iJRASET
International Journal For Research in Applied Science and Engineering Technology

INTERNATIONAL JOURNAL FOR RESEARCH

IN APPLIED SCIENCE & ENGINEERING TECHNOLOGY

Volume: 2 **Issue:** XII **Month of publication:** December 2014

DOI:

www.ijraset.com

Call: 08813907089 | E-mail ID: ijraset@gmail.com

ISSN: 2321-9653
International Journal for Research in Applied Science & Engineering Technology (IJRASET)

Changing Scenario of Doctor- Patient Relationship: A Consumerist approach

Ashish Shukla
School of Business, Lovely professional University, Phagwara, Punjab

Abstract: ***The doctor – patient relationship is very old and rapidly changing with the commercialization. Since 1991 several legal cases related to the medical negligence put a new picture of doctor – patient relationship & medical profession and portrayed a major concern for the protection of patients. Besides law of tort, The provisions of the Consumer Protection Act, 1986 provided opportunity to patients to seek redressal of grievances from the Consumer Courts followed by Supreme court. There are number of cases filed against doctors & hospitals for medical negligence and unfair medical practices in these consumer courts as well as in Supreme Court. The verdicts of Supreme Court quoted a new definition of protection of patient's interest. This paper will study the verdicts of Supreme Court and identify that upto which extent the interest of consumer is protected? This paper will identify, explain and summarize the rights of patients against medical practitioner in the light of verdicts of Supreme Court. This paper will also try to evaluate the consumer protection act and find out the need of any amendment if required to ensure the protection of patient against any medical negligence in society. Generally we all visit doctor as a patient at least once in life and this paper will provide an insight about the protection of our interest in the changing scenario of medical service.***
Keywords: Consumer Protection Act , patient protection , Supreme Court , doctor

I. INTRODUCTION

In India, majority of citizens requiring medical care and treatment cannot understand medical terms, concepts, treatment procedures and the effect & need of medicines for any particular deceases. Therefore patients accept any treatment based on diagnosis related to symptoms and the doctor's experience or intuition. There is a fiduciary relationship, a relationship based on only honesty and trust , between doctor and patient. This fiduciary relationship explains that Doctor must be ethical and honest towards the patients because patients trust over doctors for the treatment provided by doctors. The ancient Ayurveda physician Charaka said, "A good physician nurtures affection for his patients exactly like a mother, father or brother. The physician having such qualities gives life to the patients and cures their diseases." [1]. The objective of medical profession is to heal and care of the sick in a dignified manner depends on doctor-patient relationship. Since 1991, rapid changes in the healthcare delivery system and socio-political climate have resulted in considerable strain on the Doctor patient relationship while the doctors of the past were treated like God and people sacred and respected them but todays a speedy commercialization and globalization on all spheres of life have also changed to these phenomena of medical profession. As a result, the doctor-patients relationship has deteriorated considerably. However, Commercialization of medical profession has made it being oriented by the profit motive rather than that of service therefore it gave rise to unethical practices and negligence. When business motive comes to the priority, service to the patients takes place as last row while The legal duty of the doctor towards his patients is to provide a service in return for money therefore the patient of the doctor is the consumer and the rights of every patient as a consumer are protected in the consumer protection act.

The doctor's job is considered as a service because nowadays doctors treat patients only in return of money therefore wherever there is transaction of money is involved in the relationship of the two persons, it shows that there is a relationship of seller and buyer, therefore the patient automatically becomes a consumer and the need of protection of the interest of patient generates.

