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Medical Negligence: A Growing Menace

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Abstract: **Indian society is experiencing a complete change regarding patient's rights. This trend is clearly evident from the recent spurt in litigation concerning medical professionals. The establishment of liability and claiming redressal for the suffering caused due to medical negligence is on the rise. This has been one of the reasons why the Indian Supreme Court's has taken painstaking efforts to include a right to health as a fundamental right. Medical Law is undergoing a massive change. Significantly our attitude towards our health, health services, and the medical professions is changing. There was a time when doctors were held in the highest esteem; and patients were intended to be, passive and submissive. But this has changed and Doctors are no longer regarded as infallible and beyond questioning. The doctor-patient relationship has now become that of a consumer and supplier.**

Keywords: **Medical Negligence**

I. INTRODUCTION

Ever since the medical professionals have been brought within the ambit of Consumer Protection Act, 1986, [1]there has been a drastic increase in the number of cases filed against the doctors. Doctors are not liable for everything that goes wrong to the patients, but they need to exercise reasonable care and skill in treating patients. Medical practitioners will be held guilty of negligence only if they fall short of fulfilling a reasonable duty of care in treatment of their patients.

A simple lack of care or error of judgment or an accident is not a proof of negligence and so long a doctor follows a practice acceptable to the medical profession he cannot be held liable for negligence merely because a better alternative method was available for treatment .Now one thing which should always be kept in mind is that the standard of care while assessing the practice as adopted is judged in the light of knowledge available at the time of the incident and not at the date of trial. Similarly, when the charge of negligence arises out of failure to use some particular equipment, the charge would fail if the equipment was not available at the time it was suggested to be used.[2]

NEGLIGENCE:

Negligence is a breach of duty caused by omission to do something which a reasonable man guided by those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a reasonable and a prudent man would not do.[3]

If a doctor is negligent in the performance of his duty he can be held liable under both civil[4] and criminal law.[5] He can not only be held liable under the Indian Contract Act of 1872 but also under Law of tort and civil liability would follow. To constitute negligence one has to prove a duty to take care, breach of that duty and the resulting damage. Therefore, the essential components of negligence are:

1. The existence of a duty to take care which the defendant owes to the plaintiff;
2. The breach of that duty towards the plaintiff and
3. Damage or injury by the complainant as a result of such breach.

On the other hand **medical negligence** is the failure of a medical practitioner to provide proper care and attention and exercise those skills which a prudent, qualified person would do under similar circumstances.

In 1969, the Supreme Court in the case of Laxman Balkrishna Joshi v. Trimbak Babu Godbole[6]held that:

A person who holds himself out ready to give medical advice and treatment impliedly undertakes that he is possessed of skill and knowledge for that purpose; he owes a duty of care in deciding whether to undertake the case, what treatment to give and, the administration of that treatment. A breach of any of these duties gives a right of action for negligence to the patient.

This means that when a medical professional, who possesses a certain degree of skill and knowledge, decides

[1] Indian Medical Association v. V P Shanta, AIR 1996 SC 550 (India).
[2] Jacob Matthew v. State of Punjab, AIR 2005 SC 3180 (India).
[3] Ratanlal & Dhirajlal, Law of Torts (26 ed. 2010).
[4] Indian Medical Council Act of 1956, Act No. 102 of 1956.
[5] Indian Penal Code 1860, Act No. 45 of 1860.
[6] AIR 1969 SC 128 (India).

to treat a patient. He is duty bound to treat him with a reasonable degree of skill, care, and knowledge. If he falls below this, he will be held liable for negligence.

Standard of care in medical profession-

In Halsbury's Laws of England the degree of skill and care required by a medical practitioner is stated as follows:

"The practitioner must bring to his task a reasonable degree of skill and knowledge, and must exercise a reasonable degree of care. Neither the very highest nor a very low degree of care and competence, judged in the light of the particular circumstances of each cases, is what the law requires, and a person is not liable in negligence because someone else of greater skill and knowledge would have prescribed different treatment or operated in a different way; nor is he guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art, even though a body of adverse opinion also existed among medical men. Deviation from normal practices is not necessarily evidence of negligence. To establish liability on that basis it must be shown (1) that there is a usual and normal practice; (2) that the defendant has not adopted it; and (3) that the course in fact adopted is one no professional man of ordinary skill would have taken had he been acting with ordinary care."

