

Professional negligence in dental practice: Potential for civil and criminal liability in India

Ashith B Acharya,
Savitha JK¹,
Suresh V Nadagoudar²
*Departments of Forensic
Odontology and 'Oral
Pathology, S. D. M.
College of Dental Sciences
and Hospital, Dharwad,
Karnataka; ²Postgraduate
Department of Studies
in Law and Research,
Bangalore University,
Bangalore, Karnataka, India*

Address for correspondence:

*Dr. Ashith B Acharya
Department of Forensic
Odontology, S.D.M. College of
Dental Sciences and Hospital,
Sattur, Dharwad - 580 009,
Karnataka, India.
E-mail: ashithacharya@
hotmail.com*

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Abstract

The doctor/dentist-patient relationship has transformed over the last two decades. Health professionals are increasingly viewed as providers of service for consideration. The Consumer Protection Act (CPA) was enacted in 1986 for better protection of the interests of consumers as well as to provide a simple and quick mechanism for redressing consumer grievances. Since 1995, health professionals have been included within the ambit of the CPA, empowering the patient to file lawsuits (in case of perceived negligence) in consumer courts. This review explores the definitions of 'consumer', 'services', and 'negligence', discussing their implications with respect to civil and criminal liability of dentists, while providing relevant case examples and court guidelines in landmark judgments. It is concluded that the potential for civil lawsuits against dentists for negligent actions is existent, although the prospect of a dentist being held liable for criminal negligence is low.

Key words: Consumer, Consumer Protection Act, dental jurisprudence, services, Supreme Court guidelines

Introduction

The health profession has long been considered as the 'noble profession'.^[1] The doctor or dentist frequently alleviates patients' distress and, on numerous instances, saves lives. The impact of health professionals in improving standards of health and well-being in society has reflected well on the medical and dental professions. It is, therefore, not uncommon for patients to hold senior practitioners as confidants.^[1] The trend, however, has changed in recent decades - the doctor/dentist is increasingly looked upon as someone who provides service for consideration (i.e., provides treatment/consultation in return for remuneration). Nevertheless, the element of trust is still relatively firm but, on occasions when the faith in a doctor or dentist is breached (the reasons for which could vary widely), patients may not look upon the health provider sympathetically. Throughout the world, the public has become more aware of their rights

- legal literacy supplemented by modern legislations has made the society increasingly compensation-oriented.^[1] India is no exception and, in recent years, there has been a steady rise in the number of all classes of claims in which damages are sought for personal injuries - whether they are sustained in road accidents, at the work place, or in health services.^[1]

The underlying basis for this trend is the classification of individuals as 'consumers'. Every individual has daily needs - from food and shelter to education and sound working environment - which keep evolving throughout one's life.^[2] Thus, in the literal sense, every person is a consumer - we visit a market as a consumer, expect value for money, information about the mode of use of a product, etc. However, there may be instances when a consumer perceives as having been denied the quality she/he is entitled to or, worse, cheated or harassed.^[2]

The Government of India recognized the need to protect consumers from unscrupulous elements, and enacted several laws for the purpose. Legislations such as the Sale of Goods Act, Dangerous Drugs Act, Agricultural Produce Act, Indian Standards Institution (Certification Marks) Act, Prevention of Food Adulteration Act, etc. protect consumer interests to some extent. However, these laws require that the consumer initiate action by way of a civil lawsuit, which can be a lengthy and time-consuming legal process, not to mention the high monetary costs.^[2]

The Consumer Protection Act

The Consumer Protection Act (CPA) of 1986 was enacted for better protection of the interests of consumers and to provide simple and quick access to redress consumer grievances.^[2] This is done through quasi-judicial mechanisms set up at the District, State, and National levels. Consumers can file their complaints which will be entertained by the quasi-judicial bodies - referred to as Consumer Forums or Commissions. These Consumer Commissions have been empowered to award compensation to aggrieved consumers for the hardships she/he has endured. A nominal court fee (INR 200) is required to be paid to these Forums and there is no obligation to engage a lawyer to argue the case (the consumer can, her/himself, present the case). The CPA, for the first time, introduced the concept of 'consumer' and conferred express additional rights on an individual. It is interesting to note that the CPA does not seek to protect every consumer within the literal meaning of the term; rather the protection is meant for the person who fits in the definition of 'consumer' given in the CPA.^[2]

Who is a 'consumer'?

