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# Medical Negligence Claims

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## ABSTRACT

*Medicine is a complex field and there are many ways to treat a patient. Highlighting invariable aspects on the plight of those in the medical profession, these mavens are faced with criminal threats, hostility, and medical negligence suits day in and day out. This article while discussing the nuances of a claim for medical negligence, also highlights the plight of the doctors in such instances. The article also sheds some light on the calculation of compensation for a case of medical negligence, with insights from various Indian and International case laws. With a plethora of frivolous complaints being increasingly filed against doctors, they have lost the autonomy to practice the medical profession on their own terms. The chance to make them liable in the slightest of accidents or mishaps has increased by leaps and bounds. While the Hypocrite Oath and the World Medical Association's Draft (WMA) of an International Code of Medical Ethics call for an ethical means on how a medical professional is to function, there seems to be very little in terms of letter and spirit to protect and safeguard the everyday saviors in terms of International and National statutes. If this erroneous practice were to continue, the medical profession shall perish to exist as we know of it today with the hands of the doctors being tied up in every which way he goes, the heavy dark shadow of medical negligence and criminal liability looming over him always, threatening the very essence of medicine and the medical sciences. Thus, the 'Sword of Damocles' hanging above the head of the doctor must be slain sooner than later.*

## I. AN OVERVIEW

In the wake of the country's health sector creaking under the weight of the COVID-19 pandemic and with various parts of the nation experiencing intensive lockdowns, our frontline warriors soldiered on with very few protective gears and equipment, putting their lives in danger to protect mankind from the much-dreaded virus.

As per an Amnesty report, the WHO in April 2020 had called upon all governments, employers, worker organizations, and the global community at large to take urgent measures to (i) protect the occupational health and safety of frontline health workers and emergency

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responders, (ii) respect their rights to decent working conditions, and (iii) develop national programs for their safety.<sup>2</sup> However, protests and demonstrations throughout India suggest that these healthcare workers, right from the grassroots level such as the ASHA worker to residents and doctors in hospitals have salary dues yet to be paid.

Highlighting invariable aspects on the plight of those in the medical profession, these mavens face criminal threats, hostility, and attacks, day in and day out. Furthermore, they are piled with medical negligence suits and criminal charges, despite being the ones who render an indispensable service to society. Every time a professional is made to appear on stands, he is stripped of his credentials and his entire career takes a huge blow. Other than showcasing him in poor light, his entire reputation, which he had carefully built over the years, is slashed in one single move and his name is tarnished in society. The compensation which might be awarded to him when the case may be found to be vexatious equates nowhere near the humiliation and the defamation that he has faced during the trial.

## II. LITIGATION & A CLAIM FOR MEDICAL NEGLIGENCE

A case of medical negligence differs from other general litigations because the claimant in such cases must rely on expert medical evidence to establish all major elements of liability. The usual rules rely on establishing that a duty of care is owed by the defendant to the claimant and that the defendant is in breach of such duty. The standard test for a breach is whether the defendant has matched the abilities of a reasonable, prudent person or not and if such person has acted as how a prudent man would have acted in such a circumstance. In *Bolam v. Frien Hospitals*, McNair J states that the defendant had to have acted in accordance with the practice accepted as proper by a "responsible body of medical men." Later he goes on to refer to a standard of practice recognized as proper by a competent reasonable body of opinion.<sup>3</sup>

To determine whether a body of opinion is responsible, reasonable, or respectable, the courts will need to be satisfied that, the experts have directed their minds to the question of comparative risks and benefits and have reached a defensible conclusion on the matter without any lacunas.<sup>4</sup> In the absence of an expert opinion provided by the patient in proving beyond reasonable doubt that the doctors are indeed negligent, the case may thus be dismissed

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<sup>2</sup> Anuradha Raman, *At the forefront of India's healthcare system, ASHA workers soldier on - unprotected and poorly paid*, THE HINDU, July 04, 2020.

<sup>3</sup> (1957) 1 W.L.R. 582.

<sup>4</sup> *Bolitho v. City & Hackney Health Authority*, (1997) 3 W.L.R. 1151.

with no costs. When there is a lack of expert opinion, mere allegations will not suffice to seek damages.<sup>5</sup>

### **What would Amount to a case of Medical Negligence?**

Medicine is a complex field and there are many ways to treat a patient. Choosing one particular mode of treatment among many other ways is not medical negligence even if that particular method were to not give any result.<sup>6</sup> A mere error in judgment by the doctor is also not held to be as amounting to medical negligence.<sup>7</sup> Only when there is a deliberate omission or commission on part of the doctors, can it be termed as medical negligence.

### **Applicability of the Bolam's Test Principles in India:**

The applicability of the Bolam's test principles in India state 'negligence' as the breach of duty caused by the omission to do something which a rational and practical man guided by certain principles would usually or generally regulate the conduct of human nature would do or doing something which a prudent and reasonable man would not do. The essential components of negligence being: 'duty', 'breach', and 'result in damage'.<sup>8</sup> A professional may thus be held liable for his act of negligence on one of the two findings: (I) either he was not possessed of the requisite skills which he professed to have possessed, or (II) he did not exercise and act with reasonable competence.<sup>9</sup>

## **III. COMPENSATION CALCULATION IN CASES OF MEDICAL NEGLIGENCE**

In determining the appropriate lump sum to be awarded in respect of medical and nursing care, recourse is had to the 'multiplier and multiplicand'.<sup>10</sup> In India, there is no specific formula given or adopted either in the Consumer Protection Act or by the apex court under any other law. In these circumstances, the court can look into other welfare enactments like the Motor Vehicles Act and Workmen's Compensation Act for the purpose of arraying a just award merely because there is no specific codification in respect of calculating the damages to be awarded in a claim for medical negligence. Under this arises the concept of 'No-fault' liability. The lack of uniformity and consistency has been a matter of grave concern. It has been time and again felt that if different Tribunals were to calculate compensation differently on the same facts; the claimant, the litigant, and the common man will be confused, perplexed,

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<sup>5</sup> Smt. Savitri Singh v. Dr. Ranbir PD. Singh, (2004) 1 C.P.J. 25 (Bihar).

