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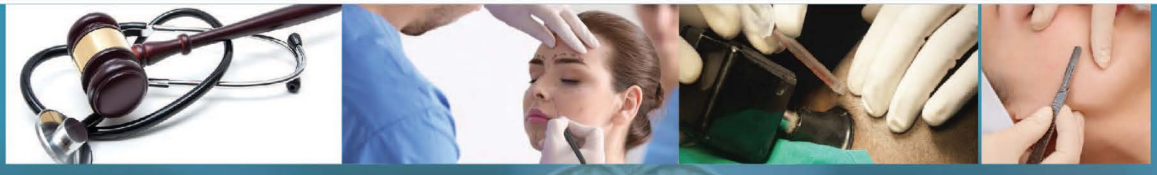
Medico-legal Aspects of Dermatology & Plastic Surgery





Venkataram Mysore • Satish Bhat • Subodh Premanand Sirur

Foreword: **N Santosh Hegde**

JAYPEE

Contents

Section 1: General Medical Law

1. **An Overview of Laws and Acts Applicable to Medical Professionals in India** 3
   Manjunath R
2. **Right to Health; Legal System and Hierarchy of Courts in India** 15
   Subodh Premanand Sirur
3. **Code of Medical Ethics** 22
   Putta Srinivas, Nayeem Sadath Haneef
4. **Civil Liability and Civil Negligence including Vicarious Liability** 38
   Subodh Premanand Sirur
5. **Criminal Medical Negligence and Criminal Liability** 44
   Subodh Premanand Sirur
6. **Consumer Protect Act-2018 and beyond: What Practicing Doctors need to know?** 49
   Atul Shah
7. **Defenses in Medical Negligence** 67
   Neeraj Nagpal
8. **Concept of Compensation** 78
   Lalit Kapoor

9A. **Informed Consent** 84
   Satyanarayana Rao KH

9B **Video Consent in Surgical Procedures** 88
   Priyadarshini P Gaddagimath, Venkataram Mysore

10. **Right to Confidentiality** 93
    Santosh Kumar Verma, Vivekanshu Verma, Virender Pal Singh
11. **Legal Implications of Advertising in Medical Practice** 105
    Lalit Kapoor
12. **Quackery** 111
    Putta Srinivas, Rajesh Buddhadev
13. **Out-of-Court Settlement: Why, When, and How** 125
    Venkataram Mysore, Subodh Premanand Sirur, Satish Bhat, KHS Rao

14. **Professional Indemnity Insurance** 131
Subodh Premanand Sirur

15. **Regulations for Starting a Clinic** 137
Dinesh Kumar Devaraj, Sneha Gandhi, Shilpa K

16. **Obligations of a Doctor/Medical Establishment under the POCSO Act** 148
Vivekanshu Verma, Rajesh Verma, Santosh Kumar Verma, Devendra Richhariya

17. **What Ails Medical Laws in India** 165
Chandrashekhar Sohoni

18A. **Self-regulation or State Legislation: An Urgent Choice to Make** 173
Narasimha Rao Kankanala

18B. **Practice Guidelines and Associations: Role in Liability Risk Mitigation** 180
Venkataram Mysore

19. **Legal Aspects of Clinical Research** 184
Manas Chatterjee, Manish Khandare

20. **Role of Social Media in Clinical Practice: Legal Implications** 193
Sidharth Sonthalia, Dharmendra Arora, Aseem Sharma, Madhulika Mhatre

21. **Avenues to Study and Apply Medicolegal Law** 223
Satish Bhat

22. **A Guide for Expert Opinion: Is every Adverse Outcome a Medical Negligence?** 232
Satish Bhat

23. **Who Can Do What?** 245
Putta Srinivas

Section 2: Dermatology

24. **The Changing Face of Dermatology Practice** 253
Venkataram Mysore, Madhulika Mhatre

Part A: General Dermatology

25. **Is Dermatology a Safe Subject? Pitfalls and Safeguards during the Practice of General Dermatology** 263
Rakesh Bharti, Ameesha Mahajan, Vipan Bhasin

26. **Consent for Drug Administration: It is Necessary?** 271
Kiran Godse, Anant Patil