The consumer movement in India is very old . Even in Kautilya's Arthshastra there are references to the concept of protection of consumers against the exploitation by trade and industry, short weighment and measurements, adulteration along with the punishment for these offences.[2] Before Independence, consumer interests were protected mainly under laws like the Indian Penal Code, and Drugs and Cosmetics Act, 1940. Even Mahatma Gandhi said, "A customer is the most important visitor on our premises. He is not dependent on us. We are dependent on him. He is not an outsider in our business. He is a part of it. We are not doing him a favor by serving him. He is doing us a favor by giving us an opportunity to do so." Mahatma Gandhi placed the consumer on a very high pedestal. However, required effort has not been made to

educate consumer (Patients and relatives) .There are a few such systems where patients and relatives can seek redressal or protest against doctor's malpractices. One of them is the Consumer Protection Act, 1986 to better protect the interest of the consumers. Earlier too, doctors were covered by various laws, i.e. the law of torts, IPC etc., but since the passing of the Consumer Protection Act in 1986, cases against doctors is on the increase because Supreme Court of India brought medical profession within the ambit of the Consumer protection Act 1986. In 1996, Indian Medical Service vs V.P. Shantha's case[3] , The Supreme Court decided that medical service would fall within the ambit of 'service' as defined in Section 2(1) (o) of the consumer protection Act and patient can be considered as a consumer under the definition of 'Consumer ' as defined in section 2(1)(d) of the act.

A medical practitioner can be said to be reasonably competent and careful when he adopts the ordinary skills and normal practices of the profession. Law does not expect very high or very low standard from a person who renders professional services. In United Kingdom the issue of medical negligence was considered in great detail in the case of Bolam v. Friern Hospital Management Committee, [4] In the landmark Bolam case, it was held that In the ordinary case which does not involve any special skill, negligence in law means a failure to do some act which a reasonable man in the circumstances would do, or the doing of some act which a reasonable man in the circumstances would not do; and if that failure or the doing of that act results in injury, then there is a cause of action.

A doctor owes certain duties to his patient and a breach of any of these duties gives a cause of action for negligence against the doctor. Doctors may have either civil liability or criminal liability in case of medical negligence. In Dr. Suresh Gupta's Case[5] the Supreme Court, held that the legal position was quite clear and well settled that whenever a patient died due to medical negligence, the doctor was liable in civil law for paying the compensation. Only when the negligence was so gross and his act was so reckless as to endanger the life of the patient, he would also be made criminally liable to offence under Section 304-A IPC. "Thus a doctor can not be held criminally responsible for patient's death unless his negligence or incompetence showed such disregard for life and safety of his patient as to amount to a crime against the State".A doctor cannot be held negligent either in regard to diagnosis or treatment or in disclosing the risks involved in a particular surgical procedure or treatment. If the doctor has acted with normal care and according to recognized practices accepted as proper by a responsible body of medical men skilled in that particular field, the doctor cannot be held liable. The burden of proof of negligence, carelessness, or insufficiency generally lieswith the complainant. In cases of medical negligence the patient must establish her/his claim against the doctor. The law requires a higher standard of evidence to support an allegation of negligence against doctor.

II. OBJECTIVE

A. To identify the extent of protection available to patients against the doctors in case of medical negligence under consumer protection Act.

B. To determine the rights available to patient against medical practitioners under consumer protection Act .

C. To evaluate the consumer protection Act with reference to the protection of patients for identifying the required amendments.

D. *Judicial Attitude towards patient's protection*

1) Medical Service: Consumer protection Act

In the case of Indian Medical Association vs VP Santha[3] , The Supreme court concluded that the Service rendered to a patient by a medical practitioner (except where the doctor renders service free of charge to every patient or under a contract of personal service), by way of consultation, diagnosis and treatment, both medicinal and surgical, would fall within the ambit of 'service' as defined in Section 2(1) (o) of the Act and patient would fall within the ambit of 'Consumer ' as defined in section 2(1)(d) of the act.

