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Medical Negligence in India – A Critical Study

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ABSTRACT

Medical negligence has nowadays have become one of the serious issue in India. Our experience tells us that medical profession is one of the noblest professions. Patients usually see the doctors as God as it is them who are going to treat their illness, health issues and in the end they will be cured and healed by them and we at least expect them to be careful while discharging their duties toward their patients. Medical negligence is also termed as medical malpractice that is an improper, unskilled, improper or negligent treatment of the patients by their physician, dentist, nurse or other health care professionals. In 1995, the SC decision in the case Indian Medical Association v. V.P. Shanta& Ors1 brought the medical services within the ambit of "service" defined in the consumer protection act 1986. This defined relationship between patients and medical professionals by giving contractual patients the power to sue doctors if they sustained injuries in the course of treatment in 'procedure free' consumer protection courts for compensation. There is an urgent need to check increasing trend in number of medical negligence cases and deteriorating quality of healthcare in India. Study of decided cases of medical negligence can provide an insight into the reasons for medical negligence cases, factors mainly responsible for medical negligence and impact of doctor-patient relationship, etc.

The present paper aims to analyze the concept of negligence in medical profession in the light of interpretation of law by the Supreme Court of India.

Keywords: *Negligence, Medical Negligence, Consumer Protection, Civil Liability, Dorts, Damage.*

I. INTRODUCTION

"No Doctor knows everything. There is a reason why it is called "practicing" medicine"

Let us first understand what actually Negligence is as we know there are various definitions of negligence as it comes under the various aspects of laws such as contract, tort, crime etc. As in layman term we can define negligence as an omission to take proper care over something which results in damage. In other words we can term it as irresponsibility,

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neglecters or say doing of something which a reasonable man would not do. In legal terms we can say breach of duty to take care of something which results in damages.

The concept of negligence and negligence law emerged in a very famous case of *Donoghue v. Stevenson*[2], until this case traditional view was that there were a number of relationships that created particular duty including that of a doctor and patient, employer and employee. With reference to another famous English case *King* v. *Phillips*[3] it was observed that a question of negligence arises only when there is a direct harm to the plaintiff by the misconduct and the harm should be foreseeable. Therefore in short we can say that damage is an essential ingredient to constitute negligence.

Negligence is a breach of duty of care so it gives another person legal right which should be respected. According to Charles worth and Percy[4] in a recent forensic speech, Negligence has three meanings. They are

- A state of mind, in which it is opposed to intention
- Careless conduct
- The breach of duty to take care

Making mistakes is a part of human nature but sometimes these mistakes cause damage to another person to such extent sometimes at the cost of their lives and one of such negligence we have termed it as "Medical Negligence". Patients usually see the doctors as God as it is them who is going to treat their illness, health issues and in the end they will be cured and healed by them and we at least expect them to be careful while discharging their duties toward their patients. But as we say even the God has made some mistakes and eventually doctors are human and no human is perfect but their mistakes leads to severe injuries and sometimes results in the death of their patients. Medical negligence is also termed as medical malpractice that is an improper, unskilled, improper or negligent treatment of the patients by their physician, dentist, nurse or other health care professionals.[5]

English law has not made any special provisions for negligence made by doctors, they are simply treated as one professional among others. In the very recent case of *R v. Prentice & Sulleman Adomako and Holloway*[6] the court dealt simultaneously with two cases of alleged medical manslaughter by gross negligence and a case involving an electrician and applied

[2] [1932] UKHL 100.
[3] [1953] 1 QB 429.
[4] Charles worth & percy, negligance – 559 (christopher walton, 14th ed., 2019).
[5] Supra note 4.
[6] [1994] QB 302.

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exactly the same reasoning to all of them.

History shows that the view of medical negligence has been shifted from crime to tort approach. In earlier civilization such as code of Hammurabi developed by Babylon's king centuries before Christian era suggests that doctor's hands were cut if any patient died during the operation. The issue of medical negligence can be found in Manusmriti, charaka samita etc. Thus it was considered more as a crime than a tort. But with the rapid progress of civilization this perception was changed and it was being treated as tort so that the judiciary can award damages to the victims. The law on medical negligence has developed gradually through a series of judgments over a period of time.

As discussed earlier the concept of negligence, this concept is little different from professional negligence, for professionals such as medical practitioners an additional perspective was added through a test known as the Bolam test[7] which is also the accepted test in India. The famous Mc Nair made the observation:

"A doctor is not guilty of negligence if he has acted in accordance with a practice accepted by a responsible body of medical men skilled in that particular art."