<sup>6</sup> Achutrao Haribhau Khodwa v. State of Maharashtra, (1996) S.C.C. 634.

<sup>7</sup> Deepak Kumar Sastangi v. Sanjeevan Medical Research Centre, (2016) S.C.C. Online N.C.D.R.C. 1652.

<sup>8</sup> Jacob Mathews v. State of Punjab, (2005) 6 S.C.C. 1.

<sup>9</sup> Ins. Malhotra (MS) v. Dr.A.Kriplani, II (2009) C.P.J. 18 (S.C.).

<sup>10</sup> Mcilgrew v. Devon Country Council, (1995) E.I.Q.R. Q66 C.A.

and bewildered. If there is significant divergence among Tribunals in determining the quantum of compensation on similar facts, it will lead to dissatisfaction and distrust in the legal system.<sup>11</sup> This is where the multiplier method<sup>12</sup> comes into the picture. It ensures uniformity and consistency in the decisions, rendering in the speedy disposal of cases promptly and effectively.<sup>13</sup>

#### IV. AN EXPERTS' CALLING

With a plethora of frivolous complaints being increasingly filed against doctors, they have lost the autonomy to practice the medical profession on their own terms.<sup>14</sup> The chance to make them liable in the slightest of accidents or mishaps has increased by leaps and bounds. A competent doctor or a committee of doctors is to be construed for this very reason to protect the autonomy of the medical profession and to stop trivial complaints from raiding the freedom of doctors. Exemplary damages are to be awarded to a plaintiff above the value of actual loss sustained, only to serve as a punishment to the defendant and to act as a deterrent to others. The compensation awarded in such cases too must be just and based on certain principles.<sup>15</sup> If the court is to go on awarding 'exemplary' damages in each case, the medical profession would cease to exist in its entirety, slowly but surely. In cases where a professional is involved and in cases where accusations are leveled, the consequences of which are disastrous to the career and reputation of the doctor, the court should pause and take a moment before entertaining such complaints in the absence of complete and adequate material before it.<sup>16</sup> There is an indispensable need for the legislature of the country to bring about in framing and executing comprehensive legislation to safeguard the medical profession from future onslaughts regarding liability for medical and criminal negligence.

#### V. CRITICAL ANALYSIS

The rights and safety of the doctor have been resting on the back burner for too long. While the Hypocrite Oath and the World Medical Association's (WMA) draft of an International Code of Medical Ethics<sup>17</sup> call for an ethical means on how a medical professional is to

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<sup>11</sup> Sarla Verma v. Delhi Transport Corporation, A.L.R. (2009) S.C. 3104.

<sup>12</sup> Klaus Mittelbachert v. East India Hotels Ltd., A.I.R. (1997) Delhi 201.

<sup>13</sup> Shoda Devi v. DDU Hospital, Shimla, MANU S.C. 0344 (2019).

<sup>14</sup> Martin F. D'Souza v. Mohammed Ishfaq, (2009) (2) S.C. 40.

<sup>15</sup> Reshma Kumari v. Madan Mohan, (2013) (99) A.L.R. 1.

<sup>16</sup> Dr. Anand R. Nerkar v. Rahimbi Shaikh Madar, (1991) (1) Bom. C.R. 629.

<sup>17</sup> Medecins Sans Frontieres, *The Practical Guide to Humanitarian Law*, DOCTORS WITHOUT BORDERS, <https://guide-humanitarian-law.org/content/article/3/medical-ethics/>.

function, there seems to be very little in terms of letter and spirit to protect and safeguard the everyday savors in terms of International and National statutes.

As James Lendall Basford says, we are in the age of M.D., medical darkness, which seeks the legislative's protection for the light.<sup>18</sup> If this erroneous practice were to continue, the medical profession shall perish to exist as we know of it today with the hands of the doctors being tied up in every which way he goes, the heavy dark shadow of medical negligence and criminal liability looming over him always, threatening the very essence of medicine and the medical sciences. This involves in itself a principle of social and moral justice and is of larger public importance.

Whilst the right of a patient seeking medical help is protected under Article 21 and various draft charters being laid down, it is imperative that the same is done to slay the 'Sword of Damocles' hanging above the head of the doctor. Relying on the advanced and progressive 'Principle of Constitutional silence or abeyance', the courts of India have filled up the gaps in respect of certain areas in the interest of justice and larger public interest many a time. The courts can lay down proper guidelines to be followed until effective legislation takes charge as has been previously laid down in the cases of *Laxmi Kant Pandey v. Union of India*, *DK Basu v. State of West Bengal*, *Vishakha and others v. State of Rajasthan*, and various others.<sup>19</sup> Judicial activism of sorts by the Indian courts is much sought at this hour of need. There is thus an imminent need for comprehensive legislation to balance the rights of doctors by devising a mechanism for recovery of their legal dues while also safeguarding them from criminal attacks and vexatious medical negligence litigation.

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<sup>18</sup>Quotegarden, *Medical Quotes, Sayings about Healthcare, Doctors, Practice of Medicine, etc.* QUOTESGARDEN, <http://www.quotegarden.com/medical.html>.

<sup>19</sup> *Manoj Narula v. Union of India*, (2014) 9 S.C.C. 1.