2) Compensation

In Kunal Saha Case vs AMRI (2012) [6] the patient was admitted to AMRI for high fever and respiratory infection. After a week she was transferred to Mumbai where she died of complications developed in AMRI Hospital. Earlier in 2006, National Commission had rejected the claim as it had not found the doctors and hospital administration guilty of negligence. An aggrieved Dr Kunal Saha husband of the patient approached the Supreme Court which gave a decision in his favour. The court directed the National Commission to decide the compensation amount. The claim was for Rs 78 crore plus interest from 1998 onwards. In 2011, National Commission asked the respondents to pay Rs 1.73 crore to victim's kin but Dr kunal saha was not satisfied with the amount of compensation, Saha again approached Supreme

Court which announced the enhanced compensation. The Supreme Court has awarded the highest ever compensation in a medical negligence case in India. The Advance Medical Research Institute (AMRI) Hospital in Kolkata to pay Rs 5.96 crore to NRI doctor Kunal Saha whose wife died in 1998 after treatment at the hospital. The Court has asked hospital and three doctors to pay the amount to Saha within eight weeks. In a historic judgment in *Nizam's Institute of Medical Sciences* v. *Prasanth S. Dhananka(2009)* [7]The Court awarded Rs. 1 crore as compensation to the victim of medical negligence. In the case of Dr. Arun Dewanagri v. Madhu (2009) [8] , National commission observed that the compensation was improper.

3) Doctor's Duty

Dr Laxman Balkrishna Joshi v. Dr Trambak Bapu Godbole(1969),[9] the Supreme Court held that the duty of a doctor will include (a) a duty of care in deciding whether to undertake a case and (b) a duty of care in deciding what treatment to give or a duty of care in administration of that treatment. Any breach of these duties gives a rise of action for negligent acts towards the patient. The Court also observed that the doctor has the discretion in choosing the treatment, which he proposes to give to the patient in one way or the other. The discretion of the doctor is relatively wider in cases of emergency. In this way the Supreme Court of India has affirmed that the breach of duty of care is the basis for liability for negligence and secondly it lays down the standard of care i.e. the doctor must bring to his task a reasonable degree of skill and knowledge and must exercise a reasonable degree of care.

4) Consent

In the case of Samira Kohli vs. Dr. Prabha Manchanda and Ors. I (2008)[10], The appellant was temporarily unconscious under anesthesia, and as there was no emergency therefore Consent given by her mother is not a valid or real consent. The question was not about the correctness of the decision to remove reproductive organs but failure to obtain consent for removal of the reproductive organs because performance of surgery without taking consent is equivalent to an unauthorized invasion and interference with the appellant's body. The Court held that The appellant was neither a minor nor mentally challenged or incapacitated therefore there was no question of someone else giving consent on her behalf. In the case of *Dr.Sathy M Pillai & Anr.* v. *S. Sharma & Anr.*(2007) [11], the National Commission held that, where informed consent is taken on the printed form without any specific mention about the name of the surgery, or signatures are taken from patient/relative in mechanical fashion, much in advance of the date scheduled for surgery, such forms cannot be considered as informed consent. In M. Chinnaiyan v. Sri Gokulam Hospital & Anr.(2007)[12], the complainant was advised to undergo hysterectomy for which the consent was obtained from the complainant. However, the complainant suffered from bleeding of uterus as a result two units of blood was transfused after the operation. The blood units were not tested for contamination. The patient suffered with HIV-AIDS after three and a half year of the transfusion and died. The hospital was held liable because complainant had given consent only for hysterectomy operation and not for transfusion of blood. In Pravat Kumar Mukherjee vs. Ruby General Hospital and Ors(2005) [13], the National Commission observed that Since emergency treatment is required to be given to a patient who was brought in seriously injured condition there was no question of waiting for consent.

5) Medical ethics: Accident's Victims

In the case of Pravat Kumar Mukherjee vs. Ruby General Hospital and Ors.(2005)[13] An accident case came into the hospital The hospital demanded an immediate payment of Rs. 15000/. Hospital discontinued treatment after 45 minutes. This lead to shifting of patient to other hospital from the current hospital. The patient died on the way. The National Commission allowed the complaint and the Opponent Ruby Hospital was directed to pay Rs. 10 lakhs to the Complainant for mental pain agony. The Commission observed that A human touch is necessary; that is their code of conduct; that is their duty and that is what is required to be implemented. The court observed that in emergency or critical cases, A Doctor must discharge their duty/social obligation of rendering service without waiting for fee or for consent.

