

## Dental Negligence And Its Liabilities In A Nutshell

### Abstract

The dental profession holds a special level of trust with the patients; the profession makes a commitment to patient that they will adhere to high ethical standard of conduct. In recent times the dental profession is under attack by litigation cases by disgruntled patients who are not satisfied by the treatment. The dissatisfaction can be resolved between patients and doctors but sometimes patient turn to courts to get the matter solved. A litigation case against a dentist causes loss of reputation, loss of income, harassment, mental agony and embarrassment in the society. Hence, to protect oneself from such type of suffering the dentist should have an idea about the rules and regulation guiding their profession, the law and litigation pertaining to their practice and standard protocols to follow to avoid the malpractice cases. The data gathered for this review article was from manual and internet search of records. The following review article provides basic information on ethical principles, dental negligence and related liabilities, case reports and how to make dental treatment more qualitative and accountable.

### Key Words

Ethical principles, Dental Negligence, Civil liability, Criminal liability, litigations, Criminal negligence.

### Introduction

The present exposure of malpractice cases in medicine and dentistry is by no means of recent origin, in reality it dates back to the 1770 s which marked the first medical malpractice case of legal record in United States (Cross v. Guthery). The first dental malpractice case of record was in 1850. In this case the dentist had guaranteed for one year satisfaction with a set of teeth or money refunded. This was for the first time dentist were warned never to give guarantee on any treatment<sup>[1]</sup>.

The health care profession is a noble one. The doctors are well-respected and their opinion is taken in high regard, but now a days due to the increase in the number of medico legal cases the same medical profession is come under attack due to the negligence of a few doctors or the work of quacks or due to some unscrupulous patients who want to make a fast buck out of the doctor. Every Doctor/Dentist has to have a basic knowledge of the law pertaining to his field of profession.

The work that one does should be guided by the Ethical Principles of our profession. The Ethical Principles are<sup>[2],[3]</sup>:

**Autonomy:** Patient should have a right to decide what treatment is going to get done and the dentist should respect the patient's choice. This forms the basis of informed consent and privileged information. However, patient's

autonomy is not absolute. Various treatment modalities should be explained to the patient.

**Beneficence:** Doing good, being helpful to another person in this case the patient. The dentist must not harm the patient. The dentist must refer the patient to the concerned doctor if the case is beyond his line of expertise.

**Compassion:** Should have the quality of understanding the suffering of others and wanting to do something about it. The dentist should relieve the pain and suffering of the patient who comes to him/her for treatment.

**Competence:** Dentist should be well qualified to diagnose and treat patients that are related to his field and refer the patient when necessary. The doctor should keep updating themselves as new data comes along.

**Integrity:** Dentist should act with honor and be courteousness. Be truthful about what treatment is been given to the patient and the different treatment modalities available for the patient's ailment. Disclose any complication that may occur before starting of the said treatment.

**Justice:** Dentist has a duty to treat the patient fairly and delivering dental care without prejudice. The dentist should not refuse to treat the patient on the grounds of patients rare, religion, gender or nationality.

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**Professionalism:** The skills, status, methods, character or a standard of a professional or of a professional organization is called professionalism and the dentist/doctors should collectively work for the betterment of the oral health of the society.

**Tolerance:** Dentist should be aware of the various cultures and religious diversities present and should be able to understand and be sensitive to these needs of the patient when dispensing treatment. **Veracity:** Honesty forms the basis of a truthful doctor-patient relationship. The doctor relies on the patient's honesty during diagnosis and patient relies on doctor decision for which treatment is best for his ailment.

### Three 'D's of negligence for the doctor

The word 'negligence' is derived from the Latin word 'nelego' or neglect which means lack of proper care and attention, culpable and carelessness. Negligence is the act of omission or submission of an act that is done by a doctor in this case a dentist who has not done his job or who has done his job carelessly<sup>[4]</sup>. The Supreme Court of India has observed that the essential components of negligence are three: 'duty', 'breach', and 'damage' as stated in the Law of Torts, Ratanlal and Dhirajlal.<sup>[5],[6],[7]</sup>:

**Duty:** refers to the responsibility

established by the physician-patient relationship.

**Dereliction:** or breach of duty refers to the doctors has fallen below the prescribed standard of care as a prudent doctor who would act in a similar situation.

