Medicolegal Insights

Can the Consent be Taken a Few Days Before the Procedure?

Recall of informed consent is not affected by the timing of obtaining informed consent before any procedure.

Evidence: Sixty patients scheduled for colonoscopy or esophagogastroduodenoscopy were enrolled in a prospective, randomized study. Each patient received informed consent 24-72 hours or immediately before the procedure, and follow-up occurred 1-3 days post procedure. There was no statistically significant difference in recall of informed consent or the individual elements of informed consent (indication, risks, benefits, alternatives) between the two groups. The study concluded that recall of informed consent is similar whether consent is obtained immediately or several days before endoscopic procedures.

Reference

1. Elfant AB, Korn C, Mendez L, et al. Recall of informed consent after endoscopic procedures. Dis Colon Rectum. 1995;38(1):1-3.

What are the Duties of a Doctor in Respect of Signing Professional Certificates, Reports and Other Documents?

Regulation 7.7 elaborates on the issue of signing professional certificates, reports and other documents.

It states as follows: "Registered medical practitioners are in certain cases bound by law to give, or may from time to time be called upon or requested to give certificates, notification, reports and other documents of similar character signed by them in their professional capacity for subsequent use in the courts or for administrative purposes, etc. Such documents, among others, include the ones given at Appendix 4.

Any registered practitioner who is shown to have signed or given under his name and authority any such certificate, notification, report or document of a similar character which is untrue, misleading or improper, is liable to have his name deleted from the Register."

Can Deviation from Medical Practice be Termed Medical Negligence?

In Jacob Mathew v. State of Punjab SC/0457/2005:(2005) 6 SCC 1, the Supreme Court of India has observed: "Deviation from normal practice is not necessarily evidence of negligence. To establish liability on that basis, it must be shown:

- that there is a usual and normal practice
- that the defendant has not adopted it and
- that the course adopted is no professional man of ordinary knowledge skill would have taken had he been acting with ordinary care."

What are the Violations in Advertising in Indian Penal Code?

Sec. 292(2) (d) of Indian Penal Code, 1860, makes it a punishable offence to publish, distribute, sell, hire or circulate any obscene advertisement.

Section 292 in The Indian Penal Code

[260][292. Sale, etc., of obscene books, etc.—[261]]

(1) For the purposes of Sub-section (2), a book, pamphlet, paper, writing, drawing, painting, representation, figure or any other object, shall be deemed to be obscene if it is lascivious or appeals to the prurient interest or if its effect, or (where it comprises two or more distinct items) the effect of any one of its items, is, if taken as a whole, such as to tend to deprave and corrupt person, who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it.

[262][(2)] Whoever—

(a) sells, lets to hire, distributes, publicly exhibits or in any manner puts into circulation, or for purposes of sale, hire, distribution, public exhibition or circulation, makes, produces or has in his possession any obscene book, pamphlet paper, drawing, painting, representation or figure or any other obscene object whatsoever, or

(b) imports, exports or conveys any obscene object for any of the purposes aforesaid, or knowing or having reason to believe that such object will be sold, let to hire, distributed or publicly exhibited or in any manner put into circulation, or

(c) takes part in or receives profits from any business in the course of which he knows or has reason to believe that any such obscene objects are for any of the purposes aforesaid, made, produced, purchased, kept, imported, exported, conveyed, publicly exhibited or in any manner put into circulation, or

(d) advertises or makes known by any means whatsoever that any person is engaged or is ready to engage in any act which is an offence under this section, or that any such obscene object can be procured from or through any person, or

(e) offers or attempts to do any act which is an offence under this section, shall be punished [263][on first conviction with imprisonment of either description for a term which may extend to 2 years, and with fine which may extend to two thousand rupees, and, in the event of a second or subsequent conviction, with imprisonment of either description for a term which may extend to 5 years, and also with fine which may extend to five thousand rupees].

Can a Patient Seek Redressal for Grievances Regarding Treatment Received?

Yes, patient who is the sufferer from the negligent act of the doctors can seek remedy under various laws:

1. **Compensatory action -** Complaint against doctors, staff or hospital whether private or government hospitals who committed negligence seeking monetary compensation before:
   i. Civil Court under law of Torts or Law of Contract,
   ii. High Court under the Constitutional Law, or
   iii. Consumer Courts under Consumer Protection Act.
2. **Punitive action -** Criminal complaint under Indian Penal Code against the doctor.
3. **Disciplinary action -** Complaint seeking disciplinary action against the medical practitioner or the hospitals as the case may be, before statutory bodies governing the medical practitioners such as Medical Council of India or State Medical Council.
4. **Recommendatory action -** Complaint before the National/State Human Rights Commission seeking compensation.