27. **Investigations and Law** 274
Satyanarayana Rao KH

28. Medicolegal Issues in Cutaneous Adverse Drug Reactions 277
Lalit Kumar Gupta, Vaishali Masatkar

29. Legal Issues in HIV and STD Patients 289
Yogesh S Marfatia, Reema Baxi, Kajal Mehta

30. Legal Aspects of Leprosy 294
Nanda B Kishore

31. Photography and the Law 298
Feroze Kaliyadan, Karalikkattil T Ashique

32. Setting up a Pharmacy in a Clinic 302
DA Satish

Part B: Aesthetic Dermatology

33. Special Features of an Aesthetic Patient 309
Namitha Chathra, Venkataram Mysore

34. Medicolegal Aspects of Hair Practice 318
Manjot Marwah, Venkataram Mysore

35. Special Aspects of Dermatosurgery Practice 333
Savitha AS, Venkataram Mysore

36. Handling Difficult Patients in Dermatology 349
Govind S Mittal, Venkataram Mysore

37. Consent for Injectables in Cosmetic Dermatology 355
Rasya Dixit

38. Medicolegal Aspects of Lasers 365
Sanjeev J Aurangabadkar

39. Consent in Procedures with Less Evidence and Off-label Indications 384
Maya Vedamurthy

Section 3: Plastic Surgery

40. Changing Face of Plastic Surgery: An Overview 391
Milind S Wagh

41. How can a Plastic Surgeon Avoid Getting into Trouble or Litigation? 400
Sanjay Parashar

42. How to Identify an Unsuitable Patient for Plastic (Aesthetic) Surgery 410
Lakshyajit D Dhami

43. Revision Surgery in Aesthetic Plastic Surgery 423
Shrirang Pandit

44. Esthetic Procedures and Surgery in Minors **435**
K Ramachandran, Charan JC

45. Legal Issues in Medical Tourism **445**
Rakesh Kalra, Vivekanshu Verma

46. Delivering Bad News after Plastic Surgery **453**
Medha A Bhave (Khair)

47. Photography and the Issue of Patient Confidentiality **471**
Mukund Jagannathan, Amarnath Munoli

48. Medicolegal Issues in Burns **479**
Sunil Keswani, Vivekanshu Verma

49. Medical Negligence in Plastic, Aesthetic and Reconstructive Surgery **509**
Rakesh Kumar Khazanchi

50. Medicolegal Issues in Setting-up a Plastic Surgery Day Care Surgery Set-up **517**
Milan Doshi, Rani Umul Khair Mulla

51. Medicolegal Issues in Liposuction **531**
Shrirang Pandit

52. Tips and Pearls for Medicolegal Situations **543**
Bhanuprakash

Index *557*

CHAPTER

2

Right to Health; Legal System and Hierarchy of Courts in India

Subodh Premanand Sirur

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INTRODUCTION

The Constitution of India guarantees certain fundamental rights, which includes right to life among others. Article 32 of the Constitution confers the right to move the Supreme Court by appropriate proceedings for enforcement of the fundamental rights and under Article 226 the right to move a High Court for enforcement of the fundamental rights.

Article 21 reads as:

"No person shall be deprived of his life or personal liberty except according to a procedure established by law."

The Supreme Court in a catena of judgment has held that the right to life guaranteed under Article 21 includes the right to healthy life.

PT PARMANAND KATARA VERSUS UNION OF INDIA AND OTHERS

(Decided by the Hon'ble Supreme Court on 28th August, 1989)

"*Article 21 of the Constitution casts the obligation on the State to preserve life. The provision as explained by this Court in scores of decisions has emphasized and reiterated with gradually increasing emphasis that position. A doctor at the Government hospital positioned to meet this State obligation is, therefore, duty-bound to extend medical assistance for preserving life. Every doctor whether at a Government hospital or otherwise has the professional obligation to extend his services with due expertise for protecting life. No law or State action can intervene to avoid/delay the discharge of the paramount obligation cast upon members of the medical profession. The obligation being total, absolute and paramount, laws of procedure whether in statutes or otherwise which would interfere with the discharge of this obligation cannot be sustained and must, therefore, give way.*"

In the case of Paschim Banga Khet Mazdoor Samity versus State of West Bengal, the Supreme Court has reiterated that right to health of a citizen is a fundamental right guaranteed under Article 21 of the Constitution of India. It held as under:

"The Constitution envisages the establishment of a welfare state at the federal level as well as at the state level. In a welfare state, the primary duty of the Government is to secure the welfare of the people. Providing adequate medical facilities for the people is an essential part of the obligations undertaken by the Government in a welfare state. The Government discharges this obligation by running hospitals and health centers, which provide medical care to the person seeking to avail those facilities. Article 21 imposes an obligation on the State to safeguard the right to life of every person. Preservation of human life is thus of paramount importance. The Government hospitals run by the State and the medical officers employed therein are duty-bound to extend medical assistance for preserving human life. Failure on the part of a Government hospital to provide timely medical treatment to a person in need of such treatment results in violation of his right to life guaranteed under Article 21."