6) Doctor's Liability: Civil or Criminal

In Dr. Suresh Gupta Vs. Govt. of NCT of Delhi and Anr.(2004)[5] ,The apex court held that whenever a patient died due to medical negligence, the doctor was liable in civil law for paying the compensation and when the negligence was so gross and his act was so reckless as to endanger the life of the patient, criminal law for offence under section 304A of Indian Penal Code, 1860 will apply. In the case of Dr. Suresh Gupta, the Hon'ble Judges had clarified that for ordinary negligence , the doctors could not be held criminally liable deserving criminal prosecution. It was only gross negligence and recklessness where the doctors could be criminally held responsible. In the case of Dr. Jacob Mathew Vs. State of

Punjab & Anr (2005)[14]. The judges of Hon'ble Court in Punjab opined against the judgment in Dr. Suresh Gupta Vs. Govt. of NCT of Delhi. They questioned the adjective "gross" and opined that negligence is negligence and the doctor should not be treated on a different pedestal. All negligent acts causing death should be treated are par. The Court concluded that an error of judgment is not proof of negligence on the part of a medical professional so long as a doctor follows a practice acceptable to the medical profession of that day, he cannot be held liable for negligence merely because a better alternative course or method of treatment was also available or simply because a more skilled doctor would not have chosen to follow or resort to that practice or procedure which the accused followed. A professional may be held liable for negligence on one of the two findings: either he was not possessed of the requisite skill which he professed to have possessed, or, he did not exercise, with reasonable competence in the given case, the skill which he did possess. What may be negligence in civil law may not necessarily be negligence in criminal law. For negligence to amount to an offence, the element of guilty mind (*mens rea)* must be shown to exist. For an act to amount to criminal negligence, the degree of negligence should be much higher . To prosecute a medical professional for negligence under criminal law it must be shown that the accused did something or failed to do something which in the given facts and circumstances no medical professional in his ordinary senses and prudence would have done or failed to do. The apex court made following observations to ensure the medical fraternity:

a) 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, 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 .A doctor accused of rashness or negligence, may not be arrested in a routine manner (simply because a charge has been levelled against him) unless his arrest is necessary for furthering the investigation or for collection 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.

In the case of Malay Kumar Ganguly v. Dr. Sukamar Mukherjee (2009) [15]The Supreme held that "for criminal prosecution of a medical professional for negligence, it must be shown that the accused did something or failed to do something which in the given facts and circumstances no medical professional in his ordinary senses and prudence would have done or failed to do." In V. Kishan Rao vs Nikhil Super Speciality Hospital(2010) [16] The Supreme Court made a clear distinction between degree of negligence in criminal law and civil law. To constitute negligence in criminal law the essential ingredient of 'mens rea'(guilty mind) cannot be excluded and in doing so. It is further held that in order to pronounce on criminal negligence it has to be established that the rashness was of such a degree as to amount to taking a hazard in which injury was most likely imminent.

7) Expert Opinion

Martin F. D'Souza v. *Mohd. Ishaq (2009)[17]* Supreme Court has directed that, "whenever a complaint received against a doctor or hospital by the consumer forum or by the Criminal Court then before issuing notice to the doctor or hospital against whom the complaint was made the consumer forum or Criminal Court should first refer the matter to a competent doctor or committee of doctors, specialized in the field relating to which the medical negligence is attributed and only after that doctor or committee reports that there is prima facie case of medical negligence should notice be then issued to the concerned doctor or hospital. This is necessary to avoid harassment to doctors who may not be ultimately found to be negligent". Thus in this case the Supreme Court not only has taken very liberal approach but also directed consumer forum to take the opinion of the medical experts before initiating the proceedings in medical negligence cases. This judgment has far reaching effects in deciding medical negligence cases. If the expert committee opinions that there is no negligence on the part of the doctor or hospital the victim's remedy will become abolished as, he has no chance to say any thing in favour of his case. In V. Kishan Rao vs Nikhil Super Speciality Hospital (2010) [16],The Supreme court held that it was not necessary in all cases to seek expert opinion before proceeding with the matter. For simple and obvious cases, the consumer courts were free to proceed without seeking expert opinion and the instant case fell in such a category.