Section 2(1)(d) of the CPA defines a 'consumer' as any person who:

- (A) **Buys any goods for a consideration** which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any user of such goods other than the person who buys such goods for consideration paid or promised or partly paid or partly promised or under any system of deferred payment when such use is made with the approval of such person but does not include a person who obtains such goods for resale or for any commercial purpose^[3]; or
- (B) **Hires or avails of any services for a consideration** which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any beneficiary of such services other than the person who hires or avails of the services for consideration paid or promised, or partly paid and partly promised, or under any system of deferred payment, when such services are availed of with the approval of the first mentioned person but does not include a person who avails of such services

for any commercial purpose.^[3] (Note that wordings in bold indicate relevant aspects of the definition from a dentist's perspective and in connection with the deliberations that follow later.)

What is 'services'?

Section 2(1)(o) of the CPA defines 'services' as that which is "of any description which is made available to potential users and includes, but not limited to, the provision of facilities in connection with banking, financing insurance, transport, processing, supply of electrical or other energy, board or lodging or both, housing construction, entertainment, amusement, or the purveying of news or other information, but does not include the rendering of any service free of charge or under a contract of personal service."^[3]

What is 'negligence'?

The word 'negligence' has been defined as "lack of proper care and attention; culpable carelessness" and is derived from Latin *neglego* or 'neglect'.^[4] Neglect has been described as "fail to care for or to do; overlook the need to; not pay attention to; disregard".^[4] However, some consider that "negligence cannot be described in a dictionary form";^[5] it has been held by the courts that in a particular situation, a particular act - which falls short of being described as a reasonable act in that particular circumstance - may be called a negligent act.

Negligence, in general, is the breach of a duty caused by omission to do something which a reasonable person would do, or doing something which a prudent and a reasonable person would not do. The Supreme Court of India believes that the essential components of negligence are three: 'duty', 'breach', and 'resulting damage'.^[6]

The Supreme Court also believes that negligence in context of the health profession necessarily calls for a different viewpoint. To infer rashness or negligence on the part of professionals, in particular a doctor/dentist, additional considerations apply. A case of occupational negligence is different from one of professional negligence. A simple lack of care, an error of judgment, or an accident, is not proof of negligence on part of the health professional. So long as a doctor follows a practice acceptable to the profession of that day in the region, she/he cannot be held liable for negligence merely because a better alternative course or method of treatment was also available.^[6]

When it comes to the failure of taking precautions, what has to be seen is whether those precautions were taken which the ordinary experience of professionals has found to be sufficient; a failure to use special or extraordinary precautions which might have prevented the particular mishap cannot be the standard for judging the alleged negligence.^[6] A professional may be held liable for

negligence on one of the two findings: either she/he was not possessed of the requisite skill which she/he professed to have possessed, or, she/he did not exercise, with reasonable competence in the given case, the skill which she/he possessed.^[6]

Civil Negligence and Liability

From the preceding definitions of 'consumer' and 'service', one may infer that they apply to availing of goods and services in general. Indeed, this was the case for close to a decade after enactment of the CPA. Negligence in relation to health practice was only gradually included under the purview of the CPA, after many contradictory judgments.^[7] In a landmark verdict in 1995, a three-judge bench of the Supreme Court went in depth of the whole issue of 'rendering of services' as defined in the CPA and analyzed the various expressions such as 'consumer' and 'services' in detail. The honorable judges disposed off all the appeals, including one filed by the Indian Medical Association.^[8] In its ruling, the Supreme Court dichotomized services provided by the health fraternity as follows:

- A. Service rendered at a nongovernment hospital where no charge whatsoever is made from any person availing the service 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 CPA.
- B. Service rendered at a nongovernment hospital where charges are required to be paid by the persons availing such services falls within the purview of the expression 'service' as defined in Section 2(1)(o) of the CPA.
- C. The Supreme Court added: Service rendered at a nongovernment hospital where charges are required to be paid by persons who are in a position to pay and persons who cannot afford to pay are rendered service free of charge would fall within the ambit of the expression 'service' as defined in Section 2(1)(o) of the CPA, irrespective of the fact that the service is rendered free of charge to persons who are not in a position to pay for such services.

