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# Medical Negligence: Whose Law is it anyway?

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## ABSTRACT

*The research paper titled “Medical Negligence: Whose Law is it Anyway?” is an in depth analysis of the medical negligence laws in India. It begins with an introduction to the concept of medical negligence, followed by an explanation of the types of medical negligence. It further address the relevance of consent under the current laws. The paper also introduces the reader to the tests applied in India and Internationally to determine liability in the cases of medical negligence, categorized broadly as civil and criminal liability. It also delves into the liability under the Consumer Protection Act, Tort Law, Indian Evidence Act and the compliance with the guidelines established by the medical council of India. It concludes with establishing a conclusion as to the nature of medical negligence laws in India and their tendency to be ‘doctor centric.’*

*Key Words: Medical Negligence, Consent, Standard of Care, Consumer, Ethics.*

## I. THE RESEARCH OBJECTIVES

This research paper has been written by the author, keeping the following research objectives in mind:

- i. To analyze the degree of standard of care owed by medical professionals to their patients in India;
- ii. To understand and explain the laws in the Indian jurisdiction related to medical negligence;
- iii. To draw a comparison between the approach of the courts in India and Internationally in medical negligence cases.

## II. HYPOTHESIS QUESTION

The aim of this paper is to determine the validity of the following hypothesis question:

Whether the medical negligence laws in India unfavourable to the patients and have adopted a more ‘doctor-centric’ approach?

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### III. RESEARCH METHODOLOGY

The research has been conducting by obtaining data from secondary sources. The researcher has conducted a thorough reading of relevant articles and papers as stated in the footnotes to arrive at the relevant conclusions.

### IV. INTRODUCTION

Medical negligence is also referred to as malpractice and is defined as, “The commission of an act which a reasonable and prudent man wouldn’t do or the omission of an act which a reasonable man would do.”<sup>2</sup> The concept of medical negligence can only understood once the elements of negligence have been established.

#### *Negligence*

Negligence is the failure to exercise the standard of care which a reasonable man is expected to exhibit. The elements of negligence as a tort were laid down as early as the year 1932 in the case of *Donoghue vs. Stevenson*.<sup>3</sup> The elements proceed as following:

- There exists a duty to care
- The duty is owed to the plaintiff
- There is a breach of the said duty
- Such breach results in consequent harm or damage to the plaintiff

The duty of care owed by a doctor to his patient, in the context of medical negligence, was explained by the Supreme Court of India in the case of *Dr. Laxman Balkrishna Joshi vs. Dr. Trimbark Babu Godbole and Anr.*<sup>4</sup>, where the court held that when a patient consults a doctor, the latter owes the following duties to him,

- Duty to decide whether to undertake the case;
- Duty to decide the suitable treatment; and
- Duty in administration of such decided treatment.

The court, in this case, further addressed the scope of reasonable degree of skill and care and while acknowledging the discretion bestowed upon the practitioners, explained that such discretion must be exercised within the scope of ‘reasonable degree of care’. The apex court also laid down the many dimensions of negligence, namely, active negligence, collateral

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<sup>2</sup> OLIVER HOLMES, *Medical Negligence: Meaning and Scope*, in *Medical Law Journal* 210,211.

<sup>3</sup> 1932 AC 562.

<sup>4</sup> AIR 1989 SC 1570.

negligence, comparative negligence, concurrent negligence, continued negligence, criminal negligence, gross negligence, hazardous negligence, active and passive negligence, willful or reckless negligence, or negligence per se.

## **V. TYPES OF MEDICAL NEGLIGENCE**

As defined earlier, the scope of medical negligence extends to the treatment, the mode of treatment etc. Therefore, the ways in which such negligence is committed can vary. The most common (not exhaustive) types of medical malpractices can be:

### ***Surgical Error***

The most common form of medical malpractice is surgical errors, primarily because such an error leads to a variety of further complications including repeated surgeries, infections, organ damages or even the demise of the patient. Surgical errors may include laceration, perforation, blood loss, alien objects being left in the patient's body or unnecessary surgery.

### ***Anesthesia Errors***

Errors in administering anesthesia to the patient by anesthesiologists may amount to medical malpractice if the dose of such anesthesia is wrongly administered, the medical history of the patient has not been sufficiently analyzed or defective equipment has been used.

### ***Unauthorized Treatment***

When the risks of the treatment are not sufficiently communicated to the patient or there is lack of consent as to the treatment which is being performed, such failure amounts to medical negligence. The same will be further dealt with in the topic covering consent.

### ***Medication Errors***

The prescription of a wrong drug or administration of a wrong dosage is a very common method of engaging in medical malpractice. In the case of Mohd. Ishfaq vs. Dr. MartinD'souza<sup>5</sup>, the court established the legal position on whether the failure to monitor the dosage of the right amount of drugs constitutes negligence. The court held in the affirmative and the doctor liable for failing to do so.

### ***Misdiagnosis or Delayed Diagnosis***

An isolated incident of misdiagnosis or delayed diagnosis cannot itself be regarded as a practice of medical negligence. Diagnostic errors are common and can arise despite the existence of a reasonable degree of care. In order for misdiagnosis to constitute medical

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<sup>5</sup> 2002 2 CPR 151.

malpractice or negligence, the process of arriving at such diagnosis must be analyzed. This includes an inspection of the 'Differential Diagnosis'. Differential Diagnosis is conducted when the practitioner rules out certain diagnosis while listing other possible diagnosis. The failure of the medical professional to include or exclude the diagnosis, which a reasonable, prudent professional would have, resulting in the deterioration or damage to the patient's condition, may constitute negligence. The Supreme Court in the case of *Kusum Sharma & ors. vs. Batra Hospital & Medical Research Centre & ors.*,<sup>6</sup> held that wrong diagnosis, per se, would not amount to medical negligence, unless the doctor is not acting in accordance with a practice accepted as 'proper' by a prudent body of medical professionals trained in that particular art.