8) Deficiency in Service

Dr. Arun Dewanagri's case [8] an ayurvedic physician conducted delivery without referring the pregnant lady to a qualified Gynaecologist: By using his muscle power he pressed abdomen of fully pregnant lady to deliver child due to which the child died. Vagina and uterus of patient were also damaged. Medical negligence was proved. But compensation of Rs. 60,000 was considered to be improper. In Harjot Ahluwalia's case [18] the patient was

administered certain medicines and injections by an unqualified nurse without prior test. Immediately thereafter, the child collapsed and suffered cardiac arrest. No oxygen was given as gas cylinder was not available. The child suffered irreparable brain damage. The SC upheld the decision of the NC that there was deficiency and held that the child and parents were entitled to the compensation as awarded by the national commission. In Poonam Verma's case [19] while deliberating on the absence of basic qualifications of a homeopathic doctor to practice allopathy in, the Supreme Court held that a person who does not have knowledge of a particular system of medicine but practices in that system is a quack. Where a person is guilty of negligence per se, no further proof is needed.

9) **Burden of Proof**

In a historic judgment in Nizam's Institute of Medical Sciences v. Prasanth S. hananka(2009)[7] the Supreme Court held that "moreover, in a case involving medical negligence, once the initial burden has been discharged by the complainant by making out a case of negligence on the part of the hospital or doctor concerned, the onus then shifts on to the hospital or to the attending doctors and it is for the hospital to satisfy the Court that there was no lack of care or diligence".

III. CONCLUSION

Till 1995 , there was a confusion that whether medical services are covered under Consumer protection act or not ? In 1995, The apex Court clarified that medical services or medical profession falls under the coverage of consumer protection act and patient can get relief against medical negligence of doctors, hospitals etc. There are three tier judicial systems to protect patients as a consumer i.e. District forum, State commission, National commission which is followed by Honorable Supreme Court. There are various laws available for the protection of patient against medical malpractices such as Law of tort, Indian penal code (IPC) and Consumer protection act. The Supreme court played a vital role in the protection of patients against doctors through its landmark judgments in the cases filed by aggrieved patients from the judgment of National commission. The consumer protection act gives power to file a case against medical practitioners on the ground of deficiency in service or medical negligence. Under consumer protection act , So many patients got justice . Patient's protection is not only ensured by consumer dispute redressal agencies but also through the apex court therefore patient has a right to file case against doctors and hospital for any civil negligence or criminal negligence or any sort of deficiency in service. Patients got compensation through National commission in several cases against medical practitioners. The attitude of the apex court is more vibrant towards the amount of compensation, for example one Kolkata based hospital and doctors were directed to pay nearly Rs. 6 crores as a compensation for the medical negligence. Patients can also file a criminal case against doctors and doctors can be held liable for criminal liability which amounts to imprisonment also. Expert opinion is required to convict the doctor in any case of medical negligence but it is doubted that due to medical fraternity this expert opinion can be biased but this doubt is now removed and the apex court said that if there is any simple and clear case of medical negligence , Court can award judgment without expert opinion also . Taking "Informal Consent" from patient before any surgery or any other medical treatment is an mandatory obligation as well as disclosing all the risk involved in the treatment is also a mandatory obligation of doctor. If the patient is not unconscious and legally capable to give consent , only patient will be authorized to give consent and one more important aspect is that court observed that in case of emergency doctor need not to wait for consent , Doctor must start the treatment. If doctor takes the consent from the patient well in advance before surgery over printed form without mentioning details related to treatment or without disclosing details related to treatment , such consent would not have any legal value. There is an obligation over the doctors to follow the code of conduct derived by their medical association and medical council act as well as apex court observed that as per the nature of profession , doctors must work on human grounds and work for humanity and society. From the various landmark judgments, Patient got some rights such as Rights to file a case against medical practitioner , Right to give consent for medical treatment, Rights to ask for compensation , Right to ask doctor to enforce his duties.

