

NEGLIGENCE AND ITS LEGAL IMPLICATIONS FOR DENTAL PROFESSIONALS: A REVIEW

Kirti Goel,¹ Parul Goel,² Sumit Goel,³

Associate Professor,¹ Reader² Reader³

1. Department of Prosthodontics, ESIC Dental College and Hospital, New Delhi
2. Department. of Periodontics, K D Dental College, Mathura, Uttar Pradesh
3. Department. of Prosthodontics, K D Dental College, Mathura, Uttar Pradesh

Abstract

The doctor/dentist-patient relationship has transformed over the last two decades. Health professionals are increasingly viewed as providers of service for consideration.

Consumer Protection Act (CPA) of 1986 was enacted for better protection of the interests of consumer grievances. This is done through judicial mechanisms set up at district, state, and national levels where consumers can file their complaints, which are entertained by the judicial bodies referred to as consumer forums. These consumer forums have been empowered to award compensation to aggrieved consumers for the hardships that they have endured. 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.

In various studies conducted to assess the level of awareness among medical and dental professionals it was found that Dentists are often ignorant about the laws governing their profession.

Thus it is imperative for health professionals today to be aware of such laws, which will be beneficial to patients and doctors and society as a whole.

This review explores the definitions of 'consumer', 'services', and 'negligence', discussing their implications with respect to civil and criminal liability of dentists. Therefore, dentists need to update their understanding on consumer protection act and its amendments to be on a legally safer side.

Key Words: - Consumer, Consumer Protection Act, Dental Jurisprudence, Negligence, Services, Supreme Court Guidelines

Introduction

Public awareness of medical and dental negligence in India is growing. Hospital managements are increasingly facing complaints regarding facilities, standards of professional competence and appropriateness of therapeutic and diagnostic methods. Negligence can occur in any aspect of professional practice, whether history taking, advice, *examination*, testing or failing to test, reporting and acting on results of tests, or treatment. The standard is one of reasonable care, not of perfection. The court will decide having regard to all the circumstances whether the health professional has been negligent. Negligence is different from mistake or error of *judgment*.

Due to the lack of updating knowledge by the professionals (dental/medical), there is an increased risk of malpractice, especially from complex case situations. In addition, the expanding patient population is becoming more knowledgeable and aware of their rights, consequently taking action by contacting the consumer forum to lodge their complaints.⁴ Singh et al studied the difference in the awareness level between two professionals regarding the consumer protection act. They found that awareness of CPA was higher among medical professionals compared to dental professionals. This difference could be due to the fact that professionals deal more with medical negligence cases.¹ However, different clinical dental services are also involved in the claims. The largest proportion of claims involved oral surgery and fixed prosthodontics.⁵

Prasad et al conducted a study aimed to assess the awareness of consumer protection act among dental health professionals in the dental schools of Ghaziabad, India. They found that MDS faculty was more aware as compared to BDS faculty and post graduate students⁶.

The purpose of this article is to educate dental practitioners about the types of treatment which may result in a greater incidence of legal claims, so they will be better prepared to avoid them. This article provides general information to a dentist regarding various dental negligent acts and legal procedures available in India.

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. Neglect has been described as fail to care for or to do; overlook the need to; not pay attention to; disregard.⁷ As per Salmond' Law of Torts, negligence is an omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.⁸

Negligence is the breach of a legal duty of care. A breach of this duty gives the patient right to initiate action against negligence⁹. All medical professionals, doctors, nurses, and other health care providers are responsible for the health and safety of their patients and are expected to provide a high level of quality care. Unfortunately, medical

professionals and health care providers can fail in this responsibility to their patients by not giving them proper care and attention, acting maliciously, or by providing substandard care, thus causing far-reaching complications like personal injuries, and even death.¹⁰

The Supreme Court of India believes that the essential components of negligence are three: duty, breach and resulting damage.¹³

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.¹³

For an act to be considered negligent, the following aspects must be present:¹⁴

1. Dentist owed a certain standard of care-- duty
2. Dentist did not maintain that standard-- breach
3. There was an injury resulting from the lack of care-- causation
4. There should be a connection (proximity) between the negligent act and the resultant injury-- damages

CONSENT IN DENTISTRY

Consent has formed an integral part of patient treatment and management. The concept of informed consent arises from the fundamental ethical principle of autonomy and rights of self-determination. The core idea of autonomy is one's action and decisions are one's own¹⁵.

Consent in dentistry follows the same basic principles as in other disciplines of medicine. Normally there are a number of different options available to a patient and all of these should be discussed with the patient so they are able to give full consent.