Does a Decision Taken in Good Faith Amount to Negligence?

A decision taken in good faith is not a crime. Defenses are available to the doctors under Indian Penal Code (IPC) sections 88, 92 and 93.

- **Section 88.** Act not unintended 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, to 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, or to take the risk of that harm.
- The illustration along with this section is: "A, a surgeon, knowing that a particular operation is likely to cause the death of Z, who suffers under a painful complaint, but not intending to cause Z's death and intending in good faith, Z's benefit, performs that operation on Z, with Z's consent. A has committed no offence."
- **Section 92.** 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 that 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 illustration along with this section is: Z is thrown from his horse, and is insensible. A, a surgeon, finds that Z requires to be trepanned. A, not intending Z's death, but in good faith, for Z's benefit, performs the trepan before Z recovers his power of judging for himself. A has committed no offence. A, a surgeon, sees a child suffer an accident which is likely to prove fatal unless an operation be immediately performed. There is no time to apply to the child's guardian. A, performs the operation in spite of the entreaties of the child, intending, in good faith, the child's benefit. A committed no offence.
- **Section 93.** Communication made in good faith. No communication made in good faith is an offence by reason of any harm to the person to whom it is made, if it is made for the benefit of that person. Illustration A, a surgeon, in good faith, communicates to a patient his opinion that he cannot live. The patient dies in consequence of the shock. A has committed no offence, though he knew it to be likely that the communication might cause the patient's death.

A Specialist Gives an Opinion to a Physician on Phone Regarding a Patient (not seen by him). Is he/she Liable for any Mishap?

No legal liability will fall upon the doctor for giving an opinion on phone for cases not seen by him as there is

no contract between him and the patient. For negligence to be proved there has to be a duty, breach of that duty and resultant damage. In this case, there will no breach of duty. But, if the specialist has charged a fee for his opinion from the patient (patient can sue) or from the physician (patient and doctor both can sue), then he/she is liable. If the fee has been paid by the referring physician, it will be deemed to be paid by the patient.

Is There a Difference Between Active Euthanasia and Passive Euthanasia?

Yes. Active euthanasia and passive euthanasia differ from each other.

Active euthanasia means where death is caused by the administration of a lethal injection or drugs. Active euthanasia also includes physician-assisted suicide, where the injection or drugs are supplied by the physician, but the act of administration is undertaken by the patient himself. Active euthanasia is not permissible in most countries. The jurisdictions in which it is permissible are Canada, the Netherlands, Switzerland and the States of Colorado, Vermont, Montana, California, Oregon and Washington DC in the United States of America.

Passive euthanasia is when medical practitioners do not provide life-sustaining treatment (i.e., treatment necessary to keep a patient alive) or remove patients from life-sustaining treatment. This could include disconnecting life support machines or feeding tubes or not carrying out life-saving operations or providing life extending drugs. In such cases, the omission by the medical practitioner is not treated as the cause of death; instead, the patient is understood to have died because of his underlying condition.

In the matter titled as **"Common Cause versus Union of India, 2018 (5) SCC 1" the Hon'ble Constitution Bench of 4 Judges of the Supreme Court of India,** has held that:

"(v) There is an inherent difference between active euthanasia and passive euthanasia as the former entails a positive affirmative act, while the latter relates to withdrawal of life support measures or withholding of medical treatment meant for artificially prolonging life.

(vi) In active euthanasia, a specific overt act is done to end the patient's life whereas in passive euthanasia, something is not done which is necessary for preserving a patients life. It is due to this difference that most of the countries across the world have legalized passive euthanasia either by legislation or by judicial interpretation with certain conditions and safeguards."

Can a Patient Seek Redressal for Grievances Regarding Treatment Received?

Yes. The National Board for Accreditation of Healthcare (NABH) Patient Charter has provisions for this.

5. Right to redress

- Patient has the right to justice by lodging a complaint through an authority dedicated for this purpose by the health care provider organization or with government health authorities.
- The patient has the right to a fair and prompt hearing of his/her concern.
- The patient in addition has the right to appeal to a higher authority in the health care provider organization and insist in writing on the outcome of the complaint.

The Patient was not Getting Cured. Can this be Termed as Medical Negligence?

No doctor can give 100% guarantee about the treatment or surgery. The only assurance which a doctor can give or can be understood to have given by implication is that he is possessed of the requisite skill in that branch of profession which he is practicing and while undertaking the performance of the task entrusted to him he would be exercising his skill with reasonable competence.

The Hon'ble Apex Court in various judgments has duly held that no guarantee is given by any doctor or surgeon that the patient would be cured.