Bolam Test[7]:

The basic principle relating to medical negligence is known as the Bolam Rule. This was laid down by Justice McNair in Bolam v. Friern Hospital Management Committee as follows:

Where you get a situation which involves the use of some special skill or competence, then the test as to whether there has been negligence or not is not the test of the man on the top of a Clapham omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill. It is well-established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art. In case of medical men, negligence means failure to act in accordance with the standards of reasonably competent medical men at the time. There may be one or more perfectly proper standards and if he confirms with one of these proper standards, then he is not negligent.

Bolam's test has been approved by the Supreme Court in Jacob Mathew's case:[8]

In the case of Jacob Mathew an oxygen cylinder was needed to be connected to the mouth of the patient. The cylinder was empty and the patient died due to lack of oxygen. The honorable Supreme Court held that there was no case of criminal rashness or negligence. As mens rea is essential, it is difficult to argue that the doctor had a guilty mind and was negligent intentionally. This has been the main argument in most of the cases in which the decision was to decide about the criminal liability.

Similarly, in the case of Jacob Mathew, neither the doctor nor any other hospital staff intentionally connected the empty cylinder. Similarly, in Bolam, the doctors or the hospital did not want to do something wrong intentionally. At no point of time, they had a guilty mind. In Bolitho v. City and Hackney Health Authority[9], Lord Wilkinson observed "The Court is not bound to hold that a defendant doctor escapes liability for negligent treatment or diagnosis just because he leads evidence from a number of medical experts who are genuinely of the opinion that the defendant's treatment or diagnosis accorded with sound medical practice. The use of these adjectives – responsible, reasonable and respectable – all show that the Court has to be satisfied that the exponents of the body of opinion relied upon can demonstrate that such opinion has a logical basis. In particular in cases involving the weighing of risks against benefits, the Judge before accepting a body of opinion as being responsible, reasonable and respectable, will need to be satisfied that in forming their views the experts have directed their minds to the question of comparative risks and benefits, and have reached a defensible conclusion on the matter".

Recently Justice S.B.Sinha Recently Justice S.B.Sinha in Malay Kumar Ganguly v. Dr.Sukumar Mukherjee[10], case has preferred Bolitho test to Bolam test. The Supreme Court redefined medical negligence saying that the quality of care to be expected of a medical establishment should be in tune with and directly proportional to its reputation. The Supreme Court extended the ambit of medical negligence cases to include overdose of medicines; not informing patients about the side effects of drugs, not taking extra care in case of diseases having high mortality rate and hospitals not providing fundamental amenities to the patient. The decision also says that the court should take into account patient's legitimate expectations from the hospital or the concerned specialist doctor.

In Kusum Sharma v. Batra Hospital and Medical Research Centre, [11] the apex court reiterated the legal position after taking survey of catena of case law. In the context of issue pertaining to criminal liability of a medical practitioner, Hon'ble Mr. Justice Dalveer Bhandari speaking for the Bench, laid down that the

[7] 1957 1 (WLR)582 (U.K.)
[8] 2005(6) SCC 1 (India).
[9] 1997 (3) WLR 1151 (U.K.)
[10] AIR 2010 SC 1162 (India)
[11] (2010) 3 SCC 480 (India).

prosecution of a medical practitioner would be liable to be quashed if the evidence on record does not project substratum enough to infer gross or excessive degree of negligence on his/her part.

Dismissing the appeal the court held that in the instant case, the doctors who performed the surgery had reasonable degree of skill and knowledge and they in good faith and within medical bounds adopted the procedure which in their opinion was in the best interest of patient. Doctors could not be held to be negligent where no cogent evidence to prove medical negligence was produced by the appellant. The medical texts speak of both the approaches for adrenalectomy as adopted in the present case. Nowhere has the appellant been able to support her contention that posterior approach was the only possible and proper approach and respondent was negligent in adopting the anterior approach.

Error of judgment by medical professionals -

Error of judgment on the part of a doctor (e.g. wrongful diagnosis, wrong treatment) would amount to negligence if it is an error which would not have been made by a reasonably competent professional medical man acting with ordinary care. Very often, in a claim for compensation arising out of medical negligence, a plea is taken that it is a case of bona fide mistake. This may be excusable under certain circumstances but a mistake which would tantamount to negligence will not be pardoned.

In the case of Whitehouse v. Jordan[12]an obstetrician had pulled too hard in a trial of Forceps delivery and had thereby caused the plaintiff's head to become wedged with consequent asphyxia and brain damage. The House of Lords held that the obstetrician was guilty of negligence. The court observed: The true position is that an error of judgment may or may not be negligent; it depends on the nature of the error. If it is the one that would not have been made by a reasonably competent professional man professing to have the standard and type of skill that the defendant holds himself out as having and acting with ordinary care then it is negligence. If on the other hand, it is an error that such a man, acting with ordinary care might have made is not negligence.