In brief, if the service provided is categorized as 'free' as a hospital/institutional policy, the patient cannot be considered to be a consumer and cannot take recourse of the CPA for addressing grievances; on the other hand, where some or several services in a hospital are rendered for a fee, the patient is considered to be a 'consumer' and can seek refuge in the CPA. Civil liability extends both to negligence in diagnosis and in respect of treatment. The Supreme Court's view (in 'C' above) is debatable since hospitals may render some forms of services free for reasons other than the inability of a patient to pay, e.g., a particular service may be made available free on account of it incurring minimal or no material cost. More importantly, it is questionable as to why the CPA itself excludes services rendered free outside of its purview, considering that socially and economically

backward segments of society would normally avail such benefits, and these segments probably require the greatest protection.

Case examples of civil negligence and liability

The CPA has had major ramifications for health professionals and providers. The Supreme Court's ruling of 1995 opened the 'flood gates' for litigation against the health profession, and doctors and dentists have been made answerable for their (negligent) actions. Patients who are considered as 'consumers' of 'services' provided by doctors and dentists are known to have taken their grievances concerning 'negligent' actions ever since the medical/dental profession was included under the ambit of the CPA. Litigations that have targeted negligence or lapses on part of health professionals have risen steadily over the past decade-or-so. Case examples are numerous but, for the purpose of brevity, we present some of the prominent and relevant decisions. We also present a critique of the judgment in *case example 1* and discuss the potential for alternative interpretation of legal nuances.

Case example 1: In a case originating in Karnataka, the needle of a syringe got detached during irrigation in the course of dental treatment and slipped into the throat of the patient.^[8] The needle that was aspirated by the patient had to be surgically removed from the intestine, with the patient being admitted in a government hospital for a few weeks. Here, the treating doctor could not provide a reasonable explanation as to why the needle became disengaged. Considering these, the State Consumer Commission, in 1999, awarded damages amounting to about INR 100,000 to the patient (as against INR 300,000 sought). Significantly, since the dentist was offering services under employment of a private dental hospital, the hospital establishment was also held liable under the principle of 'vicarious liability'. Following the State Consumer Commission's verdict, the dentist and hospital authorities appealed to the National Commission, where the case was settled amicably between the two parties.

One of the points of contention in the above case was whether the patient could be considered a 'consumer', as defined by the Supreme Court in its verdict of 1995 re. Indian Medical Association vs. V.P. Shantha^[8] and other appeals. As expressed earlier, the approach of the Supreme Court to dichotomize users of health services based on presence or absence of remuneration is questionable, as is the CPA excluding free services from its ambit, considering that the CPA was enacted to provide refuge to all consumers of any kind of service. This is rightly pointed out also by the State Consumer Commission.^[9] However, the State Commission has failed to take cognizance of the flexibility in the Supreme Court's verdict of 1995. The Commission has considered the Supreme Court ruling verbatim - in letter alone and not in spirit - and extended its use to those hospitals where, as a

matter of individual departmental policy, certain treatment procedures may be rendered free of cost to all patients, irrespective of their capacity to pay. The spirit that may have been enshrined in the Supreme Court's judgment of 1995 has probably been overlooked by the State Commission. Indeed, the aforementioned case^[9] had the potential to set precedence had the Commission ruled that, so far as remuneration of treatment is concerned, departmental policies in addition to hospital policies should be taken into consideration while defining 'consumer' and 'services'. There are also signs of ambiguity in the approach of the State Commission to disregard literature evidence put forth by the respondent (dentist) on grounds that it lacks 'authority' while, at the same time, considering similar evidence put forward by the complainant (patient).^[9] One must add that the literature evidence put forth by the respondent pertains to a leading international health journal. These incongruities may indicate the possible thin line separating a 'favorable' outcome from an 'unfavorable' one in consumer litigation.

It should, however, be recognized that the courts do not consider justice as depending merely on law and technicalities; it also considers the law of equity - economic condition of the complainant and respondent and hardship being caused to either of the parties. Courts also weigh different forms of evidence presented, such as oral statements, documents, and expert opinions.

Case example 2: While the preceding case shows a decision in favor of the complainant, it may not always be so. To illustrate an example, the National Commission dismissed the revision petition filed by the complainant in one particular case.^[10] The patient complained to the Commission that, following extraction of the wisdom tooth of the lower jaw (tooth no. 48), bleeding continued for four days, even after the placement of sutures. It was later noticed by another doctor that both the blood pressure (BP) and clotting times were high. On prescription of relevant medication, the bleeding subsequently stopped. Following this, however, the complainant's situation deteriorated and he was admitted to a local hospital, where bypass surgery was advised. This led the patient to file a complaint stating that these were the consequence of negligence while extraction as well as failure to take note of the BP and his heart condition before extraction. What the complainant, however, had held back was that his visit to the local hospital was for recall - he had already visited the same hospital earlier and the doctors had suggested a followup. Moreover, medical experts testified in the Consumer Forum that the continuous bleeding could be the result of BP (due to varied reasons such as stress), and not necessarily the direct result of tooth extraction. Hence, the National Commission dismissed the complainant's petition and ruled in favor of the dental practitioners.^[10]

