



## Medical Profession and Law

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Justice Holmes, a famous jurists has long back said "Laws are felt necessities of time". It is changes in time and society that has necessitated discussing the topic of medical profession and law seriously. By these changes I mean changes in medical science, technology and profession on one hand and changes in the society at large on the other. Let me start with an accepted fact of life that, today there is every chance of a medical professional getting confronted with the legal system in some way or the other. It has therefore become necessary for medical professionals to treat confrontation with the legal system as part of their profession.

In my years of dealing with medical negligence cases, I have come across three types of doctors. When a doctor gets a summons/ notice from the court I have found they come to us and can be categorized in the following types :-

1. Who are very nervous /agitated and terribly upset that they will be facing a court proceeding.
2. Who are over confident and take court summons and proceeding too casually and feel that nothing can happen to them and nothing can be held against them.
3. Those who take the mid path and are neither nervous nor over confident but systematically analyze allegations against them and are ready to make the Lawyers understand the medical side of the case.

It is the third type which is always the best to deal with in any court case. Cases against doctors increased particularly after passing of Consumer Protection Act, 1986. In Indian Medical Association Vs V.P. Shantha (1995) the Supreme Court held that Consumer Protection Act is applicable to medical profession. There was a great flow of consumer

complaints against doctors till about 2005 as patients thought that, they can prove the cases against doctors in cheap, speedy, easy and informal remedy of Consumer Forum. However, lawyers like us who fought for the medical professionals could show to the Consumer Forum that proving of cases of medical negligence against doctor is very difficult and cases can be defeated if a doctor is able to show that his case papers match the medical texts, thereby showing that the doctor has used reasonable degree of skill and care. Sometimes cases are referred to other experts, civil surgeons, medical colleges and normally the reports come in favour of the Doctors.

### ◀ CONCEPT OF MEDICAL NEGLIGENCE

#### [I] Reasonable Degree of Skill and Care: Bolam test

Negligence implies absence of intention to cause harm to the patient. It is conduct, not a state of mind. A Doctor owes to his patient certain duties namely -

- 1) A duty of care in deciding whether to undertake the case.
- 2) A duty of care in deciding the treatment to be given.
- 3) A duty of care in his administration of that treatment.
- 4) A duty of care in answering a question put to him by a patient in circumstances in which he knows that the patient intends to rely on his answer.

**[II] A Doctor is not liable for negligence because someone else of greater skill and knowledge would have prescribed different treatment or operated in a different way, nor is he guilty of negligence if he had acted in accordance with the practice accepted as proper by reasonable**

**body of medical men skilled in that particular art, even though a body of adverse opinion also existed among the medical men. Negligence as cause of action which renders the medical practitioner liable for damages is not the same thing as negligence which amounts to professional misconduct.**

#### [III] The patient should be told -

1. In a simple language, the nature of the ailment.
2. Nature of proposed treatment
3. Probability of success or of alternative.
4. Perhaps the risk of unfortunate results and unforeseen conditions within the body.

**[IV] It is frequently advanced by the Doctors that to disclose all the risks and hazardous of a particular procedure will frighten the patient and thus, possibly deprive him the life saving treatment. In Natanson Kline, this argument was countered by pointing out that the standard for disclosure is one of reasonableness and sensibility rather than frenzy.**

### ◀ CRIMINAL AND CONSUMER LAW

#### [I] Jacob Mathew Vs State of Punjab

2005 (6) SCC 1 Larger Bench of the Supreme Court of Indian laid down

Guidelines relating to medical negligence cases under Criminal Law i.e. S. 304 A of IPC as under :-

1. A private (criminal) 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.

2. 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 government service qualified in that branch of medical practice who can normally be expected to give an impartial and unbiased opinion applying Bolam's test to the facts collected in the investigation. A doctor accused of rashness or negligence, may not be arrested in a routine manner (simply because a charge has been levied against him). Unless his arrest is necessary for furthering the investigation or for collecting evidence or unless the investigation officer feels satisfied that the doctor proceeded against would not make himself available to face the prosecution unless arrested, the arrest may be withheld.

**[II] In Martin F. D'Souza Vs Mohd. Ishfaq**

2009(3) Bom.C.R. 202

Katju Markandey & Lodha R.M., JJ., the Supreme Court applied the above general principles of guidelines mentioned in Jacob Mathew to consumer cases.

**[III] However, in In V. Kishan Rao Vs Nikhil Super Speciality Hospital & anr.**

2010 (6) BCR 155 SC, the Supreme Court overruled Martin D'Souza to the extent it applied the guidelines/ directions in Jacob Mathew to Consumer cases.

To sum-up the present position of law as far as criminal and consumer cases is that, no criminal case whether in the police station or in the criminal court can proceed without there being another independent opinion, prima facie recommending filing a case of negligence against the Doctor. However, this requirement is not applicable to consumer or civil cases which are based on the law of torts.

It will be appropriate to conclude with observations of the Supreme Court in Kusum Sharma and ors Vs Batra

Hospital and Medical Research Centre [ AIR 2010 SC 1050]

I. Negligence is the breach of a duty exercised by omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.

II. Negligence is an essential ingredient of the offence. The negligence to be established by the prosecution must be culpable or gross and not the negligence merely based upon an error of judgment.