This approach has been accepted in India in the case of *Jacob Mathew v. State of Punjab*[8] after an in depth survey and analysis of both English and Indian decisions observed that:

"A lawyer does not tell his client that the client shall win the case in all circumstances. A physician would not assure the patient of full recovery in every case. A surgeon cannot and does not guarantee that the result of surgery would invariably be beneficial, much less to the extent of 100% for the person operated on. The only assurance which such a professional can give or can be understood to have given by implication is that he is possessed of the requisite skill in that branch of profession which he is practicing and while undertaking the performance of the task entrusted to him he would be exercising his skill with reasonable competence."

II. MEDICAL NEGLIGENCE – LAWS IN INDIA

In the circumstances of Indian law, medical negligence comes under three categories that is

- Criminal negligence
- Civil negligence

[7] Bolam v. Friern Hospital Management Committee, [1957] 1 WLR.
[8] Appeal (crl.) 144-145 of 2004.

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- Negligence under consumer protection Act

Different provisions regarding the remedy in the form of punishment and the compensation are covered under these three laws.

(A) Criminal Law And Medical Negligence

Indian Penal Code has laid down the medical professional on a different footing as compared to an ordinary human. Section 304A of the IPC 1860 states that " whoever causes the death of a person by a rash or negligent act not amounting to culpable homicide shall be punished with imprisonment for a term of two years, or with a fine or with both."

Thus, criminal liability can also be imposed upon a doctor under particular situations wherein the patient dies during the time of managing anesthesia during the time of operation the death must also be due to malicious intention or gross negligence[9]. Despite the rights provided to patient mentioned above there are few exceptions as well in the form of sec 80 and 88 of IPC and provide defences to doctor. Under sec 80 'nothing is an offense that is done by accident or misfortune and without any criminal intention or knowledge in the doing of a lawful act in a lawful manner by lawful means and with proper care and caution.' Under sec 88 'a person cannot be accused of an offense if she/ he performs an act in good faith for the other's benefit, does not intend to cause harm even if there is a risk, and the patient has explicitly or implicitly given consent.'

In *Kurban Hussein Mohammedali v. State of Maharastra*[10], in the case involving section 304A of IPC, 1860 it was stated that "To impose criminal liability under Section 304-A, it is necessary that the death should have been the direct result of rash and negligent act of the accused, without other person's intervention".

(B) Civil Law And Medical Negligence

The spot regarding negligence under civil law is very important as it surrounds many elements within itself. Under the tort law or civil law, this principle is applicable even if medical professionals provide free services[11]. It can be said that where the consumer protection act ends tort law starts. In cases where the services offered by the doctors and hospital does not come under the ambit of CPA, patients can take help of tort law and claim compensation. Here the onus lies on the patient to prove that the damage has been occurred due to the negligence of the doctor or the hospital.

[9] Available at http://lawcommissionofindia.nic.in/reports/rep196.pdf.
[10] 1965 AIR 1616, 1965 SCR (2) 622.
[11] Smreeti Prakash, *'A Comparative Analysis of various Indian legal system regarding medical negligence.'*

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In the case of *State of Haryana& Ors. v. Smt. Santra*[12] the Supreme Court held that every doctor "has a duty to act with a reasonable degree of care and skill." However, since no human is perfect and even the most renowned specialist can commit a mistake in diagnosing a disease, a doctor can be held liable for negligence only if one can prove that she/ he is guilty of a failure that no doctor with ordinary skills would be guilty of if acting with reasonable care.

In *Kanhaiya Kumar v. Park Medicare & Research Centre*[13] it was held that negligence has to be established and it cannot be presumed.

(C) Consumer Protection Act And Medical Negligence

Since 1990, there is a huge speculation and debate on whether medical services are explicitly or categorically included in the definition of "Services "as under section 2(1) of consumer protection Act. Deficiency of service means any fault, imperfection, shortcoming, or inadequacy in the quality, nature, or manner of performance that is required to be maintained by or under any law for the time being in force or has been undertaken to be performed by a person in pursuance of a contract or otherwise about any service.

The question that comes to mind is that where can a complaint be filed; the answer is that, a complaint can be filed in:

1. The District Forum if the value of services and compensation claimed is less than 20 lakh rupees,
2. Before the State Commission, if the value of the goods or services and the compensation claimed does not exceed more than 1 crore rupees, or
3. In the National Commission, if the value of the goods or services and the compensation exceeds more than 1 crore rupees.

