

**“No doctor knows everything. There’s a reason why it’s called “practicing” medicine.”**

**- Anonymous**

**A. Expected Services from a Medical Professional:** When discussing the responsibilities of service delivery of a doctor or a medical practitioner the following three components are needed to be remembered by the practitioner :

- A duty of care in deciding whether to undertake the case.
- A duty of care in deciding what treatment to give.
- A duty of care in the administration of the treatment given.

However, as medical practice is now under the realm of a consumerist service, compounded with the omnipresent legal component, the accountability of Medical Practitioners in the following deliverables have increased:

- Communication and explanation to the patients so that treatment is through a consensual decision making between the two and not by a paternalistic approach by the Physician.
- Option for a second opinion from both sides.
- Outcome of service including side-effects both short term and long term
- Informed consent vis a vis implied consent
- Estimated Cost of treatment

**B. Common Errors by Medical Professionals**

Patients sue because of a feeling that they were not heard, that their needs were not attended to, and that nobody seemed to care, and as a result, a bad outcome resulted due to a mistake or negligence. Some of the instances where errors do happen by medical professionals are as follows:

- **Avoidance:** Compassionate gestures count. If a hospitalized patient has a bad outcome, some physicians may avoid making rounds in the presence of relatives. It is important to let the patient and their caregivers to know that as a treating doctor their problems are understood.
- **Defensive medicine:** It is better to avoid practicing defensive medicine. Particularly when affordability is an issue, victim is very likely to complain. Moreover, it amounts

to medical malpractice (a medical practitioner intentionally advising unwanted investigation).

- **Failure to communicate:** Communicate clearly and effectively. Take time to ensure your patient understands their diagnosis, treatment, and medication plans, and then check their understanding by asking them to explain it back. This ensures instructions are properly followed and demonstrates your care toward patient.
- **Failure to diagnose:** Failure to diagnose is the number one reason a physician gets sued for medical malpractice. A techno-savvy patient may give/explain/ask more information or psychologically less sophisticated patient may withhold the information and make diagnosis difficult.
- **Failure to identify a complication:** If a certain complication is a known risk, it should be on the consent form for the medical procedure. However, the consent form need not list every single complication that has ever occurred for that procedure. Often there are mistakes in communicating the complications. If, for example, the complication is known to occur 10% of the time during a given procedure but the consent form states that it occurs only 1% of the time, then the consent form was wrong.
- **Inadequate follow-up:** There are instances when tests results are not received by the ordering physician. On other occasions, patients do not follow through with tests as directed or the results come in are filed away before the physician reviews them, and the patient is not briefed about the findings. It is essential that physicians and their staffs are able to track the status of these orders to make sure that none are overlooked or forgotten. Another aspect of care needing better follow-up involves referrals to specialists. Every step has to be documented not only for preventing medico-legal issues but also for good patient care as well.
- **Patient time:** The time spent allowing the patient to fully explain his/her concern determines the physician's ability to show concern, empathy, and likeability. The longer the quality time a physician spends with the patient, the less likely will that physician be sued.
- **Prescribing errors:** Before prescribing any medication, a physician should be aware of all medications the patient is taking, including over-the-counter drugs and alternative medicines. Physicians should reinforce the importance of taking the medications only as prescribed. Patients should be advised that if they feel any medication is not having its intended effect, they should immediately contact their

physician. An important way to prevent inadvertent drug interactions is by working in concert with hospital pharmacists. Avoid handwriting prescriptions and utilize instead electronic medical recording with electronic prescribing.

### **C. What then is the legal perspective of Medical Negligence:**

In a judgment relating to medical malpractice, the Supreme Court of India reverberated its feeling holding that "The medical practitioner must bring to his task 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 circumstances of each case is what the law requires. But where you get a situation which involves the use of special skill or competence, then the test is the standard of the ordinary skill a man exercising and professing to have that special skill. A man need not possess the highest expert skill; it is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art". However, if a medical man grossly fails below the standard which is expected from him in treating a patient, then he becomes criminally liable. "

### **D. Does the Indian law offer any protection to Doctors:**

The Indian law protects the doctors from criminal liability through sections 88 to 92 of Indian Penal Code (IPC), because the law presumes that a doctor always acts in good faith for the well being of his patient. However, the concept of good faith assumes a complicated role in a medical malpractice suit. The term "Good Faith" is explained in Section 52 of the IPC as "Nothing is said to be done or believed in 'good faith' which is done or believed without due care and attention"

**IPC Section 52: (Good faith).** Nothing is said to be done or believed in "good faith" which is done or believed without due care and attention. Good faith implies genuine belief on the part of the doctor that his/her act of omission or commission would be in the best interest of the patient. The onus lies on the defendant (doctor) to prove that not only the good intentions but also a reasonable skill and care are exercised for the discharge of duty<sup>1</sup>.

### **Other IP Codes relating to good faith doctrine applicable in medical practice:**

- **IPC Section 80: (Accident in doing a lawful act).** Nothing is an offense which is done by accident or misfortune and without any criminal intention or knowledge in the doing of a lawful act in a lawful manner by lawful means and with proper care and caution. Accident implies without the prior knowledge or intention of causing the evil

effect<sup>1</sup>.