In M/S Spring Meadows Hospital v. Harjot Ahluwalia [13] the Supreme Court observed that gross medical mistake would always result in a finding of negligence. Use of wrong drug or wrong gas during the course of anesthetic will frequently lead to the imposition of liability and in some situations even the principle of *res ipsa loquitur* can be applied. Even delegation of responsibility to another may amount to negligence in certain circumstances. A consultant can be negligent where he delegates the responsibility to his junior with the knowledge that the junior was incapable of performing his duties properly.

In Achutrao Haribhau Khodwa v. State of Maharashtra[14]a mop was left inside the lady patient's abdomen during an operation. Peritonitis developed which led to a second surgery being performed on her, but she could not survive. Liability for negligence was fastened on the surgeon because no valid explanation was forthcoming for the mop having been left inside the abdomen of the lady.

Thus, a doctor who is charged with negligence can absolve himself from liability if he can prove that he acted in accordance with the general and approved practice. He will be held liable only if the judgment is so palpably wrong as to imply an absence of reasonable skill and care on his part.

The Consumer Protection Act 1986-

The Supreme Court in a landmark judgment delivered in Indian Medical Association v. V.P. Shantha [15] and clarified the various points raised before it. The court upheld the constitutional validity of the Consumer Protection Act and held that doctors/hospitals and nursing homes fell within the scope of the Act as the services rendered by them including the rendering of consultation, diagnosis and treatment – both medical and surgical – would come under the definition of service under the Act. However, where a doctor or hospital renders service free of charge to every patient or under a contract of personal service, a patient availing of such free services will not be a consumer.

The landmark judgment of Apex Court in Laxman Thamappa Kotgiri v. G.M. Central Railway [16] has given the railway employees the right of consumers while availing treatment in a railway hospital free of cost. Similarly, the beneficiaries of ESI Corporation Kishore Lal v. Chairman, ESIC [17] and in the case of Jagdish Kumar Bajpai v. Union of India[18] (decided by National Commission) they received the right to sue the doctors working in ESI hospital and CGHS approved hospitals and dispensaries even if the treatment is free of cost. This is in stark free treatment was considered outside the purview of Consumer Protection Act.

The above act was enacted to remedy the situation by providing a simple, inexpensive and expeditious method for redressing the genuine grievances of consumers of goods and services and later it came to the rescue of patients who had been victims to medical negligence.

[12] (1981) 1 ALL ER 267 (U.K.)
[13] AIR 1998 SC 1801 (India).
[14] AIR 2011 SC 249 (India).
[15] AIR 1996 SC 550 (India).
[16] (2007) 4 SCC 596 (India).
[17] (2007) 4 SCC 579 (India).
[18] 2007 (MLRI) 75 (India).

II. CRIMINAL LIABILITY IN CASES OF MEDICAL NEGLIGENCE-

A criminal liability arises when it is proved that the doctor has committed an act or made omission that is grossly rash or grossly negligent which is the proximate, direct or substantive cause of patient's death. Under Section 304 A of the Indian Penal Code, a doctor is punishable for criminal negligence. Under this section, "whoever causes the death of any person by doing any rash or negligent act amounting to culpable homicide is punishable with imprisonment for a term that may extend up to two years or with fine or with both."

The criminal law has invariably placed the medical professionals on a pedestal different from ordinary mortals. The Indian Penal Code enacted as far back as in the year 1860 sets out a few vocal examples. Section 88 in the Chapter on General exceptions provides exemption for acts not intended to cause death, done by consent in good faith for person's benefit. Section 92 provides for exemption for acts done in good faith for the benefit of a person without his consent though the acts cause hart to a person and that person has not consented to suffer such harm. Section 93 saves from criminality certain communications made in good faith.

The jurisprudential concept of negligence differs in civil and criminal law. 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 mens rea must be shown to exist. For an act to amount to criminal negligence, the degree of negligence should be much higher i.e. gross or of a very high degree. Negligence which is neither gross nor of a higher degree may provide a ground for action in civil law but cannot form the basis for prosecution.

The judiciary through many judgments has made absolutely clear the when can a case be considered within the ambit of criminal negligence:

In the case of Reg v.Idu Beg[19] the court held that . Criminal negligence is the gross and culpable neglect or failure to exercise that reasonable and proper care and precaution to guard against injury either to the public generally or to an individual in particular, which having regard to all the circumstances of the case out of which the charge has arisen, it was the imperative duty of the accused person to have adopted.

