

ANAESTHESIOLOGY AND THE LAW

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Introduction

Services provided by Anaesthesiologists have been the subject matter of judicial review time and again. The Consumer Disputes Redressal Commissions/Forums have laid down decisively what is and what is not 'deficiency' in the services provided by an Anaesthesiologist.

Section 2(1)(o) of the Consumer Protection Act 1986 defines the word service. 'Service' means service of any description which is made available to potential users and includes the provision of facilities in connection with banking, financing, insurance, transport, processing, supply of electrical or other energy, board or lodging or both, housing construction, entertainment, amusement or purveying of news or other information but does not include the rendering of any service free of charge or under a contract of personal service.¹ The Supreme Court has held that the services provided by the medical fraternity falls within the ambit of the word 'service' as defined by Section 2(1)(o) of the Consumer Protection Act 1986.²

The word 'deficiency' has been defined by Section 2(1)(g) of the Consumer Protection Act 1986. "Deficiency" means any fault, imperfection, short coming or inadequacy in the quality, nature and manner of performance, which is required to be maintained by or under any law for the time being in force or has been undertaken to be performed by a person in pursuance of a contract or otherwise in relation to any service.¹ Thus, sub-standard services provided by an Anaesthesiologist are actionable.

Negligence and rashness

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

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(Accepted for publication on 20-1-2005)

In India, as in England, it is well settled that medical malpractice cases are governed by the general principles of the law of Torts. Before the enforcement of the Consumer Protection Act, medical negligence was inevitably governed by the law of Torts. Alderson B defined negligence as: "Negligence is the omission to do something which a reasonable man, guided upon those considerations which regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do."³ Salmond in his authoritative treatise on the Law of Torts referred to this definition.⁴

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

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

An Anaesthesiologist not accompanying a patient, being transferred (for an anaesthesiology problem), from the operation theatre to a tertiary care center amounts to deficiency in services.⁶

Contributory negligence

Contributory negligence is negligence in not avoiding the consequence arising from the negligence of the doctor, when means and opportunity are afforded to do so. It is the non-exercise by the patient of such ordinary care, diligence, and skill so as to avoid the consequence of the doctor's negligence. Not informing an Anaesthesiologist of an existing endocrinal disorder which can lead to problems during induction, amounts to contributory negligence.

Duty of care and standard of care

An Anaesthesiologist cannot be sued for negligence unless he has violated some 'duty to take care'. The violation

of this duty must inflict some damage to the person to whom this duty is owed.

An Anaesthesiologist has to evince reasonable degree of skill and knowledge and must exercise a reasonable degree of care while practicing his profession. He cannot be expected to apply the ideal or the highest degree of skill and care while handling a case.⁷

The duty of an Anaesthesiologist is based on the fact that he is handling a human being and is likely to cause physical damage unless proper care and skill is applied. An Anaesthesiologist who induces a case is presumably giving an undertaking that he possesses the required skill and knowledge for that purpose. He is duty bound in two respects viz., he owes a primary duty of care in deciding whether he should undertake the case and after having undertaken the case the next duty is cast on him, the duty of care in the administration of the treatment wherein he should use diligence, care, knowledge and caution. His failure to perform either of the above two duties, if proved, will offer reasonable and valid ground to fasten negligence on him.⁸ He need not be expected to possess the highest or a very high standard nor should he have a very low standard.⁹ Law requires fair and reasonable standard of care and competence. Every Anaesthesiologist who enters into the medical profession thus has a duty to act with a reasonable degree of care and skill.

An Anaesthesiologist need not possess the highest expert skill at the risk of being found negligent. It is well established law that it is sufficient if he exercises ordinary skill of an ordinary Anaesthesiologist exercising that particular art.¹⁰ An Anaesthesiologist who professes to have some special skill (cardiac anaesthesia, paediatric anaesthesia, pain relief by nerve blocks) is judged not by the standards of an ordinary Anaesthesiologist but by much higher standards. The test here will be the standard of a skilled Anaesthesiologist exercising and professing to have that special skill.

