rights were through judicial interpretation read to be provided for by Article 21 of the Constitution of India- Right to health, Right to emergency treatment, Right of hospitals to refuse to treat, Right to confidentiality of treatment details, etc. He highlighted that generally the medical negligence claim suits involve the following:

- Anesthesia
- Wrong/ Improper conduct of operation
- Pre- and Post-operative care
- Iatrogenic-nosocomial infection
- Lack informed consent
- Lack of facilities
- Withholding treatment records for unpaid bills, etc.

He then discussed briefly the two tests of fixation of liability on doctors in medical negligence cases, namely the Bolam test and the Bolitho test which, in his opinion, brought clarity and logic to Bolam test.

He put forward the reasons for increasing cases of medical negligence claims. In the end he concluded by suggesting remedial actions that could be taken to reduce medical negligence suits, which included

- Constitution of effective ethics & disciplinary committee for doctors
- Avoidance of vexatious complaints from the part of patients- through spreading awareness as well as stronger screening processes at consumer redressal forum level.

Dr. Aneesh Pillai, Assistant Professor, School of Legal Studies, CUSAT, presented an overview of 'determination of damages in medical negligence cases', factors influencing such award of damages and the theory behind it. He classified the damage suffered by the aggrieved party as economic or pecuniary loss and non-economic or non-pecuniary loss and gave examples to

illustrate the same. He brought to the notice of the participants an interesting factor in the determination of damages in medical negligence cases- loss of consortium. Loss of consortium is the non-economic loss suffered by the complainant on account of the medical negligence depriving him/her of the usual husband-wife relationship, including emotional support, sexual activity, household chores, taking care of children, etc. either due to the death or physical disability of his/ her spouse or his/her own physical disability, caused due to the medical negligence in question.

He highlighted that in the USA there is a legally fixed ceiling on the damages payable to various degrees or types of medical negligence and in UK there are guidelines for the assessment of general damages in personal injury cases, but in India there is no law dealing with assessment of damages payable for medical negligence. The general methods used by courts to assess damages are

- 1) Lump sum compensation-which is totally at the judges' discretion and is arbitrary due to the same reason
- 2) Just & fair compensation- this also depends on the mindset of the judge awarding the damages
- 3) Multiplier compensation- under this method, compensation payable is worked out in the following way:

Every year economic loss – Every year Expense = Multiplicand

Average life – Age of the deceased + unproductive years = Multiplier

Multiplicand x Multiplier = Compensation.

However, he pointed out that this method is faulty as it does not take into account non-economic losses or loss of consortium, etc.

He concluded by pointing out how a definite set of guiding principles need to be essentially laid down with respect to assessment of damages amount in medical negligence cases, if ends of justice has to be met.

After every technical session, there were paper presentations by law students of various Universities.

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