A dentist must explain the proposed treatment to the patient, the risks involved, and the possibility of any alternative treatment and ensure that appropriate consent is obtained. As there are often a number of different ways of treating a particular dental problem, the patient must understand all of the options available and be able to choose the treatment he/she would like.

If a general anesthetic or sedation is required, all procedures must be explained to the patient. The dentist must ensure that all necessary information and explanations have been given, either personally or by the anesthetist.

Before the procedure, the patient must be given clear pre-operative and post-operative instructions in writing and written consent must be obtained.

ALLEGED NEGLIGENCE IN DENTISTRY AND HOW TO AVOID IT

No.1 Alleged Negligence: Complications due to extractions

- ✓ Infections requiring hospitalization
- ✓ Severed Lingual nerve
- ✓ Severed Inferior Alveolar nerve
- ✓ Sinus perforation
- ✓ Fractured mandible
- ✓ TMJ injuries
- ✓ Extraction of wrong tooth

Some general dentists are comfortable performing extractions. Some have additional surgical training, while others have extensive extraction experience. Nevertheless, each tooth must be evaluated individually. A diagnostic X-ray that shows all roots and surrounding anatomy is imperative. Potential complicating factors include hooked or curved roots and proximity to nerves and sinuses. Such cases are generally best referred to oral surgeons. If a dentist underestimates the difficulty of an extraction and a complication occurs, the patient should be advised. Patients should be carefully followed or referred to an oral surgeon.

No.2 Alleged Negligence: Complications due to Endodontic Procedures

- ✓ Infections requiring hospitalization
- ✓ Broken instruments in canals
- ✓ Sinus perforation
- ✓ Nerve damage
- ✓ Other perforations
- ✓ Air embolism

Endodontic treatment is responsible for second highest number of malpractice claims against general dentists. Like extractions, teeth that need to be treated endodontically should be evaluated for curved roots, calcified canals, and other potential complicating factors. Good pre-operative X-rays and use of a rubber dam are imperative. Infections due to endodontic procedures can be deadly due to their anaerobic nature. If a dentist breaks an instrument in a canal and the instrument cannot be retrieved, the patient should be advised and referred appropriately.

No.3 Alleged Negligence: Complications due to Implant Procedures

- ✓ Postoperative infections
- ✓ Unrestorable implants
- ✓ Nerve damage
- ✓ Sinus perforation
- ✓ Implant loss
- ✓ Fractured jaw

The most glaring area of alleged negligence in the implant procedure category is failure of treatment planning or improper evaluation of the patient or both. Because implants are permanent, they must be placed in a site suitable for restoration. When they are placed in locations that cannot be utilized, patients frequently will attempt to

sue the dentist who placed them. Evaluation of the patient should include the history of smoking and systemic diseases that can affect healing and bone density.

No. 4 negligence: substandard crown, bridge treatment.

- ✓ open margins
- ✓ overhanging restorations
- ✓ poor occlusion
- ✓ lack of treatment planning

Most of the crown and bridge litigation involves multiple units or full-mouth reconstructions. Treatment planning these cases is imperative. Diagnostic wax-ups should be routine, and temporaries should reflect the permanent crowns to avoid cosmetic disputes and functional problems with the final product.

No. 5 negligence: periodontal disease

- ✓ failure to diagnose or treat periodontal disease in a timely fashion.
- ✓ X-rays are not taken routinely
- ✓ periodontal probings are rarely recorded.

To avoid suits regarding failure to diagnose periodontal disease, keep periodontal records. It is not necessary to do probings on a patient who comes in for emergency treatment, but if that patient becomes a "regular" patient, probings must be done and recorded routinely.

No. 6 negligence: orthodontics

- ✓ Root resorption.
- ✓ Increased mobility of teeth and ultimately their loss
- ✓ TMJ injury.

The majority of orthodontic lawsuits were due to severe root resorption. Patients must be X-rayed routinely to check for root pathology. If root resorption occurs, the patient should be advised immediately. Treatment may need to be modified or ceased. Adult patients tend to lose bone more rapidly than younger patients during orthodontic treatment and should be monitored closely.

No. 7 negligence: dental anesthesia complications

- ✓ Patient fatalities
- ✓ Allergic reactions

No. 8 negligence: dental infections

To avoid suits due to dental injections, inject slowly and monitor your patient during the procedure. Tell the patient to raise his or her hand if there is an "electric shock." If the patient indicates you have hit the nerve, withdraw the needle and carefully reinsert from another direction after gaining the patient's permission. Permanent nerve injury and trigeminal neuralgias can occur from routine dental injections.

