

in question holds office of profit. In this case it was held that comptroller and Auditor-general of India exercise full control over the Auditors of Government company. Hence, the Auditor is not a holder of office of profit. Thus it is clearly laid down that 'controlling' test decides the nature of 'office of profit'. It is nothing but an organization test. If it is by Government, he holds office of profit. This decision is followed in AIR 1964 SC page 744.

The word 'profit', has a great variety of meanings and it has been variously interpreted in judicial pronouncement. It is an elastic relative term. It is an ambiguous term. It is difficult to lay down any strict legal definition though not impossible.

No doubt Courts held the mere fact, that the Government holds more shares, appoint a Board of Directors is not a factor to hold that the company or any under taking is a state and the office can be treated

as an 'office of profit'. But I feel that the Courts invented a theory called 'Theory of instrumentality', where the Government holds control over the office. In such case, it is deemed to be a 'State' and eventually the 'office is an office of profit'.

Perhaps envisaging these future developments the framers of the constitution deprived a Member of either house to hold two offices; by imposing disqualification.

Members of either house are elected by the citizens to frame the laws in the best interest of the nation. It is a social service. They are paid for it. Under the guise of it no member shall hold office of any other nature, other than the said office.

Hence, it is advisable to the parliament to define 'what is office of profit' instead of leaving it to judicial probe. Guidelines may be laid down in the constitution itself. It avoids frequent judicial interference.

DOCTOR.....NOT ABOVE THE LAW

By

—Dr. CH. RAJENDER,
MBBS, DCH, LL.M, PGDMLE,
(Chairman Legal Cell IMA AP since
1999, Medico Legal Adviser (CAPCO)

Every Medical Practitioner should know Medical Law and Ethics—is essential to know the Legal involvement in the Practice of Medicine to practice medicine smoothly and effectively. Recently after the introduction of CPA, filing of cases against medical practitioners has enormously increased although many are proved baseless. Doctors should not be over confident and should be in a position to understand the

various areas of Litigation – Proceeding in the Court of Law-Scientific defenses should be presented in good way to counter the cases.

Prevention is always better than cure; Medical profession is just like any other profession should be transparent and accountable. Profession should be used for social needs than self.

Medical Related Laws :

- Areas in the Medical field where legal interference is existing
- To know the Legal rights and responsibilities of both Doctor and Patient
- Ethical Consideration in the Practice of Medicine
- Preventive measures : Doctor-Patient relationship- updating Medical skills, consideration of patient is top priority in the management of disease will avoid the unnecessary litigations.
- Importance of record-keeping
- Legal relationship between Hospital management and errors made by the staff-consultants-(Vicarious liability)
- Minimum wages for the staff (Minimum wages Act/Labour Act)
- Law related to disposal of Hospital wastage to avoid environmental contamination (Environmental Law)
- Indemnity Medical Insurances (Insurance Law)
- Dealing with Police – Judiciary – Public representatives – Administrative Heads like RDO, District Collector *etc.*-social prominent personalities in relationship with Medical profession must be studied to maintain and uplift the dignity of Medical Profession in the Society.
- Best presentation in the Court of Law for Expert evidence-Good defense in the course of Court proceedings.
- Social interactions
- Law related to Defective products (Ex.Vaccine caused damage case., (Law of contract)

- Law related to artificial insemination – Abortion – Disclosure of sex of foetus – Sterilizations and Transplantation of Human Organs.

Aware of Medico Legal Areas :

First step to identify the areas of Litigation both in diagnostic – Therapeutic – Rehabilitative then be prepared to be more protective; Medico Legal Issues : Doctor – Arrest, Table death, mismatched blood transfusion, failure of sterilization operation, wrong diagnosis, delay in diagnosis, wrong lab reports, unexpected post operative complications, injury during examinations, substandard treatment, behavior, with patients, Doctor sending nurse out during examination of adult female, precautions for usage of medicines – injections *etc.* explaining the risk of procedures, side effects of medicines – vaccines *etc.* carelessness in the management of disease, unnecessary investigations, un reasonable prescriptions for monitory benefits, follow-up the disease.