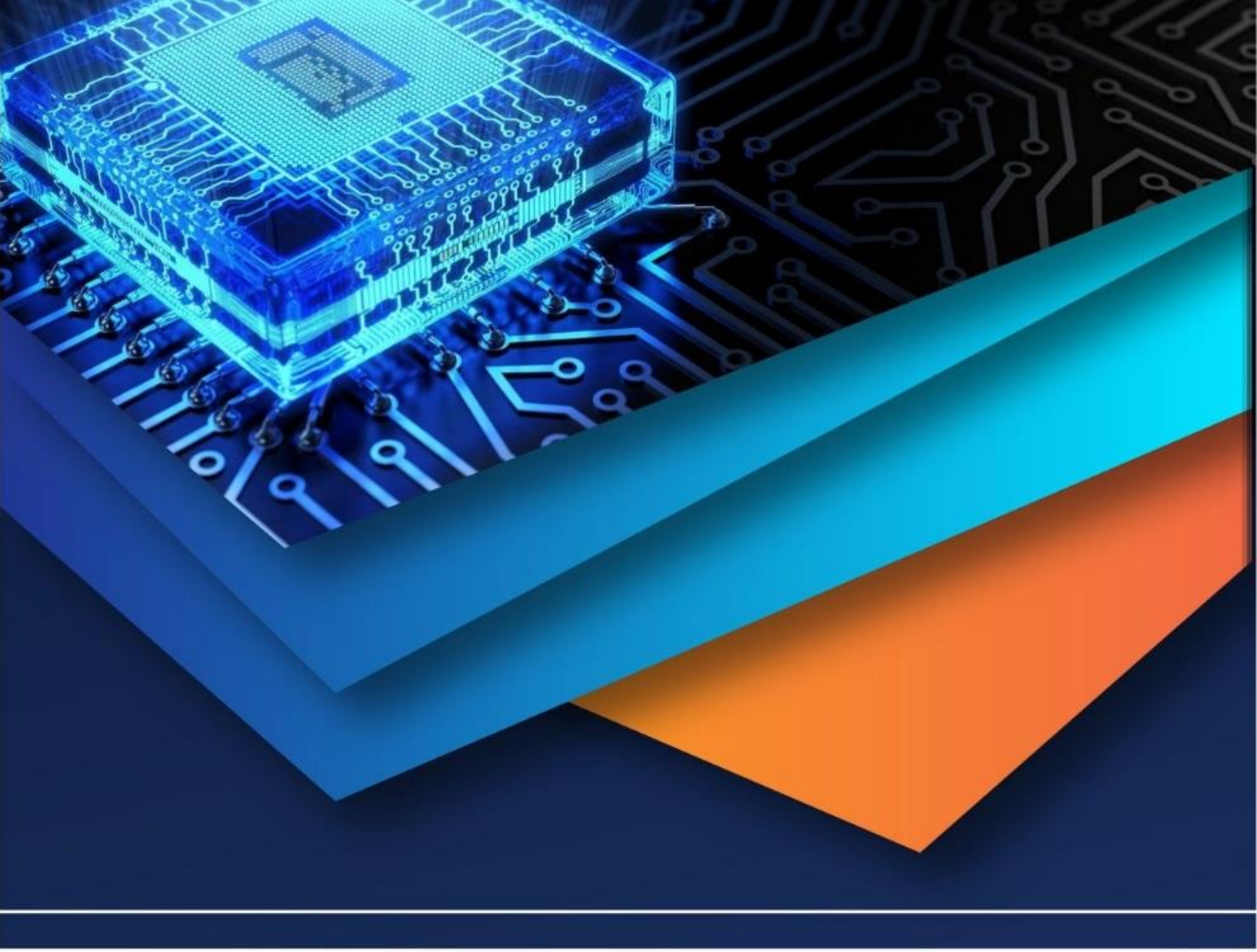
However , Several aspect of protection of patient is covered , but burden of proof is still a problematic issue for the patients because normally patients are not able to much concentrate over the characteristics due to ignorance towards medical technicalities as well as normally they do not have any preconceived approach of filing any case against the doctors as they trust over doctor therefore it is very tough job for patient to prove the allegations due to their ignorance towards medical practices