The prudent man is the man who has acquired the skill to do the act which he undertakes. If a man has not acquired the skill to do a particular act he undertakes, then he is imprudent, however careful he may be, and however great may his skill be in other things. The degree of care which an Anaesthesiologist is required to use in a particular situation varies with the obviousness of the risk. If the danger of injuring a person by the pursuance of a certain line of treatment is great, great care is necessary. If the danger is slight, only a slight amount of care is required. Thus, Anaesthesiologist must not act in such a way as to cause injury to his patients. The care that will be required of him will be the care that an ordinary

prudent Anaesthesiologist is bound to exercise. But, Anaesthesiologists who profess to have special skills, or who have voluntarily undertaken a higher degree of duty, are bound to exercise more care than an ordinary prudent Anaesthesiologist.

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

Accepted practices and procedures

An Anaesthesiologist is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art. Accepted practice means practice accepted as proper by the Anaesthesiologist's peers. If the Anaesthesiologist has complied with this practice then that is strong evidence that he is not negligent, if he does not then it is likely he will be negligent.⁸ Not taking consent for per rectal insertion of diclofenic suppositories is considered as deficiency in services.¹¹

Deviation from accepted practices

An Anaesthesiologist may be held liable in negligence when he departs from accepted practices. Departure from approved practices is in itself not negligence. If an Anaesthesiologist departs from the approved practice, and he is able to justify his actions he will not be negligent, but if he cannot justify his departure from the accepted practice, the patient should have little difficulty in establishing negligence.¹² The negligent performance of an approved practice will also constitute a departure.

Accidents; misadventures; mishaps

Courts have held that it would be wrong, and indeed bad law, to say that simply because a misadventure or mishap occurred, the hospital and the doctors are thereby liable. It would be disastrous to the community if it were so.¹³

An Anaesthesiologist is not an insurer; he does not warrant that his treatment will succeed or that he will perform a cure.

Naturally he will not be liable if, a treatment which in ordinary circumstances would be sound, has unforeseen results. The standard of care which the law requires is not insurance against accident slips. It is not every slip or mistake that imports negligence. Law recognizes the dangers, which are inherent in induction and maintenance of anaesthesia. Mistakes will occur on occasions despite the exercise of reasonable skill and care.¹⁴

Error of judgment

An error of judgment does not of itself amount to negligence.¹⁵ Law allows errors of judgment which do not by themselves amount to negligence. The House of Lords in England held that some errors of judgment may be negligence and some may not. The error of judgment committed by an Anaesthesiologist may or may not be indicative of negligence, but the proper test to be applied is whether he abided by the standards laid down by his peers (Bolam's Test).

The courts have held "No human being is infallible and in the present state of science even the most eminent specialist may be at fault in detecting the true nature of the diseased condition. A practitioner can only be liable in this respect if his diagnosis is so palpably wrong as to prove negligence, that is to say, if his mistake is of such a nature as to imply absence of reasonable skill and care on his part, regard being had to the ordinary level of skill in the practitioner."¹⁶

With regard to junior Anaesthesiologist inexperience is no defense. He must meet the standard of care expected of his rank and status.¹¹

Inherent risks of treatment

Every anaesthesiological procedure has its own risk factors. Just because one of these factors becomes manifest does not mean that the Anaesthesiologist is negligent and his services defective. He can be held negligent only when the standard of care exhibited by him falls below the standards expected of a reasonable prudent Anaesthesiologist practicing under the circumstances he is placed in.¹³