No. 9 negligence: dental injections

- ✓ Damage to the lingual nerve;

- ✓ Damage to the inferior alveolar nerve.
- ✓ The dentists hit the nerve, but do not withdraw the needle and reinject
The dentists neither follow up the injuries nor refer them to be followed.

No. 10 negligence: adverse drug reactions

No. 11 negligence: TMJ and orthognathic surgeries

No. 12 negligence: Oral cancer

Failure to diagnose oral cancer in a timely fashion.

No.13 negligence: miscellaneous

Under Public Liability Insurance Act, a dentist can be held liable for harm caused to the public by inadvertent exposure of harmful substances like mercury, arsenic or radiations¹⁶

General precautions

Dental X-rays also should be routine. If a patient refuses, document it in the chart. Patient referrals also should be documented by placing a copy of the referral slip in the patient's chart.

A smoking history should be a red flag for patients who are more prone to infections and complications.

NON-NEGLIGENT ACTS

1. Not obtaining a consent form in an emergency is not negligent.
2. Patient's dissatisfaction with the progress of treatment cannot be called negligence.
3. Not getting desired relief is not negligence.
4. Charging, what the patient thinks is exorbitant is not negligence.
5. When patient does not follow advice of the doctor and does not get satisfactory results, dentist cannot be held negligent

Dentists are liable under four heads¹⁷

1. Tortious liability
2. Contractual liability
3. Criminal liability
4. Statutory liability

1. Tortious liability (Civil liability)

It may be of two types

a. Primary tortious liability: When a dentist is directly liable for an act of negligence in his clinic or hospital it is called primary liability. The remedy for breach of tortious liability is unliquidated damages as awarded by the judge. It is usually in the form of compensation by cash.

b. Vicarious liability: Dentist who is employed by a hospital or institution is often not primarily responsible for negligence. The hospital has the liability for the negligence of an employee. However, if the patient is admitted by a dentist in his personal capacity, then the dentist will be personally liable.

2. Contractual liability

In a doctor-patient relationship, an implied contract is established when a dentist accepts a patient for treatment. A breach of any aspect of this implied contract, where the dentist is under duty to, treat with care as well as continue to treat and not terminate until patient is cured or patient discontinues treatment, may be considered a contractual liability.

3. Criminal liability

Criminal liability is penal and involves punishment in the form of imprisonment or fine or both. Criminal negligence is considered to be a crime against society and not just the aggrieved party.

The important offences inviting criminal liability with regard to negligence are:

- **Section 304A Indian Penal Code (Sec 304 A IPC)** – Negligent homicide. A rash or negligent act resulting in death, e.g. death on the dental chair.
- **Sec 336 (IPC)** - An act endangering the life of a person (even if there is no injury), e.g. extracting a tooth for a patient with valvular heart disease without antibiotic prophylaxis against endocarditis (even if he does not develop endocarditis).
- **Sec 337 (IPC)** - A rash or negligent act causing simple injury, e.g. pain and swelling after extraction due to negligent extraction.
- **Sec 338 (IPC)** - A rash or negligent act resulting in grievous injury, e.g. fracture of jaw during extraction due to excessive or improper force.

A few terminologies¹⁶

Cognizable offence: An offence where a police officer can, based on his investigation, arrest a person without a judicial warrant.

Non-cognizable: An offence, where an arrest can only be made by a judicial warrant.

Bailable: The arresting officer can give a bail

Non-bailable: Bail can be secured only from a judge. Heinous and violent crimes fall in this category, e.g. If there is a significant risk that the offender may commit further crime, abscond or tamper with evidence.

Compoundable: A crime in which a compromise between the suspected offender and the victim or his representatives can be worked out is said to be compoundable

Non-compoundable: If the crime is against society and is of a serious nature, no compromise can be made between the accused and the victim. These cases are said to be noncompoundable.

Sec 304A is cognizable, bailable and non-compoundable. It can be punished with imprisonment of either description for a term of two years or fine or both.

Sec 337 and 338 are cognizable, bailable and compoundable.

Sec 337 may attract an imprisonment up to three months and a fine up to Rs 250 or both.

Sec 338 can involve imprisonment up to two years and a fine up to Rs. 1000 or both.

4. Statutory liability

A dentist is liable if there is any infringement of statutes. They then become accountable to a statutory body. The liability depends on the kind of infringement and the provisions in the statute to deal with it. Dentists may also be liable to other statutory bodies such as Pollution Control Board.

a. Who is liable?¹⁸

- Dentists with independent practice rendering only paid services.
- Private hospitals charging all.
- All hospitals having free as well as paying patients; they are liable to both.
- Doctors/hospitals paid by an insurance firm for treatment of a client or an employer for the treatment of an employee.

b. Who is not liable?¹⁸

- Dentists in hospitals which do not charge of their patients.
- Hospitals offering free services to all patients.