Resulting damages refer to any injuries caused by the defendant. Direct or proximate cause refers to the continuous sequence of events, unbroken by any intervening cause, that produces an injury and without which the injury would not have occurred.

**Dental negligence:** Is the improper treatment by a Dentist, Orthodontist, Endodontist, Periodontists or other dental care professional that causes patient harm.<sup>[8]</sup> Dental Negligence comes under the ambit of medical negligence. Dental practices subjected to negligence include few of the following:

1. Failure to diagnosis or detect a disease: for e.g.: - failure to diagnosis a precancerous lesion or oral lesion or failure to diagnosis a periodontal disease which may lead to serious complications for the patient.<sup>[9]</sup>
2. Careless work: if a dentist causes inadvertent injury or harm while treating the patient by not carrying out the procedure properly, a medical negligence case can be made against the doctor.
3. Inadequate treatment: if a dentist carries out treatment inadequate / incomplete treatment either on one occasion or over a period of time due to which the patient suffers injury and pain in the oral cavity or surrounding bone or tissue the patient can put a case against the doctor.
4. Lack of informed consent for a treatment or procedure from a patient is a negligent act. Common complications of a procedure should be mentioned to the patient in informed consent and give instructions how to manage them.<sup>[10]</sup>
5. Drug usage error: if a dentist gives the wrong amount of drug, does not administer the local anaesthetic drug properly or fails to see an allergic reaction due to the drug which causes harm or injury to the patient.<sup>[2]</sup>
6. It is a negligent act if Dentist attempt to treat beyond their level of expertise and failure to refer cases to appropriate specialist.
7. Improper use of dental instruments, tools which might cause injury to the

patient.

8. Swallowed instrument: dental instruments and swabs which may not be secured properly and fall down patients throat could be considered as medical negligence.<sup>[10]</sup>
9. Extraction of a tooth for a patient with valvular heart disease without an antibiotic prophylaxis against endocarditis can invite a case of criminal negligence Indian Penal Code (IPC) Section 336.<sup>[2]</sup>
10. Pain and swelling after extraction due to negligent extraction could invite a case of criminal negligence IPC Section 337.<sup>[2]</sup>
11. Fracture of jaw during extraction due to excessive or improper force could be suggestive of criminal negligence IPC Section 338.<sup>[2]</sup>
12. Death of a patient on the dental chair due to dental negligence could come under criminal negligence IPC Section 304-A.<sup>[2]</sup>
13. Under Public Liability Insurance Act, dentist can be held liable for harm caused to public by inadvertent exposure of harmful substances like mercury or due to radiations<sup>[2]</sup>.
14. Unnecessary procedures done on patients to get more monetary gain from them.

Dr Baxter conducted a study on 243 cases and found that most of the dental negligence cases were due to complications due to extraction, negligence due to endodontic treatment, complications of implant treatment, substandard crown and bridge placement, failure to diagnose and treat periodontal disease, complications due to orthodontic treatment, anaesthetic complications, failure to treat dental infection in a timely fashion, nerve injuries due to dental injections and adverse drug reactions in the descending order of occurrence<sup>[11]</sup>.

What are the liabilities a Doctor can face?

**Tortious liability:** Liability incurred when one party owed a duty to the other and failed to reasonably exercise that duty. This is a classic example of civil liability.<sup>[4]</sup>

**Vicariously liability:** arises when the law holds one person responsible for the harmful acts (tort) of another, even if the other person had nothing to do with the commission of the tort. For example employer is being held responsible for the acts of his employee (“Respondent superior”).<sup>[4]</sup>

**Res ipsa loquitur:** is a Latin phrase which means “the thing speaks for itself”. This particular phrase is used when it is obvious that the negligent act of the defendant (doctor) has caused the damage alleged.<sup>[4]</sup>

**Statutory liability:** is derived from statutes regulating clinical establishments (e.g. for registration and licensing of these establishments). Statutory liability depends on infringement of certain statutory duties that the clinical establishments have to provide towards the patient and its staff.<sup>[4]</sup>

**Contributory Negligence:** means the failure by a person to use reasonable care for the safety of himself/herself so that he/she becomes blameworthy in part as an “author to his own wrong”<sup>[13]</sup>. “In India the rule of negligence with the defense of contributory negligence requires proportional sharing of liability when both parties are negligent, that is the compensation that the victims receives gets reduced in proportion to his or her negligence”.<sup>[14]</sup>