Choice of treatment – discretion

Many anaesthesiological problems can be managed or treated in more than one ways. Anaesthesiologists have the discretion to choose the line of treatment they wish to adopt and can be faulted for the same only if their choice is 'palpably wrong' and or dangerous to the patient. When there are two genuinely responsible schools of thought about the management of a clinical situation, the Courts

could do no greater disservice to the community or the advancement of medical science than to place the hallmark of legality upon one form of treatment.¹⁷ An Anaesthesiologist is not liable for taking one choice out of two or for favouring one school rather than another.¹⁸ He is only liable when he falls below the standard of a reasonably competent practitioner in his field. In the realm of diagnosis and treatment there is ample scope of genuine difference of opinion and one Anaesthesiologist clearly is not negligent merely because his conclusion differs from that of other professional men, nor because he has displayed less skill or knowledge than others would have shown. If an Anaesthesiologist has followed a course of treatment or procedures accepted by and followed by a responsible section of the profession, he would not be guilty of negligence even if another section of the profession does not subscribe to that practice and follow a different course.¹⁹ An Anaesthesiologist has discretion in choosing the treatment which he proposes to give to the patient and such discretion is wider in cases of emergency, but he must bring to his task a reasonable degree of skill and knowledge and must exercise a reasonable degree of care according to the circumstances of each case.²⁰

Guarantee and warranty

Law does not expect Anaesthesiologists to guarantee the end results of their services. In any treatment, it is never claimed by the Anaesthesiologists that every person who receives the treatment must and should be benefited by the same. This is because the benefit of a particular type of therapy or anaesthesia or a nerve block depends upon a number of factors which are beyond the control of the Anaesthesiologist.

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

Vicarious liability

Liability which is incurred for, or instead of, another can be defined as vicarious liability. Every person is responsible for his own acts or omissions but there are circumstances where for the acts committed by a person, the liability comes to lie, not on that person, but on someone else. A master is liable for the acts or omissions of his servant and the principal is accountable for the acts of his

agent. The hospital authorities are responsible for the whole of their staff, not only for the nurses and the doctors but also for the anaesthetist and the surgeons. It does not matter whether they are permanent or temporary, resident or visiting, whole-time or part-time. The hospital authority is responsible for all of them. The reason is because even if they are not servants, they are the agents of the hospital to give the treatment. The only exception is the case of consultants and anaesthetists selected and employed by the patient himself.²¹

Deficiencies in statutory requirements

To practice medicine without proper registration with the State Medical Council or the Medical Council of India would violate express provisions of law.²² So also employing staff that is unqualified will violate the provisions of the Indian Medical Council (Professional conduct, Etiquette and Ethics) Regulations, 2002. Institutions where surgeries are performed under anaesthesia must also be registered with the Appropriate Authority under the laws for the time being in force. Ratios of judge-made laws or 'precedents' are also applicable and binding on Anaesthesiologists and violation of the same also constitutes an offence that is actionable.

Lord Justice Denning explained the law on the subject of negligence against doctors and hospitals in the following words: "Before I consider the individual facts, I ought to explain to you the law on this matter of negligence against doctors and hospitals. Mr. Marvan Evertt sought to liken the case against a hospital to a motor car accident or to an accident in a factory. That is the wrong approach. In the case of an accident on the road, there ought not to be any accident if everyone used proper care; and the same applies in a factory; but in a hospital when a person who is ill goes in for treatment, there is always some risk, no matter what care is used. Every surgical operation involves risks. It would be wrong, and indeed bad law, to say that simply because a misadventure or mishap occurred, the hospital and the doctors are thereby liable. It would be disastrous to the community if it were so. It would mean that a doctor examining a patient or a surgeon operating at a table instead of getting on with his work, would be for ever looking over his shoulder to see if someone was coming up with a dagger; for an action for negligence against a doctor is for him like unto a dagger. His professional reputation is as dear to him as his body, perhaps more so, and an action for negligence can wound his reputation as severely as a dagger can his

body. You must not, therefore, find him negligent simply because something happens to go wrong; if, for instance, one of the risks inherent in an operation actually takes place or some complication ensues which lessens or takes away the benefits that were hoped for, or if in a matter of opinion he makes an error of judgment. You should only find him guilty of negligence when he falls short of the standard of a reasonably skilful medical man".¹³

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