Protection against civil liability

Case example 3: Protection against civil liability is probably best obtained through sound record-keeping. The importance of meticulous treatment records is highlighted in a case from Gujarat.^[11] Here, the State Consumer Commission noted the lack of documentary evidence to support the doctors' defense against negligence. The State Commission's order went on to state that, in the absence of case papers and documentary evidence regarding treatment given to patient (who later died) in the hospital, it would appear that the doctor had not given proper, adequate, or standard treatment and was trying to cover up negligence.^[11] While the *Ethical Rules for Dentists* prescribed by the Dental Council of India do not mandate record-keeping, it would be good practice to maintain detailed treatment records. One must add that the Medical Council of India authorizes record maintenance for three years from the date of commencement of treatment, and encourages maintenance of computerized records for quick retrieval; this can be deemed as a healthy exercise and should extend to dental practice. As in Western countries, courts/quasi-judicial systems in India, also, hold absence of records against health practitioners and consider them negligent and liable to pay compensation. Dental records may well be the only permanent evidence if/when questions of litigation arise. Therefore, it must be stressed that one of the most important factors in self-protection is the maintenance of accurate, full, and up-to-date records of all treatments provided.^[12]

Criminal Negligence and Liability

Traditionally, litigations against health professionals were seen through the prism of Section 88 of the Indian Penal Code (IPC).^[1] According to this, causing any harm to any person - if it is for the benefit of that person - is not a crime, provided:

- A. The act which causes the harm was done in 'good faith', and
- B. Expressed or implied consent of that person, to suffer that harm, was obtained.

By interpreting IPC Section 88, a surgeon would be protected if the patient dies during or after the surgical procedure provided that the patient had given informed consent, fully aware of the risks involved. Also, the surgeon must have acted in 'good faith', which has been interpreted here to mean "with due care and attention".^[1]

On the other hand, liability of health professionals as under Section 304-A of the IPC was different. This Section reads as follows:

"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.”^[5]

Consequently, and as observed by the Supreme Court,^[6] the case of health professionals being subjected to criminal prosecution was on the increase. Doctors and dentists were soft targets and prosecutions were either filed by private complainants or by police on a First Information Report (FIR) being lodged and cognizance taken.

Landmark Supreme Court verdict

The Supreme Court recognized that the investigating officer (police) and complainant cannot always be expected to have knowledge of health sciences so as to determine whether the act was negligence, and of what degree, within the domain of criminal law under Section 304-A of IPC. The criminal lawsuit, once initiated, subjects the doctor/dentist to serious embarrassment and, on occasion, harassment. She/he has to seek bail to pre-empt arrest, which may or may not be granted. While the doctor/dentist may be exonerated of negligence at a later stage, the loss suffered to reputation cannot be compensated for by any standards. Therefore, the Supreme Court emphasized the need for care and caution, in the interest of society, before proceeding with criminal prosecution of doctors/dentists. The honorable three-judge bench held that the service which the health profession renders to human beings is probably the noblest of all, and hence there is a need for protecting the doctors from frivolous or unjust prosecutions.^[6] Many complainants prefer taking to criminal prosecution as a tool for pressurizing the health professional for extracting unjust compensation and “such malicious proceedings have to be guarded against”.^[6] The maxim *res ipsa loquitur* has limited application in cases of criminal negligence. (Note that *res ipsa loquitur* is a legal term derived from Latin which is often translated as “the thing speaks for itself”. It signifies that further details are unnecessary and that proof of the case is self-evident and routinely applied in civil litigation.^[13]) The Court agreed with the views of noted individuals from the health profession that the effect of encouraging frivolous cases against doctors will have a ‘distorting effect’ on doctor-patient relations and will not benefit patients in the long run.^[7] To prevent frivolous criminal complaints against doctors and dentists, detailed guidelines have been framed. The preceding view of the Supreme Court and the guidelines that follow were put in place as part of the landmark *Jacob Matthew vs. State of Punjab* judgment.^[6] The essence of the Supreme Court verdict is that ‘intention’ and ‘lack of proper care and caution’ are important ingredients before which criminal action can be launched against a doctor under criminal law.^[7]