**Criminal liability:** when the medical man exhibits a gross lack of competence or inaction and wanton indifference to his patient’s safety and which is found to have risen from gross ignorance or gross negligence.<sup>[15]</sup>

The dental negligence cases are usually tried in Consumer forums and civil courts; rarely in Criminal courts. The internet and manual search for records was used to get information about cases of dental negligence claims made in India. Out of which the following cases have been discussed to explain the above mentioned liabilities: -

**Vicariously liability:**

**CASE 1:**

**Disfigurement of teeth**

Case was filed by Ms Anitha, a lecturer on Oct 8th 2008 against Sravani Super Speciality Dental Hospital, Tilaknagar, Hyderabad, owned by Karthik Reddy for gross negligence and rashness with which the hospital treated her leading to injury and disfigurement of her teeth. She had gone to the hospital for treatment of her tooth and RCT was done on her tooth which was also ground beyond requirement, her tooth structure was damaged permanently which caused her a lot of pain and discomfort. The doctor consulted for this case was from Government Dental College, Hyderabad. The State Commission in its recent order

(FA No 126/2012) directed the hospital to pay Rupees 5 lakhs (as against 20 lakhs sought) as compensation for disfigurement of her tooth and that it pays nine percent interest per annum from the date of complaint i.e. July 2008. It also directed the hospital to pay Rupees 10,000 towards cost of complaint and appeal. The hospital has appealed.<sup>[16]</sup> Here the hospital and the doctor have been held liable hence it is a case of vicarious liability against the hospital and tortious liability against the dentist.

### **Tortious liability**

#### **CASE 2**

#### **Dentist to compensate for the removal of the wrong tooth**

Poonam Devi had visited Ashima Kohli private dental clinic in Sector 30 in June 2009 as had pain in the lower jaw, Kohli diagnosed that the seventh tooth was causing pain and it has to be extracted (it was informed to Kohli that another doctor had suggested removal of the sixth tooth as it was infected). Dr Kohli removed the seventh tooth but this did not relieve the pain and so Poonam went to a government doctor who diagnosed the problem to be with the sixth tooth. When she and her husband approached Kohli she refused to meet us and hence we filed a complaint with the consumer forum. The consumer forum referred the medical reports to Postgraduate Institute of Medical Education And Research. A special team of senior doctors went through the medical reports and gave its decision in favour of Devi. Consumer dispute forum directed the dentist to pay Rs. 57,200 as compensation to the patient.<sup>[17]</sup>

In this case the consumer forum found the dentist liable under Tortious liability.

### **Res Ipsa Loquitor**

#### **CASE 3**

#### **Detachment of needle from syringe and slippage into throat**

Detachment of needle from syringe and slipping into throat suffered from some dental problem and was suggested extraction of the right molar of the lower jaw by the dentist. After extraction there was some amount of bleeding and the doctor thought it necessary to irrigate the socket, while irrigating the needle got detached from the syringe and slipped into the throat. Attempts to get the needle out failed and instead the needle slipped further down into the stomach for which an operation was needed. The court held

that the needle getting detached from the syringe in lends probability to the version of the compliant that opposite party did not properly set the needle in the syringe. The doctor was expected to take all possible care and caution and such an act is considered as negligence and deficiency of service. It is a case of Res ipsa loquitor (thing speak for itself). The commission awarded compensation of 1, 03,200 Rs/- to the patient as against to 3, 00,000Rs/- sought. [Amblappa v. Sriman D. Veerendra Heggade & Ors 1999(3) CPR 72 (Ker SCDRC)].<sup>[18]</sup>

### **Tortious liability**

#### **CASE 4**

#### **Severe hypertensive patient has a stroke after L.A. injection**

A dental patient had extremely severe hypertension for which her physician was treating her. Before injecting a local anaesthetic the dentist did not ask any questions regarding the medical history of the patient of if she was on any medications. The Local Anaesthetic (LA) agent usage specifically and clearly stated that under no circumstances should it be used for hypertensive patients. The patient got up from the dental chair after her tooth filled and collapsed on the floor with a stroke. The dentist was held liable. [Sanzari v. Rosenfeld, 167Azd 625, NJ 1961].<sup>[18]</sup>

### **Contributory liability**

#### **CASE 5**

#### **Surgical procedure of a diabetic patient without the proper blood test**

Fetah Singh in his complaint had alleged that Dr Dr Vaneet Khakar had not checked his blood sugar prior to the dental surgery. He informed the doctor about his medical condition and that his sugar level is normal, the dentist then said that it will not affect the surgical procedure but due to his high sugar level, the operated area developed pus which infected his throat which required surgery costing 70,000 Rs/-.