Doctor – Patient Relationship :

This is vital area of consideration. My experience by analysis shows that patient never files a suit for Suspicion of Negligence in the Treatment but ‘consideration of patient’ in the management of disease is counted. Services toward sick are noble. Patient is basis for fame and defame of Doctor. Mother *Teresa* was praised by Human race for her positive thinking – working and sacrificing towards sick – dying – abandoned. Usually litigation arises by carelessness, sudden provocation of loss of temper or both, misunderstanding, disinformation and unexpected outcome.

Consider the patient in every aspect at all levels :

‘Your patients won’t care how much you know, but they will know how much you care’

(In examination, diagnostic, Treatment, rehabilitation *etc.*) to lessen Unnecessary Litigation. Sit with the patient, inform to the patient, inform to the patient (Informed Consent). Again listen to the patient, Listen... Listen... Listen... to the patient. Devoting the time with patient will never be wasted but rewarding, understanding and lessen the chance of Litigation.

Doctor should have good relations with the social dignitaries – Administrative heads (Eg. RDO at Taluk, District Collector at District), Judiciary, Police Public representatives in order to understand each other and to prevent flaring up of emotional-related problems.

Reasonable Duty of care :

Be a 'Reasonable man' in Medical Profession and avoid carelessness/exploitation of patients/ Maintain Good rapport – The Doctor Patient Relationship – Cost Effective Treatment – Preserve and uplift the Dignity of Medical Profession

Hospital staff/Vicarious Liability :

Boss is responsible for his staff. Man is not only responsible for his faults but also for others. Hospital authorities are responsible for the whole of their staff, not only for the nurses, Doctors, but also for the anesthetists and surgeons. It does not matter whether they are permanent or temporary, resident or visiting whole time, or part time, the Hospital authorities are responsible for all of them. The reason is because, even if they are servants, they are agents of the Hospital to give treatment. Only exception is the case of consultants or anesthetists selected and employed by the patient himself.

Counselling of Patients :

Soft corner to be involved in Counselling the patient to facilitate in understanding

regarding the pattern of disease self limiting/ risky/fatal and procedures *etc.* And doubts and fears will be discussed towards better solution.

Doctor – Judiciary :

In delivering the judgment in Medico-Legal issues the involvement of Technical/ expert is mandatory, otherwise it will be misappropriation. Example – There are various judgments in 'Failure of Sterilization' cases – like Dismissed – Rs.60,000/- compensation-Rs.2,00,000/- compensation – Although the Grounds of the case is same the judgments may differ- That all depend on how the presentation of 'evidences' are made.

Defenses – interpretations – during the Procedures in the Court of Law. (In above case the inherent risk of failure rate of Sterilization operation technique recommended – Doctor has no control on it – proper management of patient – may be Good defense)...

Consent

Treatment without taking consent can be tried under Law of Battery/Tort of Negligence – whichever is applicable. As the plaintiff has got rights over his own body against interference of action of others (Law of Battery). Defendant has total consent to practice of Medicine (Medicine, Surgery, Diagnostic, rehabilitative *etc.*) on him. Failure to do will liable for damages and punishment. Treatment with consent becomes more defensive otherwise subjected to Law of Battery/Trespass.

Procedure :

Consent must be true and clean. Consent is void when taken from minors, Mental incapacity (must be certified by Legal Authorities) under coercion *etc.* Justifiable actions in unconsciousness patient without

consent are always considered a implied Consent and are always advisable in saving of life of the patient – not violating Law. Features of consent should include :

- (a) Must be explained regarding the procedure and risks of actions by the Doctor on patient
- (b) Plaintiff must express his understanding regarding action of defendant and risks of procedures preferably in common-understandable language.