Abridgement of guidelines framed by the Supreme Court

According to the Supreme Court, the concept of negligence differs in civil and criminal law. What may be negligence

in civil law may not necessarily be negligence in criminal law. For negligence to amount to an offense, the element of *mens rea* must be shown to exist.^[6] (Note that *mens rea* or ‘guilty mind’ is one of the necessary elements of a crime.^[13]) For an act to amount to criminal negligence, the degree of negligence should be much higher, i.e., gross or of a very high degree. Negligence which is neither gross nor of a high degree may provide a ground for civil action but cannot form the basis for criminal prosecution under IPC Section 304-A.^[6] To prosecute a health professional under criminal law for negligence causing death, it must be shown that the respondent did something or failed to do something which, under the circumstances, no health professional in her/his ordinary senses and prudence would have done or failed to do.^[6] Negligence is considered as the genus of which rashness is the species - it involves an utter disregard to the life and safety of others and the conduct deserving of punishment. It must also be shown that there was a failure to exercise proper care and precaution to guard against injury to the patient. A private complaint may not be entertained unless the complainant produces *prima facie* evidence. (Note that *prima facie* is a Latin expression meaning “on its first appearance”. It is used in modern legal terminology to signify that on first examination, a matter appears to be self-evident from the facts.^[13]) The Supreme Court added that doctors should not be held criminally responsible unless the *prima facie* evidence before the Court is in the form of a credible opinion from another competent doctor, preferably a government doctor in the same field of health sciences, supporting the charges of rash and negligent act. Thus, genuine error in judgment or mere carelessness will not make the health professional liable under IPC Section 304-A. However, she/he will have civil liability to pay appropriate compensation, as decided by Courts/Consumer Commissions.^[6]

Concluding Remarks

Mistakes occur in every profession, as it does in life. It is probably every individual’s duty to avoid errors and foresee the potential for mistake but, on occasions, it simply may become unavoidable. Unfortunately, in the health profession mistakes could result in serious consequences for the patient and, in turn, lead to the doctor/dentist being made answerable.

The dentist has a duty to warn the patient of risks inherent in the treatment procedure. Following examination, the dentist should carefully decide what line of treatment to adopt.^[1] It may be unwise for a practitioner to state that she/he “will perform a cure” or “undertake to use the highest possible degree of skill”.^[1] A dentist who has acted in accordance with a practice accepted as proper by a reasonable body of practitioners cannot be considered negligent merely because there is a body of opinion that takes a contrary view.^[1] While desirable for a dentist to possess the highest

degree of skills, she/he need not possess such skills - it is sufficient that the practitioner exercises the ordinary skill of an ordinary competent person exercising that particular art and science. Hence, in case of health professionals, negligence means failure to act in accordance with the standards of a reasonably competent health professional of the same field. The preceding observations have also been observed by the Supreme Court in *Suresh Gupta vs. Government of National Capital Territory of Delhi*,^[14] another landmark case which was a precursor to the *Jacob Matthew vs. State of Punjab* ruling.^[6]

The Supreme Court ruling in the latter case indicates that it holds the health profession with the highest regard,^[6] and will go to great lengths to frame guidelines before allowing a case of criminal negligence against the doctor/dentist. However, if there are grounds for criminal prosecution and if criminal negligence is proved, the courts will not hesitate to deal with health professionals as it would with any criminal. While taking decisions, courts consider whether the health practitioner in question has undertaken the procedure with a fair, reasonable, and competent degree of skill. With respect to the Supreme Court stating that doctors' profession is the noblest of all, and that there is a need to protect them from frivolous prosecution,^[6] it is implicit that doctors/dentists must be aware of the continued goodwill towards them in society, and that it is their duty to practice in the best interest of the patient, upholding concepts of righteousness and service.

In summation, the potential for civil lawsuits against dentists is very real. Aggrieved patients can seek redress in the CPA when negligence exists on part of the dentist. This constitutes civil liability and can result in monetary compensation to the patient, the consumer, for deficient services of the dentist. However, the onus is on the patient to prove that the doctor was negligent and that the injury was a consequence of the doctor's negligence. The potential for criminal liability of dentists is relatively low - in the event of death occurring during the course of dental treatment, proof of gross negligence alone will hold against the dental practitioner. Nevertheless, even in the absence of such proof,

the dentist can still be held accountable in civil law under the CPA and is liable to pay compensation.

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