Contributory negligence on the part of the patient is no defense; The North District Consumer Disputes redressal forum held that Dr. Kakar was negligent for not getting the blood sugar level of Singh checked despite having been informed by him that he was diabetic, and instead relied on his word that sugar level is under control. The opposite party should have been on guard when the patient said he was diabetic and it was the doctor duty to ask the patient to go for

blood sugar test. There is dereliction on the part of the complainant this does not absolve the opposite party of his negligence. The District Consumer Forum directed the dentist to pay one lakh rupees to the patient as compensation.<sup>[19]</sup>

### **Criminal Negligence:**

Criminal negligence cases in Dentistry are rare but the important offences that could invite criminal liability with regard to dental negligence are<sup>[2]</sup>:

1. IPC Section 304 A–Negligent homicide. A rash or negligent act resulting in death, for e.g. Death of a patient in a dental chair due to negligence.
2. IPC Section 336—an act endangering the life of a person (even if there is no injury), for e.g. extracting a tooth of a patient with a valvular heart disease without prophylaxis antibiotics against endocarditis. (Even if the patient does not develop endocarditis).
3. IPC SECTION 337– A rash or negligent act causing simple injury. For e.g. pain and swelling after extraction due to negligent extraction.
4. IPC Section 338 – a rash or negligent act resulting in grievous injury, for e.g. fracture of jaw during extraction due to excessive or improper force.

On August 05, 2005 a Three Judge Bench of Supreme Court of India of Chief Justice R.C.Lahoti, Justice G.P.Mathur and Justice P.K.Balasubramanyam by order quashed prosecution of a medical professional under Section 304-A / 34 IPC and disposed of all the interlocutory applications that doctors should not be held criminally responsible unless there is a evidence before the Court in the form of a credible opinion from another competent doctor, preferably a Government doctor in the same field of Medicine supporting the charges that the degree of negligence so gross and his act was reckless as to endanger the life of the patient. (This is in agreement with the principles of law laid down in Dr. Suresh Gupta's case (2004) 6 SCC 422).<sup>[20]</sup>

### **Test used to determine negligence<sup>[21]</sup>:**

Bolam test: Bolam v Friern Hospital Management Committee (1957) 1 WLR 582 is an English tort law case that lays down the typical rule for assessing the appropriate standard of reasonable care

in the negligent cases involved skilled professionals (e.g. doctors/ dentists):

1. The test of negligence is a test of the reasonable man. What a reasonable man must have done, if not done or vice versa would result in an inference of negligence.
2. The test of a skilled professional is the test of an ordinary man with the requisite amount of knowledge and not one with higher degree of knowledge
3. What is required to be seen is that in the given circumstances was the treatment given by the doctor justified.
4. Mere difference of opinion among medical faculty would not constitute as liability upon a doctor on the course adopted by him/her.

#### Tests used to determine medical negligence in India<sup>[22]</sup>

In determining the test for medical negligence and prosecution of medical/dental practitioner, the Supreme Court of India (Dr. Suresh Gupta's case (2004) 6 SCC 422) has issued certain guidelines. Once an investigation begins against a doctor, the loss of reputation is nearly irreversible; the nature of work the doctor performs is one involving public service hence it is necessary to have certain guidelines to be issued in this regard.

1. Government of India along with the Medical Council of India should formulate certain rules/regulations to regulate aspects of negligence in medical practitioners.
2. To make a case against a doctor, the complainant has to submit evidence of a prima facie (at first sight) case before the authority taking cognizance of the act.
3. The investigating officer must also, independently, obtain an impartial and unbiased opinion of a doctor who practice in the same field in the same regard (preferably a government hospital)
4. The doctor concerned should not be arrested like in a regular prosecution. He may be arrested if there is a fear that that the doctor will not make himself available for investigation.