III. The medical professional is expected to bring a reasonable degree of skill and knowledge and must exercise a reasonable degree of care. Neither the very highest nor a very low degree of care and competence judged in the light of the particular circumstances of each case is what the law requires.

IV. A medical practitioner would be liable only where his conduct fell below that of the standards of a reasonably competent practitioner in his field.

V. In the realm of diagnosis and treatment there is scope for genuine difference of opinion and one professional doctor is clearly not negligent merely because his conclusion differs from that of other professional doctor.

VI. 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. Just because a professional looking to the gravity of illness has taken higher element of risk to redeem the patient out of his/her suffering which did not yield the desired result may not amount to negligence.

VII. Negligence cannot be attributed to a doctor so long as he performs his duties with reasonable skill and competence. Merely because the doctor chooses one course of action in preference to the other one available, he would not be liable if the course of action chosen by

him was acceptable to the medical profession.

VIII. It would not be conducive to the efficiency of the medical profession if no Doctor could administer medicine without a halter round his neck.

IX. It is our bounden duty and obligation of the civil society to ensure that the medical professionals are not unnecessary harassed or humiliated so that they can perform their professional duties without fear and apprehension.

X. The medical practitioners at times also have to be saved from such a class of complainants who use criminal process as a tool for pressurizing the medical professionals/hospitals particularly private hospitals or clinics for extracting uncalled for compensation. Such malicious proceedings deserve to be discarded against the medical practitioners.

XI. The medical professionals are entitled to get protection so long as they perform their duties with reasonable skill and competence and in the interest of the patients. The interest and welfare of the patients have to be paramount for the medical professionals.

**◀ CONSENT :-**

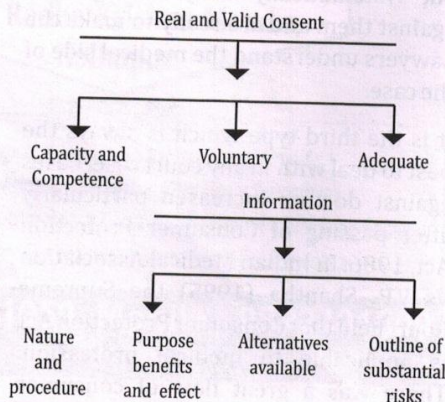
The Supreme Court in

**Samira Kohli v/s Dr. Prabha Manchanda & Anr.**

2008 AIR 1385 : 2008 (2) SCC 1 laid down the following propositions relating to 'consent' in medical profession.

Consent for treatment includes surgery.

Consent should be real and valid.





## सभासदांना सूचना

नवीन टेलिफोन डिरेक्टरी लवकरात लवकर पूर्ण करणेची आहे. तरी ज्या सभासदांनी अजूनही फोन नंबरर्स, ई-मेल आदि माहिती पाठविली नसेल तर त्यांनी त्वरित ती के. एम. ए. हाऊसकडे पाठवावी. अन्यथा उपलब्ध माहितीनुसार टेलिफोन डिरेक्टरी प्रकाशित केली जाईल, याची नोंद घ्यावी. तसेच ज्यांना टेलिफोन डिरेक्टरीमध्ये जाहिरात प्रसिद्ध करणेची असेल त्यांनी त्वरित के. एम. ए. शी संपर्क साधावा.

## आवाहन

कोल्हापूर महानगरपालिकेसंबंधी सर्व कामकाजा संदर्भात I. M. A. चे सभासद होणे सर्वांना बंधनकारक होण्याची शक्यता आहे. (I. M. A. ही शासन मान्य संस्था आहे.) जे सभासद नसतील त्यांनी आजीव सभासदत्व लवकरात लवकर स्वीकारावे, जेणेकरून आपल्या अडचणी दूर होणेस मदत होईल.

डॉ. आनंद कामत      डॉ. रविंद्र शिंदे  
अध्यक्ष                      मानद सचिव

## Change in Address

**Dr. Jayant Watve - Kan-Nak-Ghasa Hospital**  
temporary shifted to  
Pain Clinic, above Trimurty Laboratory,  
7th Lane, Rajarampuri, Kolhapur



## वाढदिवसाच्या हार्दिक शुभेच्छा !

March-2015



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Dr. Gadve Prakash	11-03	Dr. Shinde Prakash	24-03
Dr. Shah Arun	11-03	Dr. Shinde Saroj	27-03
Dr. Babar Smita A.	13-03	Dr. Patil Mohan B.	29-03
Dr. Kulkarni Neeraja	13-03	Dr. Patel Kanji	29-03
Dr. Vibhute Rajendra	13-03	Dr. Joshi Vinay V.	29-03
Dr. Patankar Kiran	13-03	Dr. Nigade Ramesh	30-03
Dr. Patil Suresh R.	14-03	Dr. Bagade Uday	31-03
Dr. Sarnaik M. M.	14-03	Dr. Joshi Radhika	31-03

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