The court in R. v. Prentice & Sullman[20] and in R. v. Adomoko[21] have settled the law as to how to determine criminal negligence in medical practice. The following is the test to bring home the charge of criminal negligence in medical field as settled in R. v. Adomako.

a) Indifference to an obvious risk of injury to health;
b) Actual foresight of the risk coupled with the determination nevertheless to run it;
c) An appreciation of the risk coupled with an intention to avoid it, but the attempted avoidance involves a very high degree of negligence and
d) Inattention to a serious risk which goes beyond "mere inadvertence" in respect of an obvious and important matter which the doctor's duty demanded, he should address.

The Supreme Court in Dr. Suresh Gupta v. Govt. of NCT [22]has declared that for fixing criminal liability on a doctor or surgeon, the standard of negligence required to be proved should be so high as can be described as "gross negligence" or "recklessness". The court, in this case, held: "Where a patient dies due to the negligent medical treatment of the doctor, the doctor can be made liable in civil law for paying compensation and damages in tort and at the same time, if the degree of negligence is so gross and his act was so reckless as to endanger the life of the patient, he would also be made criminally liable for offence under Section 304-A IPC."

In this case, the patient was operated by the appellant plastic surgeon for removing his nasal deformity resulting in the death of the patient. It was alleged that the death was due to 'asphyxia resulting blockage of respiratory passage by aspirated blood consequent upon surgically incised margin of nasal septum'. The cause of the death was found to be not introducing a cuffed endo-tracheal tube of proper size so as to prevent aspiration of blood from the wound in the respiratory passage. The court held that the carelessness or want of due attention and skill alleged in this case cannot be described to be so reckless or grossly negligent as to attract criminal liability.

Proving negligence -

In cases of medical negligence it is very easy to allege but often very difficult to prove. The burden of proof as always has to be discharged by the person who alleges it. After the claimant proves his case the burden then shifts to the opposite party.

A complaint alleging negligence by mishandling of needle biopsy as the needle pierce the blood vessel of the patient resulting in death, is dismissed by the National Commission on the grounds that the complainant neither filed any report of a doctor to substantiate the averments made in the complaint nor produced any medical literature in support of the allegations. Thus, there was no evidence on record of any negligence in the procedure adopted for

[19] 1881 [1] 3 All 776 (India).
[20] Court of Appeal (1993) 4 Med LR 304 (U.K.)
[21] (1993) 4 All ER 935; 15 BMLR 13; CA affirmed by (1994) 3 All ER 79 (HL)
[22] [2004] 6 SCC 422 (India)

needle biopsy except the bald allegations of the complainants.

Expert testimony -

The plaintiff in a medical negligence action is ordinarily required to produce, in support of his claim, the testimony of qualified medical experts. This is true, because the technical aspects of his claim will ordinarily be far beyond the competence of the judges whose duty is to assess the defendant doctor's conduct. The plaintiff, himself a layman in most instances, is not free simply to enter the courtroom, announce under oath that the defendant surgeon amputated his leg instead of saving it, and then request the jury to find the surgeon negligent. The judges, possessing no special expertise in the relevant field, are incapable of judging whether the facts described by the plaintiff, even assuming an accurate narration by him, add to a negligent conduct. And the plaintiff himself lacks the training and experience that would qualify him to characterize the defendant's conduct.

Ever since medical professionals have been brought under the ambit of Common Protection Act, there is a rise in the number of unnecessary, frivolous and even malicious litigation harming medical fraternity. In the light of this, the Supreme Court in Martin F D' Souza v. Mohd. Ishfaq[23] has directed the consumer forum to first seek an expert opinion from a panel of doctors whether any prima facie case is made out against the doctor or not, and only thereafter send notice to the medical practitioner. This was thought necessary to avoid harassment to doctors who may not be ultimately found to be negligent. However, recently Supreme Court in V. Kishan Rao v. Nikhil Super Speciality Hospital[24] held that expert opinion of prima facie negligence is not a precondition for consumer forum to proceed with the case. Expert opinion is required only when a case is complicated enough warranting expert opinion, or facts of a case are such that forum cannot resolve an issue without expert assistance. It was further held that direction given in Jacob Mathew v. State of Punjab [25]for consulting another doctor before proceeding with criminal investigation was confined only in cases of criminal complaint and not in respect of cases before the consumer forum.