The good positive thing is that there is a minimal fee for filing a complaint before the District consumer redressal forums. In 1995, the SC decision in the case *Indian Medical Association v. V.P.Shanta & Ors.*[14] brought the medical services within the ambit of "service" defined in the consumer protection act 1986. This defined relationship between patients and medical professionals by giving contractual patients the power to sue doctors if they sustained injuries in the course of treatment in 'procedure free' consumer protection.

[12] AIR 2000 SC 1888
[13] III (1999) CPJ 9 (NC).
[14] 1996 AIR 550, 1995 SCC (6) 651.

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III. COMPARATIVE STUDY

While researching about medical negligence I came across many cases and incidents about how developed countries tracked cases of medical negligence and medical errors. By tracking the incident the authorities are able to examine why such cases of negligence happens. After the identification of the problem, they are able to adopt measures which reduces such error which often causes severe injury and damages and sometimes even permanent disability and also in death.

In the U.K; The National Health Service Litigation Authority (NHSLA) in the UK revealed that 10,129 claims cases were filed in the 12 months up to March 2013, compared with 9,143 the previous year. The NHSLA a special health authority responsible for handling both clinical and non-clinical negligence cases on behalf of the NHS brings out a fact sheet each year outlining details of claims cases. According to the NHSLA claims are now settled in an average of 1.25 years, counting from the date of notification to the NHSLA to the date when compensation is agreed or the claimant discontinues their claim. Thus the authority also tracks how much time it takes for a claims case to be processed. Its annual fact sheet gives a break-up of the claims cases by specialty and also by which specialty accounted for the highest compensation.

And in June this year, Health Secretary Jeremy Hunt revealed that 500,000 patients were harmed and 3,000 died each year from lapses in safety in the NHS. He added that known cases of error included 161 people with foreign objects left in their bodies, like swabs or surgical tools; 70 people suffering wrong-site surgery, where the wrong part of the body or even the wrong patient was operated on; and 41 people given incorrect implants or prostheses. This was widely reported in the Press. Compare that to our health ministry which has no data on medical negligence or error in Delhi, let alone the whole country.

In the US: The April 2013 issue of British Medical Journal Quality and Safety included a study done by researchers of Johns Hopkins University which estimated anything between 80,000 to 160,000 deaths annually from diagnosis errors. According to the Journal of the American Medical Association (JAMA), medical negligence is the third leading cause of death in the US. Yet, according to a *Harvard Medical Practice Study, only one* in *eight* or 2% of patients *injured* by medical *negligence filed malpractice claims*. It is often believed, without any concrete evidence, that much of the litigation in the US is frivolous. Researchers at the Harvard School of Public Health examined over 1,400 closed medical negligence claims and found that 97% were meritorious and about 80% involved death or

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serious injury. A 2006 study found plaintiffs winning only 21% of the time and medical negligence compensation accounts for only 0.3% of national healthcare costs.

In Australia: In 2011-12 approximately 1,300 new claims were reported in the public sector and about 1,700 claims were reported in the private sector. On average, the length of time between incident and when the claim was opened was about 2 years, and 3 to 4 years between the health- care incident and when the claim was closed. Only 9-10% of the cases took more than five years. About 54% of the 2,978 combined public and private sector claims cost less than $10,000, 25% cost between $10,000 and $100,000, 16% cost between $100,000 and $500,000, and 5% cost $500,000 or more. This was stated in a report compiled by the Australian Institute for Health and Family Welfare, a government institution. The report gives a detailed analysis of how many claims are filed in the private and public sector, how much average compensation was paid, the time taken to settle claims, specialties accounting for the claims cases and so on.

If these countries can do it, why is India unable to do so? Why are doctors here defensive about their negligence or errors being examined and recorded? Why does the government not heed the public demand for a more accountable health delivery system? These are important questions that need to be addressed at the earliest.

When we talk about the landmark judgment in medical negligence case the very first case that comes to our mind is one of the most talked case with the highest amount of compensation granted till date. In *Kunal Saha v.AMRI Hospital*[15] *(*advanced medical research institute) famously known as Anuradha Shaha case. This case was filed in the year 1998 with the allegation of medical negligence on Kolkata based AMRI hospital along with its three doctors namely Dr. Sukumar Mukherjee, Dr. Baidyanath Halder and Dr. Balram Prasad. The facts of the case is that the wife of the plaintiff was suffering from drug allergy and the doctors were negligent in prescribing medicine which further aggravated the condition of patient and finally led to death. In brief this was the facts and circumstances of the case, in this case the final verdict was given by the Supreme court on 24th October 2013 and a compensation of around 6.08 crore for the death of his wife.