IPC 304A

Conviction for a criminal offence requires proof beyond reasonable doubt that the person charged has carried out an unlawful act '*actus reus*' in doing so had the necessary guilty state of mind '*mens rea*'

Many of Litigations are tried other than Crimes like Law of Torts – Law of Contracts – Consumer Protection Act *etc.* There are Good Defenses to the Doctors against the Crime – Like Consent – Intention – duress *etc.*, must be presented at the time of proceedings in the Court of Law.

Doctor Medico Legal Cases :

There is no second opinion than *preservation of 'Human Life'* is paramount importance. Doctor whether he is in Government/ Private he can extend his services towards preservation of Life – no law or state action can intervene to avoid delay in discharge of emergency services made by Medical Profession.

Generally Emergencies in Medico-Legal cases are referred because fear of Law than to extent their services towards securing life.

'Supreme Court' gave prime importance in protection of Human Life is paramount importance to Medical Profession even in Medico Legal cases.

"The Supreme Court (*Pt. Paramanand Katara v. Union of India*-Cr. Writ Petition No.270 of 1988) has laid down that whenever of Medical Profession is approached and if he finds that whatever assistance he could give is not sufficient to save the life of patient, but some better assistance is necessary it is the duty of the medical man so approached to provide primary medical and to the patient and then to refer the patient to the hospital where the expertise facilities required for the treatment are available. The practice of the Doctors and certain Government institution to refuse even the primary medical aid to the patient and referring them to other hospitals simply because they are medico-legal case is deprecated by Apex Court and Clause 13 if Code of Medical Ethics dawn up with the approval of the Central Government under Section 33 of Indian Medical Council Act.

Physician is free to choose whom he will serve. He should, however respond to entry request for his assistance in an emergency or whenever temperate public opinion expects the service. 'No medical practitioner shall commit an act of negligence that may deprive his patient from necessary medical care'.

Golden rules to avoid Litigations

- Show immense interest in the welfare of the patient
- Take enough time to examine the patient
- Explain nature of disease whether – self limiting-risky – fatal
- Explain the diagnostic – Therapeutic procedures with their risks
- Take always consent in local and understandable manner
- Update medical knowledge

- Professional indemnity (compensatory) insurance
- Don't refuse emergency because fear of law
- Law is designed for justifications
- Awareness of Medical related laws
- Don't comment on colleagues
- ***At IMA Branch level*** : Make a rapport with social heads – police – Judiciary – Public representatives to lessen the flaring of untoward situation /to understand each other/to prevent unnecessary litigations.

Medical Indemnity Insurance Scheme :

Being insured is the way of Life of Medical Practitioner. Doctor must protect himself against litigations. Medical Profession is not free of risks, after introduction of CPA other related Laws are made Practitioner to handle cases cautiously in the view of emerging litigations. To combat the situation effectively the answer is INSURANCE for compensation in proved cases of litigations. Nature of risk should correlate the requirement of 'Insurance' must be checked before signing the agreement and premium settlements. Before going into contract with insurance he should be clear the area of

contract being involved. Premiums will be high in risk groups like Ortho Surgeons – Obstetricians – Anesthetist *etc.*

Emergency :

Attending the emergency with available duty of care with advice is always justifiable. Just like any other Professional Doctor is not expected to know everything. Doctor is not guaranteed for healing of all ailments. He is expected with possession of qualification and training. Unreasonable delay and Non-attendance of emergency is Negligence-unethical even inhuman. Doctor shouldn't refuse a case only because fear of law. You can picturise the scene of emergency and claim for justification act. *He is Complete-Doctor*

Conclusion :

Doctor can be free of Litigation if he is at 'Reasonable duty of care-is exercised and Non-violation of statutes, ethics-considered'

To avoid Law and litigations – Be 'Reasonable man' in Medical Profession and avoid carelessness – (Patient is innermost core of Medical Profession should be given top priority)/exploitation of patients/ Maintain Good rapport Doctor-Patient relationship – Cost effective Treatment – Preserve and Uplift the Dignity of Medical Profession.