- **IPC Section 88: (Act not intended to cause death, done by consent in good faith for person's benefit).** Nothing which is not intended to cause death is an offense 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 section highlights the importance of acting on good faith and with informed consent of the patient<sup>1</sup>.
- **IPC Section 89:** It is similar to IPC Section 88 with the point of view of consent in case of children below 12 years and persons with a mental disorder where a guardian is authorized to give consent<sup>1</sup>.
- **IPC Section 92:** (Act done in good faith for benefit of a person without consent). Nothing is an offense 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/her from whom it is possible to obtain consent in time for the thing to be done with benefit. In all such cases, it is prudent to involve another senior colleague in making the decision and recording in detail the justification or circumstances under which the decision was taken<sup>1</sup>.
- **IPC Section 93:** (Communication made in good faith) No communication made in good faith is an offense by reason of any harm to the person to whom it is made if it is made for the benefit of that person. However, the doctor would be prudent enough to ensure that the communication is based on verifiable facts of the case, in a good faith for the benefit of the person it was made and in view of the delicacy of the matter, conveyed appropriately in the presence of spouse/relative/guardian<sup>1</sup>.
- **Criminal Procedure Code Section 174:** This section does not preclude the right of aggrieved relatives of a deceased patient to prosecute the doctor for criminal liabilities under IPC Section 304A (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 2 years, or with fine, or with both), it prevents doctors from being arrested immediately after the unfortunate death of a patient. It also offers doctors an opportunity for being assessed by their peers for any of the alleged professional lapses<sup>1</sup>.

**E) Burden of Proof :** In addition to the legal coverage already in favour of Practicing Medical Professionals as per the IP codes above, the plaintiff (complainant) must provide irrefutable evidence to allege malpractice. This is called Burden of Proof.

## Burden of proof

The court has held the opinion that medical negligence has to be established and cannot be presumed. In cases of medical negligence, the patient must establish her/his claim against the doctor. The burden of proof is correspondingly greater on the person who alleges negligence against a doctor. A doctor can be held liable for negligence only if one can prove that she/he is guilty of a failure that no doctor with ordinary skills would be guilty of if acting with reasonable care. The burden of proof of negligence, carelessness, or insufficiency generally lies with the complainant. The law requires a higher standard of evidence than otherwise to support an allegation of negligence against a doctor.

**F)** It is therefore not as murky and depressing a picture as many practitioners visualize regarding the possibilities of legal or civil prosecution in their practice. Any patient can allege malpractice or negligence on any Doctor at any time. However, these must be proved in a court of law.

Some of the tips to remember to avoid litigation are:

1. Faulty Communication
2. Lack of Informed Consent
3. Failure to stay up-to-date on standards and training
4. Inadequate follow-up of diagnostic tests and specialist referrals
5. Variations in policies and procedures
6. Avoidance behavior
7. Identify contributory negligence:

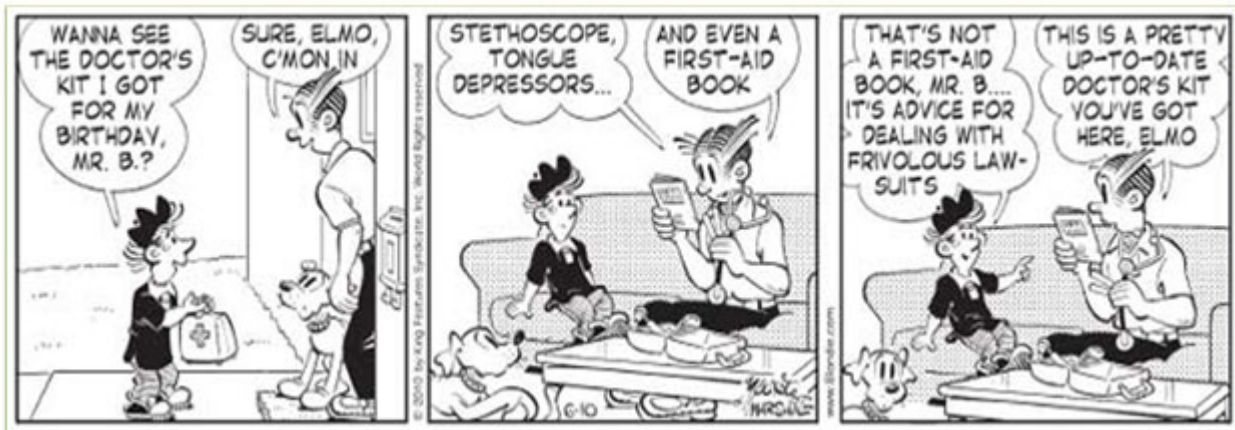
**Contributory negligence:** When a patient by his/her own want of care, contributes to the damage caused in the process of treatment then they are said to be guilty of contributory negligence. For example, if the patient refusing to carry out the remedial treatment recommended by the doctor or indulging in activities forbidden by the doctor further exacerbates the damage.

When there is negligence of two or more persons toward the patient resulting in a particular damage, it is called **composite negligence**. They are jointly or severally held liable for the damages<sup>1</sup>.

The top factors (U.S.) that actually contributed to patient injury, based on expert reviews of the data, are:

- Problems with clinical judgment (38%)
- Technical skills (23%)
- Communication (22%)
- Patient behaviors (20%)
- System failures (14%)
- Documentation (13%)

In the world of evolving dynamics of the Medical Profession, it is therefore a pre-requisite that all Medical practitioners keep themselves abreast of at least the basic concepts of ethical and legal practice but should not be overshadowed by the fear litigation. Compassion, competence and correctness are the gold standards of practice.



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