LEGAL SYSTEM

There are fundamentally two systems of justice: (1) civil and (2) criminal.

HIERARCHY OF COURTS

In hierarchy, the Supreme Court is the highest Court in India. It is the guardian of the Constitution of India and is also the highest court of appeal. The decisions of the High Courts are challenged before the Supreme Court and the decisions of the Supreme Court under Article 141 of the Constitution are considered to be the law of the land and are binding on all Courts within the territory of India. As noted earlier, the Supreme Court can be approached for enforcement of the fundamental rights guaranteed under the Constitution.

Services that are rendered free of charge fall under the exclusionary clause of service under the provisions of the Consumer Protection Act, 1986. Therefore, if the services are rendered free of charge to everybody availing the said services, there would be no remedy under the Consumer Protection Act. In such a case, regular civil court can be approached seeking compensation or a writ petition can be filed before the High Court or before the Supreme Court. Such a writ petition was filed before the Supreme Court where two petitioners filed the writ on behalf of the affected patients as a public interest litigation.

AS MITTAL AND OTHERS VERSUS STATE OF UP AND OTHERS

(Decided by the Supreme Court of India on 12th May, 1989 under Article 32 of the Constitution of India)

Facts of the Case

An eye camp was conducted in a rural area where ophthalmologists from a city attended the camp conducted the cataract surgery and then returned to the city. Many of the patients developed postoperative infection leading to loss of vision. A writ petition in the nature of public interest litigation was filed.

Decision

The Court directed all States to implement the guidelines and norms issued by the Government of India while holding eye camps and to incorporate the recommendations of an expert sub-committee of the Medical Council of India in these revised guidelines.

The guidelines among others included the following:

"*Staff:* The operations in the camp should only be performed by qualified, experienced Ophthalmic Surgeons registered with Medical

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Council of India or any State Medical Council. The camp should not be used as a training ground for postgraduate students, and operative work should not be entrusted to postgraduate students."

Further, it directed payment of compensation to those patients who lost their vision following the cataract surgery at the camp.

Learning Points

1. If a camp is conducted it should be ensured that there is compliance of all local laws, rules and regulations on the conduct of such camp.
2. Sufficient precautions should be taken to prevent infection to the patients. Whatever surgical instruments/materials are required to be used need to be sterilized and medicines to be administered should be of standard quality.
3. The camp should not be used for the purpose of training of postgraduate students. It should be conducted by qualified and skilled specialists.

The highest Court in hierarchy for a State is the High Court of that State. One High Court may have jurisdiction over two or more States. For example, the Bombay High Court has jurisdiction over the States of Maharashtra and Goa. Every High Court has original and appellate jurisdiction, which means it can entertain writ petitions, suits directly filed in the High Courts and such others in original jurisdiction and in appellate jurisdiction it hears appeals from Courts lower to it. The decisions of the High Court are binding on all judicial and quasi-judicial authorities subordinate to that High Court. The High Court in its writ jurisdiction can entertain writ petitions under Article 226 of the Constitution of India for violation of any of the fundamental rights.

CIVIL COURTS

There are Subordinate Civil (District Courts, City Civil Courts, Small Causes Courts) and Criminal Courts in each State. Before the enactment of the Consumer Protection Act, the aggrieved patients or their legal representatives (in the event of the death of the patient) would be required to file a suit before the civil court for seeking compensation for any negligence on the part of the doctor and/or the hospital. However, the regular courts are clogged with pendency of numerous cases leading to a protracted litigation. Further, these Courts have a legalistic approach and have a stricter rule of evidence.

DR TT THOMAS VERSUS SMT ELISA AND OTHERS

(Decided by the Kerala High Court on 11th August, 1986, AIR 1987 Ker 52)

Facts of the Case

The mother, widow and the children of a patient who died due to perforated appendix on 13th July, 1974 filed a suit claiming damages to the tune of ₹ 50,000 from the attending surgeon for failure to perform appendectomy in time and which led to perforation and subsequently death of the patient. The State of Kerala was impleaded as a party to the suit. The lower Court directed the surgeon to pay compensation to the plaintiffs. The challenge came before the Kerala High Court, which gave a decision on 11th August, 1986.

Therefore, the Consumer Disputes Redressal Agencies (commonly referred to as Consumer Courts) established under the provisions of the Consumer Protection Act, 1986 was seen as an alternative and speedier remedy for the patients for seeking compensation in cases of alleged negligence or

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deficiency of service on the part of the doctor and/or the hospital. In the strictest sense, these agencies are quasi-judicial authorities and not Courts.

There exists a three-tier system under the Consumer Protection Act, 1986.