Important guidelines laid down by the Supreme Court to stop harassment of doctors:

The Bench in D'Souza noted the previous three-Judge Bench judgment in Mathew but in Para 106 of its judgment D'Souza equated a criminal complaint against a doctor or hospital with a complaint against a doctor before the consumer fora and gave the following directions covering cases before both:

We, therefore, direct that whenever a complaint is received against a doctor or hospital by the consumer fora (whether District, State or National) or by the criminal court then before issuing notice to the doctor or hospital against whom the complaint was made the Consumer Forum or the 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 a prima facie case of medical negligence should notice be then issued to the doctor/hospital concerned. This is necessary to avoid harassment to doctor who may not be ultimately found to be negligent. We further warn the police officials not to arrest or harass doctor unless the facts clearly come within the parameters laid down in Jacob Mathew case, otherwise the policemen will themselves have to face legal action.

After refereeing to these directions the court expressed the view that the aforesaid directions in D'Souza are not consistent with the law laid down by the larger Bench in Mathew. In Mathew the direction for consulting the opinion of another doctor before proceeding with criminal investigation was confined only in cases of criminal complaint and not in respect of cases before the Consumer Fora .

III. CONCLUSION:

Sometimes what one feels is that the medical profession has consistently resisted the jurisdiction of the courts. A recent Supreme Court in Jacob Matthews's case, judgment puts medical professionals in India above the criminal law of the land. But surely it is hazardous to start carving out exceptions to the uniform applicability of criminal law.

The judgment directs that a doctor accused of rashness or negligence may not be arrested in a routine manner simply because a charge has been leveled against him but only if arrest is necessary for furthering investigation or collecting evidence or if the doctor did not make himself available for facing prosecution. There is no reason in law or any logic why these sound directions should not be applicable to every person accused of an offence.

It is hazardous to start carving out exceptions to the uniform applicability of criminal law. Tomorrow, no FIRs may be lodged against engineers whose sub-standard buildings collapse and lead to deaths, unless a fellow engineer certifies that there was negligence. And no criminal case could be registered against a lawyer without the expert opinion of a fellow lawyer. To protect patients' rights, the accountability of professionals has to be taken out of the ambit of vested interests and professional

[23] (2009) 3 SCC 1 (India).

[24] (2010) 5 SCC 513 (India)

[25] (2005) 6 SCC 1 (India)

coteries. Another reason why medical professionals should not be given leverage is that they would get ample time and opportunity to fabricate the evidence on record. This is quite possible as we know how the police in India work.

Immunity and prerogatives to medical practitioners have no place in a democratic society. Doctors should be as accountable as other professionals under criminal, civil and consumer law for any acts of carelessness leading to harm. As Justice Laskin in Reibl vs Hughes[26] declared, "The definition of duty of care is not to be handed over to the medical or any other profession, but a matter for law and the courts. They cannot stand idly by if the profession, by an excess of paternalism, denies its patients a real choice. In a word, the law will not permit the medical profession to play God".

The judicial system of India so far has been able to strike a balance between the interests of medical practioners and patients to some extent. There has been a common saying that a hand continuously trembling under the fear of getting prosecuted cannot perform an operation. In other words a doctor cannot carry out his profession if he is under such pressure of being sent to jail for an act which was done in good faith.

But on the other hand we have innocent patients who have to bear the brunt of negligence committed by medical professionals. According to such patients the laws should be made more stringent. Making the law stringent would not do any good until and unless it is properly implemented. It is very important to punish the guilty doctors, which would be a lesson for others acting in a rash and negligent manner.

Recently what happened in the Bilaspur (Chhattisgarh) has send shivers down the spine of many, eleven women die and 34 were reported critical after undergoing faulty sterilization surgeries at a government organized family planning camp in Bilaspur district of Chhattisgarh.[27]

Medicines past their expiry date were given to the patients and the surgeries were conducted in an extremely unhygienic place which led to the deaths. This is criminal negligence on the part of the government. According to the news report the doctors had done 83 surgeries in 5 hours which was impossible because each surgery takes a minimum time of 20 minutes. Strict action should definitely be taken against the people involved.

The Chhattisgarh High Court took *suo motu* cognizance of the tragedy and asked the government to submit a detailed report on the incident within 10 days, while appointing two advocates as amicus curiae.

Now there have been few arrests and the doctors as usual claim to be innocent. But what the judiciary along with the legislature needs to do is specify separate courts to deal with such case of medical negligence. This would not only save the doctors but even the patients from mental as well as physical harassment.

[26] 1980 2 SCR 880 (India)

[27] Pawan Dahat, 11 women die after sterilisation surgeries in Chhattisgarh, The Hindu, November 11, 2014