- In the matter titled as **"P. B. Desai versus State of Maharashtra, AIR 2014 SC 795,"** the Hon'ble Apex Court has held that:

"39. It is not necessary for us to divulge this theoretical approach to the doctor-patient relationship, as that may be based on model foundation. Fact remains that when a physician agrees to attend a patient, there is an unwritten contract between the two. The patient entrusts himself to the doctor and that doctor agrees to do his best, at all times, for the patient. Such doctor-patient contract is almost always an implied contract, except when written informed consent is obtained. While a doctor cannot be forced to treat any person, he/she has certain responsibilities for those whom he/she accepts as patients. Some of these responsibilities may be recapitulated, in brief:

(a) to continue to treat, except under certain circumstances when doctor can abandon his patient;

(b) to take reasonable care of his patient;

(c) to exhibit reasonable skill: The degree of skill a doctor undertakes is the average degree of skill possessed

by his professional brethren of the same standing as himself. The best form of treatment may differ when different choices are available. There is an implied contract between the doctor and patient where the patient is told, in effect, "Medicine is not an exact science. I shall use my experience and best judgment and you take the risk that I may be wrong. I guarantee nothing."

(d) Not to undertake any procedure beyond his control: This depends on his qualifications, special training and experience. The doctor must always ensure that he is reasonably skilled before undertaking any special procedure/treating a complicated case.

(e) Professional secrets: A doctor is under a moral and legal obligation not to divulge the information/ knowledge which he comes to learn in confidence from his patient and such a communication is privileged communication."

- In the matter **"Malay Kumar Ganguly vs. Sukumar Mukherjee & Ors. AIR 2010 SC 1162,"** the Hon'ble Supreme Court of India has held that:

"INDIVIDUAL LIABILITY OF THE DOCTORS There cannot be, however, by any doubt or dispute that for establishing medical negligence or deficiency in service, the courts would determine the following:

(i) No guarantee is given by any doctor or surgeon that the patient would be cured.

(ii) The doctor, however, must undertake a fair, reasonable and competent degree of skill, which may not be the highest skill.

(iii) Adoption of one of the modes of treatment, if there are many, and treating the patient with due care and caution would not constitute any negligence.

(iv) Failure to act in accordance with the standard, reasonable, competent medical means at the time would not constitute a negligence. However, a medical practitioner must exercise the reasonable degree of care and skill and knowledge which he possesses. Failure to use due skill in diagnosis with the result that wrong treatment is given would be negligence.

(v) In a complicated case, the court would be slow in contributing negligence on the part of the doctor, if he is performing his duties to the best of his ability.

Bearing in mind the aforementioned principles, the individual liability of the doctors and hospital must be judged."

- In the landmark judgment of **"Jacob Mathew Petitioner v. State of Punjab & Anr. 2005 (3) CPR 70 (SC),"** the Hon'ble Supreme Court has held that:

"Para 28: No sensible professional would intentionally commit an act or omission which would result in loss or injury to the patient as the professional reputation of the person is at stake. A single failure may cost him dear in his career. Even in civil jurisdiction, the rule of res ipsa loquitur is not of universal application and has to be applied with extreme care and caution to the cases of professional negligence and in particular that of the doctors. Else it would be counterproductive. Simply because a patient has not favorably responded to a treatment given by a physician or a surgery has failed, the doctor cannot be held liable per se by applying the doctrine of res ipsa loquitur."

- In the matter titled as **"Martin F. D'Souza versus Mohd. Ishfaq, 2009(3) SCC 1,"** the Hon'ble Supreme Court has held that:

"Para 124: "It must be remembered that sometimes despite their best efforts the treatment of a doctor fails. For instance, sometimes despite the best effort of a surgeon, the patient dies. That does not mean that the doctor or the surgeon must be held to be guilty of medical negligence, unless there is some strong evidence to suggest that he is."

- In the matter titled as **"Lok Nayak Hospital versus Prema, RFA No. 56/2006,"** the Hon'ble High Court of Delhi vide judgment dated 06.08.2018 has held that:

"8. Firstly, it is to be noted that the only allegation of negligence alleged by the respondent/plaintiff against the appellant/defendant is that the tubectomy/ sterilization operation failed. ***Since medically there is never a 100% chance of success in sterilization operations, the mere fact that the operation was not successful, that by itself cannot be a reason to hold the appellant/defendant and its doctors guilty of negligence.*** *This aspect is no longer res integra and is so held by a Division Bench of this Court in the case of Smt. Madhubala Vs. Govt. of NCT of Delhi, 118 (2005) DLT 515 (DB)."*

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