IV. SUGGESTIONS

A. Medical ombudsman should be introduced in India as it is introduced by 7 European countries.
B. Medical tribunal should be constituted to deal only medical cases because health care business is one of the significant revenue generating business and rapidly increasing commercialization is also preparing platform for malpractices in medical profession.
C. Burden of proof should be relooked because proving the allegation in court is a hard nut to crack for patients .

REFERENCES

[1] Divekar Sachin, Doctor-Patient Relationship Worsening in Indian Context , International Journal of Applied Research & Studies , iJARS/ Vol.I / Issue II /Sept-Nov, 2012/207
[2] www.jmijitm.com/papers/1299089376MOHANASUNDARI 2 .M..pdf
[3] Indian Medical Association v. V.P. Shantha, AIR 1996 SC 550
[4] Bolam v. Friern Hospital Management Committee, Queen's Bench Division, 1957, Date of decision – 26 February 1957, Citation: [1957] 1 W.L.R. 582 = [1957] 2 All E.R. 118
[5] Dr. Suresh Gupta vs. Government of N.C.T. of Delhi, August 4, 2004, Supreme Court of India, AIR 2004 SC 4091
[6] http://www.thehindu.com/news/national/kolkata-hospital-3-doctors-told-to-pay-rs-596-cr- for negligence/article5268364.ece
[7] Prasanath Dhanaka v Nizam's Institute of Medical Sciences (NIMS), Hyderabad, I (1999) CPJ 43 (NC)
[8] Dr. Arun Dewanagri v. Madhu (Preti Chandel), AIR 2009 (NOC) 2803 (NCC)
[9] Dr Laxman Balkrishna Joshi v. Dr Trambak Bapu Godbole AIR 1969 S.C. 128
[10] Samira Kohli vs. Dr. Prabha Manchanda and Ors. I (2008) CPJ 56 (SC)
[11] Sathy M. Pillai (Dr.) And Anr. vs S. Sharma And Ors. , 10 August, 2007 , CPJ 131 NC
[12] M. Chinnaiyan v. Sri Gokulam Hospital and Anr. III (2007) CPJ 228 NC;
[13] Pravat Kumar Mukherjee vs. Ruby General Hospital and Ors, II(2005)CPJ35(NC)
[14] Jacob Mathew vs State Of Punjab & Anr , 5 August, 2005 , CASE NO.: Appeal (crl.) 144-145 of 2004 (SC)
[15] Malay Kumar Ganguly v. Dr. Sukamar Mukherjee (2009) 9 SCC 221
[16] V. Kishan Rao vs Nikhil super speciality hospital, 8 March, 2010 , Civil appeal no.2641 of 2010
[17] Martin F DSouza Vs Mohd Ishfaq-AIR 2009 SC 2049
[18] Harjot Ahluwalia v spring Meadows Hospital AIR 1998 SC 1801 [19] Poonam Verma vs. Ashwin Patel and Ors.
(1996) 4 SCC 322



10.22214/IJRASET

45.98

IMPACT FACTOR: 7.129

IMPACT FACTOR: 7.429

INTERNATIONAL JOURNAL FOR RESEARCH

IN APPLIED SCIENCE & ENGINEERING TECHNOLOGY