**Damages:** is the legal term used to describe the physical, mental, financial, and social suffering caused by the negligent act. Damages determine how much compensation is due to the

victim.<sup>[23]</sup>

**Compensation:** in legal terms is the monetary sum that is given to the patients in personal injury cases caused by the doctor. This monetary amount is meant to compensate for the financial consequences that befell the victim as well as for the physical, social and emotional suffering that they experience as a result of their injuries.<sup>[23]</sup>

#### The damages given to the victim are the following:<sup>[22]</sup>

**Compensation:** In Indian law the concept of awarding compensation is the most usual form of providing a remedy to the injured party. The concept behind providing compensation is not punishment to the erring doctor but to help to the injured party to at least partially recover the loss that they have suffering due to negligence of the doctor. In India the amount compensation starts from a thousand rupees to up to a value in lakhs. The compensation awarded is not always put on the doctor committing the negligence but also the hospital where the doctor is an employee and hence the employee-employer relationship. Here is where vicarious liability comes into place. The patient can claim damages from the hospital that employed the doctor if the doctor is not in a position of paying the compensation amount.

**Punishment through imprisonment:** this is done when a criminal suit is filed in the court by the plaintiff. Most of the time dental/medical negligence cases come under civil courts but in cases where the negligence act is grievous that the injured party is interested in compensation but wants the doctor who committed the act to be punished severely. The punishment is harsh not just to punish the wrongdoer but so that these acts are not repeated and proper and required precautions are taken by the doctor before diagnosing, treating the patient.

**Compensation and imprisonment:** this is very rare in medical negligence cases. This is done when a criminal suit is filed in the court by the plaintiff (patient). The judgment will depend on the facts of the case and the plea of the injured party.

#### Essentials for avoiding legal hassles by a Doctor:<sup>[24],[25],[26]</sup>

1. Know your job; update your professional knowledge and skills continuously.
2. Act in good faith.
3. Maintain proper records of your

professional work for a minimum of 3 years (for adult patients), for child patient (18+3) years and if it is a mediocolegal case or potential mediocolegal case till the case is judged. Do not forget that when something goes wrong it is only the written records that prove your innocence.

4. **Good communication:** All information must be explained in comprehensible non-medical terms, preferable in local languages about the diagnosis, nature of treatment, risk involved, prospects of success, prognosis if the procedure is not performed and alternative methods of treatment.
5. Maintain confidentiality.
6. Never forget to take the appropriate type of consent whenever indicated. Take informed consent if any invasive dental procedure and/or local anesthetic agent is being used; preferably in the local language or in the language patient can read.
7. Before injected L.A. solution perform an allergy test.
8. Know your limits of competence, do not cross them.
9. Do not take decisions on behalf of the patient. Informed and educate the patient and let them take the decision about his/her treatment.
10. When a patient refuses to consent for a treatment /procedure which the doctor feels necessary, the doctor must take an informed refusal of the consent in writing from the patient, in the presence of and authenticated by some independent witness, after fully explaining to the patient/ relatives the risk and consequences of refusal of procedure.
11. Never guarantee a result.
12. Respect the patient, treat the patient like you would want yourself treated.
13. Act within the legal limits. Know the laws, rules and regulation of your profession and do not violate them.
14. Have a professional indemnity insurance of appropriate value and ensure its timely renewal.
15. Know the legal provisions in favour of medical profession. (For e.g. Indian Penal Code (IPC) Section: 52, 80, 88, 89, 92, 93). IPC Section 499 deals with defamation. It can be used by dentist to counter malicious charges by patients intending to spoil the good name of the doctor by frivolous charges.[2]

16. Follow the code of conduct and Dental ethics in letter and in spirit.
17. And finally, do not do any harm to your patient.

### Conclusion

This article was written in mind taking the current state of dental practice where there dentist does not realize that a little bit of empathy goes a long way. Some of the cases filed against dentist are purely to scare the doctor into getting more money out of them and some cases are negligence cases that have occurred due to carelessness or recklessness by the doctors themselves. Dental science is not an exact science, there are no guarantees but what we can do is to give the best possible treatment to the patient under any given circumstances. If the proper protocol is followed then chances of negligence is reduced. Treat patient with respect, treat the patient as you would treat yourself and you would minimize the mistakes. Mistakes happens like the saying 'to err is human' but to manage the mistakes, the complications and to learn from it is what makes us good/great doctors.

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