At the lowest rung, is the Consumer Disputes Redressal Forum or in short District Forum. Every district or one or more districts have one District Forum, which entertains consumer complaints whose value does not extend beyond ₹ 2,000,000. The District Forum is presided by a retired or a sitting District Judge or a person qualified to be a District Judge.

For a consumer complaint whose value exceeds ₹ 2,000,000 but is up to ₹ 10,000,000 can be filed before the State Consumer Disputes Redressal Commission or in short the State Commission. Every State or two or more States may have one State Commission. An appeal from the District Forums subordinate to a particular State Commission will lie before that State Commission. The orders of the State Commission are binding on the District Forums subordinate to that State Commission. The State Commission also has administrative control over these District Forums. The State Commission is presided by a retired or a sitting Judge of the High Court.

An original complaint whose value exceeds ₹ 10,000,000 is required to be filed before the National Consumer Disputes Redressal Commission or in short the National Commission. Appeals or revision applications from the orders of the State Commissions would lie before the National Commission. An appeal from the order of the National Commission lies before the Supreme Court.

A consumer complaint against a doctor or a hospital could be for a negligent act causing loss or injury or death of the patient; deficiency of service (shortcoming in the rendering of service); unfair trade practice (like misleading advertisement) and sale of defective goods (selling of ointments/cosmetics prepared by the doctor or claiming to have been prepared by the doctor).

CRIMINAL COURTS

As per section 6 and 7 of the Criminal Procedure Code (CrPC), 1973, the hierarchy of criminal courts is as follows:

Section 6—Classes of Criminal Courts—Besides the High Courts and the Courts constituted under any law, other than this Code, there shall be, in every State, the following classes of Criminal Courts, namely:

1. Courts of Session;
2. Judicial Magistrates of the first class and, in any metropolitan area, Metropolitan Magistrates;
3. Judicial Magistrates of the second class; and
4. Executive Magistrates.

Section 7—Territorial divisions—(1) Every State shall be a sessions division or shall consist of sessions divisions; and every sessions divisions shall, for the purposes of this Code, be a district or consist of districts:

Provided that every metropolitan area shall, for the said purposes, be a separate sessions division and district. The Chief Metropolitan Magistrate and every Additional Chief Metropolitan Magistrate shall be subordinate to the Sessions Judge; and every other Metropolitan Magistrate shall, subject to the general control of the Sessions Judge, be subordinate to the Chief Metropolitan Magistrate.

As per section 28 of CrPC the sentences which High Courts and Sessions Judges may pass are as follows:

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1. A High Court may pass any sentence authorized by law.
2. A Sessions Judge or Additional Sessions Judge may pass any sentence authorized by law; but any sentence of death passed by any such Judge shall be subject to confirmation by the High Court.
3. An Assistant Sessions Judge may pass any sentence authorized by law except a sentence of death or of imprisonment for life or of imprisonment for a term exceeding 10 years.

As per section 29 of CrPC:

Sentences which Magistrates may pass—

1. The Court of a Chief Judicial Magistrate may pass any sentence authorized by law except a sentence of death or of imprisonment for life or of imprisonment for a term exceeding 7 years.
2. The Court of a Magistrate of the first class may pass a sentence of imprisonment for a term not exceeding 3 years, or of fine not exceeding ₹ 10,000, or of both.
3. The Court of Magistrate of the second class may pass a sentence of imprisonment for a term not exceeding 1 year, or of fine not exceeding ₹ 5,000, or of both.
4. The Court of a Chief Metropolitan Magistrate shall have the powers of the Court of a Chief Judicial Magistrate and that of a Metropolitan Magistrate, the powers of the Court of a Magistrate of the first class.

A criminal complaint may be filed by a patient or the patient's legal representative. Generally, the sections of Indian Penal Code (IPC) applied in case of medical negligence include sections 336, 337, 338 (these sections are applied when death has not occurred due to the negligent act of the doctor) and 304-A (when death has occurred due to the rash and negligent act of the doctor).

The Supreme Court in Jacob Mathew versus State of Punjab held as follows with respect to prosecuting medical professionals:

"As we have noticed hereinabove that the cases of doctors (surgeons and physicians) being subjected to criminal prosecution are on an increase. Sometimes such prosecutions are filed by private complainants and sometimes by police on a First Information Report (FIR) being lodged and cognizance taken. The investigating officer and the private complainant cannot always be supposed to have knowledge of medical science so as to determine whether the act of the accused medical professional amounts to rash or negligent act within the domain of criminal law under Section 304-A of IPC. The criminal process once initiated subjects the medical professional to serious embarrassment and sometimes harassment. He has to seek bail to escape arrest, which may or may not be granted to him. At the end, he may be exonerated by acquittal or discharge but the loss which he has suffered in his reputation cannot be compensated by any standards.