But is that amount is sufficient to fill the void that has been created by her death? No amount of money whatever is given cannot bring her back and what led her to death, the negligence on the part of the doctors. A small negligence can lead to dangerous ends. It is there duty to serve their patient properly because of them sometimes many of the patient lost their lives.

[15] Criminal Appeal Nos. 1191-1194 of 2005.

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In the case of *V.Krishan Rao v Nikhil Super Speciality Hospital 2010*[16], Krishna Rao, an officer in malaria department filed a complaint against the hospital for negligent conduct in treating his wife. His wife was wrongly treated for typhoid fever instead of malaria fever, due to the wrong medication provided by the hospital. Finally, the verdict was given and Rao was awarded a compensation of Rs 2 lakhs. In this case, the principle of **"*Res Ipsa Loquitor*"** which means **'thing speak for itself'** was applied and the compensation was given to the plaintiff.

A mere sum of 2 lakhs rupees is not going to reduce the pain and disturbance which has been caused to the patient both mentally and physically. If the treatment has been given of typhoid then obviously the medicines would have been given for the same cause and medicine also have their side effect as well. And how they can be so negligent while discharging their sole duty towards their patient. All these are the sole queries that is need to be discussed.

In some cases of medical negligence, the compensation to the victim has given looking on the ethical values related to humanitarian basis as we can infer with the case of *Pravat Kumar Mukherjee Vs. Ruby General Hospital and ors*[17] *,* in this case National Commission of India delivered a land mark judgment for treating of accident victim, what happened in this case the complainant were the parents of deceased boy named Samanate Mukherjee a 2nd year B.tech boy who studied in Netaji Subhas Chandra Bose Engineering College , the complaint was filed in National Commission of India. The boy was hit by a Calcutta transport bus and rushed to the hospital which was 1 km from the accident spot. The boy was conscious when he was taken to hospital and he showed his medical insurance card, which clearly says that the boy will be given Rs.65000 by the Insurance company in case of accident, relying on it hospital started treating boy but after giving some initial treatment hospital demanded Rs15000 and on the non- payment

of the demanded money hospital discontinued treatment of the boy and the boy was rushed to another hospital in the way the boy died. This was the case and in this case the National Commission held Ruby hospital liable and provided Rs.10 lakhs as compensation to the parents. So, in this case the court looked on humanitarian basis and compensation was awarded to the complainant.

Here the court is talking about humanity, well where was the humanity when that patient condition was critical the hospital authorities refused to treat him just because he refused to pay the amount because he was having the insurance. Whatever the situation was they should

[16] CIVIL APPEAL NO. 2641 OF 2010 (Arising out of SLP (C) No. 15084/2009).
[17] ORIGINAL PETITION NO. 90 OF 2002.

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have treated them and now merely compensating them with 10 lakhs, what wonders is that going to do, Is he going to come back? No

IV. CONCLUSION

We discussed about negligence and how this concept was all started and established. Then we came to the concept of medical negligence and how it is little different from negligence. When we talk about medical negligence outside India, as compared above the laws and regulation is actually very strict as compared to India and here the question if other countries can then why cannot India. Why cannot it actually frame such strict rules so that no more lives should be lost because of one small negligence?

When we talk about law related to medical negligence in India the burden of proof always lies on the plaintiff that is the patient to establish how the negligence actually happened. So even if a patient alleges negligence the law will require higher standard of evidence to prove it. Here, for an ordinary human or a patient, it becomes very difficult to determine the exact damage and the causal relation between the injury and the fault of the doctor.

Resultantly, the patient is not able to prove doctor's fault beyond a reasonable doubt, since, the field of medicine is unexpected and unpredictable and anytime anything can happen in a human body and so, it reverts to the plaintiff. Therefore, it is high time that the laws dictating upon the medical negligence get changed so as to suit patients first. And the patients should be sensitized regarding their rights against medical malpractices by civil societies through a proper education channel.

In a country where there is (a) an terrible investment in health, (b) the absence of human resources, (c) a huge gap between urban and rural health care, and (d) poor political will to improve the health sector, it would be prudent to implement a no-fault liability system within the public health sector and also to have caps on the types compensation after research and discussion. The government needs to act and invest in health care before it is too late. India needs to overhaul the present system of addressing medical negligence using all of the above-mentioned solutions effectively.

To quote *Mahatma Gandhi*, **"It is health that is a person's real wealth and not pieces of gold and silver"**

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