What should a dentist do in case of alleged negligence?¹⁸

When something untoward happens following a diagnostic or therapeutic procedure, or when a patient or relative makes a complaint, the dentist must take appropriate steps, some of which may be:

1. Complete the patient's record and recheck the written notes.
2. Be frank enough and inform clearly of the mishap. Show that you were genuinely concerned. Answer all the queries of patient / relative and do not mind their repeated questioning, harsh attitude and at times even abusive language. Doctors who are open-minded and communicative are much less likely to be complained against as patients / attendants are extremely forgiving of errors made by a friendly and concerned medical attendant. A high proportion of complaints are precipitated or escalated into legal action by a progressive breakdown of the doctor-patient communication.
3. After these initial responses, the dentist should contact some other doctor / protection organization to seek advice. The Dental Associations can form groups / cells to advise and assist in such situations.

LEGAL PROCESS

Dental negligence falls under section 2 (0) of the Consumer Protection Act (CPA) because Indian Dentist Act (IDA) had no provision to:

- Entertain any complaint from the patient
- Take action against dentist in case of negligence
- Award compensation

CONSUMER COURTS ¹⁷

1. District Forum (one or more district form for each district). Jurisdiction up to Rs. 20 lakhs.
2. State Commission (one state commission for each state) Jurisdiction above Rs. 20 lakhs and up to Rs. 1 crore. It also serves as a supervisory agency and has the power to call for the records and pass appropriate orders in any dispute pending or decided by the District Forum.
3. National Commission (one national commission for entire country) Jurisdiction above Rs. 1 crore. The National Commission acts as an appeal agency for decisions of the State Commission. Where the National Commission has served as the court of first instance the Supreme Court of India acts as the court of appeal.

Procedure

Complaint means any allegation in writing by the complainant that he has suffered loss or damage due to deficient services. It can be related to deficiency causing discomfort, loss of activity, loss of money, loss of workdays, quality of life etc.

1. As provided under section 24A of CPA, a complaint has to be filed within two years of date on which cause of action arises.
2. As per section 13 of CPA, first a copy of complaint has to be sent to dentist directing him to give his version within a period of thirty days, which may be extended up to 45 days. After 45 days, if no reply is provided, then the court orders contempt proceedings against the dentist.
3. During reply, dentist may deny the allegation of the complaint.
 - It is mandatory to decide the cases speedily i.e. within a period of three months. If, after the proceedings, the District Forum is satisfied that any of the allegations contained in the complaint about the services are proved, it shall issue an order to the opposite party directing him to do one or more of the following things¹⁸
 - To return to the complainant the charges paid.
 - Pay such amount as may be awarded by it as compensation to the consumer for any loss or injury suffered by the consumer due to the negligence of the opposite party.
4. Any person aggrieved by an order made by the District Forum may appeal against such order to the State Commission or National Commission within a period of 30 days from the date of the order. The State Commission may entertain an appeal after 30 days if it

is satisfied that there was sufficient cause for not filing it within that period.

The State or National Commission is required to decide the appeal as far as possible in their 90 days from the first date of hearing.

5. Where a complaint instituted before the District Forum, the State Commission or the National Commission, as the case may be, is found to be frivolous or vexatious, it shall, for reasons to be recorded in writing, dismiss the complaint and make an order that the complainant shall pay to the dentist such cost, not exceeding 10,000 rupees, as may be specified in the order.
6. Where dentist or the complainant fails to comply with any order made by the District Forum, the State Commission or the National Commission, as the case may be, dentist or complainant shall be punishable with imprisonment for a term which shall not be less than one month but which may extend to three years, or with fine which shall not be less than 2,000 rupees but which may extend to Rs.10,000 or with both.

Conclusion

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.²³

Records are the most important factors needed to prevail in the lawsuit. Written records, including medical and dental history, chart notes, radiographs, photographs and models, are the only available guidelines from which to deliberate in a negligent lawsuit and must be meticulously kept.²⁴ All records must be signed and dated.

Legally, dentist written records carry more weight than patient's recollections.

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

The legal process is difficult and distressing to navigate, so it is best to avoid this when possible. A dental practitioner needs the help of a competent attorney who specializes in such litigation. The best defense is avoiding the lawsuit in the first place.

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Corresponding Address:

Dr. Kirti Goel
Associate Professor,
Department of Prosthodontics
ESIC Dental College and Hospital,
New Delhi, India
Email – kirti1204@gmail.com