The Supreme Court laid down certain guidelines which would govern the prosecution of doctors for offenses of which criminal rashness or criminal negligence is an ingredient. The guidelines are as follows:

"A private 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. 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

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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 leveled 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."

The following case law illustrates the hierarchy of the courts with respect to criminal matters.

In a case of where a patient died of toxic epidermal necrolysis, a relative of the patient filed a Criminal Complaint in the Court of *Chief Judicial Magistrate* against the treating doctors for commission of offense under Section 304-A of IPC. The learned Chief Judicial Magistrate found the two of three doctors (the third doctor was acquitted) guilty of commission of an offense under Section 304-A of IPC and sentenced them to undergo simple imprisonment for 3 months and to pay a fine. The third doctor was acquitted.

Against the order of the learned Magistrate, appeals were filed before the learned *Sessions Judge*, whereas the complainant filed a revision application for enhancement of the punishment imposed on the two doctors. The complainant also filed another revision application before the High Court questioning the legality of the judgment with respect to acquittal of the third doctor. The *High Court* withdrew the appeals preferred by the two doctors before the learned Sessions Judge to itself and heard the criminal appeals and revision petitions together. The High Court held in favor of the doctors and dismissed the applications of the complainant. The said decision of the High Court was challenged before the *Supreme Court* (Criminal Appeal Nos. 1191–1194 of 2005). The Supreme Court dismissed the criminal appeal and acquitted the doctors.

There are often criminal complaints filed and an FIR filed or proceedings commenced against a doctor. There is a remedy available to the doctor if the criminal complaint is false and has been filed to harass the concerned doctor. The remedy is of filing an application under section 482 of CrPC.

Section 482 of CrPC: Saving of Inherent Powers of the High Court

Nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice.

The Supreme Court laid down the scope of interference by the High Court in the matters of quashing of the FIR or complaint in the State of Haryana and Others versus Bhajanlal and Others, reported in 1992 Supp (1) SCC 335 among others the following:

1. When the allegations made in the FIR or the complaint, even if they are accepted in their entirety do not prima facie constitute any offense against the accused.
2. Where the allegations made in the FIR or complaint are absurd and inherently improbable.
3. Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance of the accused.

The Supreme Court, however, cautioned that the power of quashing a criminal procee-

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ding by the High Courts should be exercised very sparingly and with circumspection and that too in the rarest of rare cases.

If an arrest is illegal and an abuse of process of law, the Supreme Court has held in a catena of judgments that it can amount to violation of the fundamental right to life guaranteed Article 21 of the Constitution and compensation can be granted to the victims of such arrest.

POINTS TO REMEMBER

- Right to health is part of right to life enshrined under Article 21 of the Constitution of India.
- Right to health can be enforced against State instrumentalities by filing a writ petition under Article 226 of the Constitution before a High Court or the Supreme Court under Article 32 of the Constitution.
- The disposal of matters pending before the civil courts is tardy as it is clogged with pending matters.
- Consumer Disputes Redressal Agencies (commonly referred to as Consumer Courts) are in strictest sense not Courts but have all the trappings of a Civil Court.
- Criminal liability for doctors (for medical negligence) usually involves filing of criminal complaint before the Magistrate Court and challenge can be made before the Sessions Judge and from there to High Court and from there to the Supreme Court.
- Section 482 of CrPC can be invoked in circumstances such as when an FIR has been filed or criminal proceedings have been commenced against the doctor just for the purpose of harassing the doctor and which is a gross abuse of the process of law.

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Medico-legal Aspects of Dermatology & Plastic Surgery

This book on medicolegal issues seeks to educate doctors on this vital and fast changing subject. The book, holds relevance for all medical practitioners, both government and private, to understand the dynamic, ever-changing norms and adopt necessary strategies to minimize risk and maximize outcomes.

The book has 52 chapters in three sections. Section 1 deals with general medicolegal issues which are relevant to all doctors such as consent, practice management, malpractice and negligence, liability-both civil and criminal, social media, clinic regulations, pharmacies and dispensing, consumer courts, advertisement, ethics, quackery, compensation, legal aspects of medical research, photography and confidentiality, and dealing with legal cases. Sections 2 and 3 deal with specific issues of relevance to dermatology, in particular dermatologic surgery and aesthetic dermatology, and plastic, reconstructive and cosmetic surgery in important diseases, procedures, surgeries and situations.

The authors for this compendium are all eminent doctors who have been handpicked, based on their noteworthy expertise in the fields of medicine and law.

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