The Supreme court, in the recent case of *Vinod Jain v. Santokba Durlabhji Memorial Hospital & Anr.*<sup>7</sup> Held that misdiagnosis is merely an error of judgment and does not amount to medical negligence.

## **VI. DUTY TO OBTAIN CONSENT**

Consent is a common element that substantiates all health care provisions in India today. Before any treatment is administered to a patient, it is mandatory to obtain his or her consent for the same. Consent obtained for the treatment may be in the form of express consent or implied consent. Further, consent is also classified as tacit consent, surrogate consent or advance consent.

There is, however, nothing that mandates that a written consent must be obtained by the medical practitioner. To set a uniform set of standards in place, the Medical Council of India has prescribed guidelines which are applicable primarily to operations.<sup>8</sup> The said guidelines divide the treatments into the following categories while segregating consent:

### ***Informed Consent***

The courts in India and the UK have shown a tendency to take a more doctor oriented

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<sup>6</sup> (2010) 3 SCC 480.

<sup>7</sup> Appeal (Civil), 2024 of 2019.

<sup>8</sup> Medical Council of India (Professional Conduct, Etiquette and Ethics) Regulations, Regulation 7.16, of. 2002.

approach when the question of consent in medical negligence cases arose. The English courts, in cases such as *Blythe vs. Bloomsbury Health Authority*<sup>9</sup> and *Sidway vs. Board of Governors of the Royal Bethlehem Hospital*<sup>10</sup>, have held that the doctor is not obliged to explain all possible risks of treatment while responding to a general inquiry of a patient. Further, the Indian courts followed the same footsteps and applied the said principle in the case of *Ram Bihari v Dr. Srivatsava*<sup>11</sup>. The American and Canadian courts, however, have differed in their approaches in this matter and have taken a seemingly more ‘patient oriented’ approach and have time and again held that the patient should be sufficiently informed of the risks associated with his treatment.

A very landmark case in Indian Jurisprudence, regarding the concept of informed and limited consent is that of *Samira Kohli vs. Dr. Prabha Manchanda*<sup>12</sup>. In the present case, the issue had arisen that the patient had provided consent only for diagnostic and operative laparoscopy and “laporotomy if needed” and had not provided any consent for a complete hysterectomy which had been performed upon him. There was no state of emergency to perform such operation and the patient was a competent adult to give such consent. The Supreme Court, in the present case, held that the surgery so performed was an unauthorized invasion and fell under deficiency of service under the ambit of the Consumer Protection Act 1956. Further, the court in the aforementioned case laid down certain essential elements of informed consent. The elements, inter alia, included the communication of adequate information by the doctor to the patient as to the nature of the treatment, its likely effects, outline of risk (not remote) involved and consequences of refusing to take the suggested treatment. The judgment also reiterated that the consent so obtained from the patient should be real and the patient should have the capacity to provide such consent by reason of it being voluntary in nature, majority, soundness of mind and knowledge of the nature of the treatment.

### ***Consent by Minors***

Only a person competent to contract and who has attained the age of majority is authorized to give a valid consent. 18 years is the age for a valid consent to be given in India. If the patient is incompetent to provide consent, the same can be taken in the form of proxy consent from the next of kin.

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<sup>9</sup> (1993) 4 Med L. Rev. 15 1.

<sup>10</sup> (1985) 2 WLR 840.

<sup>11</sup> AIR 1985 SC 441.

<sup>12</sup> (2008) 2 SCC 1.

### ***Other Consent Requirements***

Other consent requirements in medical negligence cases are that consent should be procedure specific<sup>13</sup>, consent which is obtained during the course of the surgery or operation is not acceptable<sup>14</sup>, fresh consent should be obtained for repeated procedure, and the patient has right to refuse treatment<sup>15</sup>.

## **VII. BOLAM TEST**

Bolam vs. Frien Hospital Management Committee<sup>16</sup>, established a test known as the Bolam Test which lays down the standard of reasonable care that a doctor is supposed to adhere to. In the present case, Mr.Bolam was a patient at the defendant hospital where he had agreed to an electro-convulsive therapy for his neurological defects. He was not given any muscle relaxant before the treatment, neither was he restrained or properly informed about the risks involved in the treatment and consequently suffered fractures. Mr.Bolan, henceforth sued the hospital for negligence. The jury in this case, had delivered in favour of the defendant. However, what left an imprint in this case was the opinion of Justice McNair who accorded great relevance to the 'common practice' in a particular profession. According to him, if the medical practitioner has acted in consonance with the practice accepted by a responsible body of medical men who are skilled in that particular art, he cannot be held liable. Further, it was also held that the man cannot be held liable solely on the ground that there is a body of professionals who would take a contrary opinion. This came to be recognized as the Bolam Test. This test was given a wider meaning in the case of Montgomery v Lanarkshire Health Board<sup>17</sup>. In this particular case, the court stated that 'informed consent' by patients rests mostly on the duty of disclosure of risks by medical practitioners.

## **VIII. LEGAL POSITION**

### ***Civil Liability***

Civil Liability incurs the claim for damages suffered in the form of compensation. If when the patient is under the supervision of a medical professional, who commits a breach of duty of care, he is liable to pay compensation to the patient in the form of damages. In the case of

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<sup>13</sup> Samira Kohli versus Dr. Prabha Manchanda and Anr AIR 2008 SC 1385.

<sup>14</sup> Dr Shailesh Shah vs Aphraim Jayanand Rathod. National Consumer Disputes Redressal Commission New Delhi, FA No. 597 of 1995.

<sup>15</sup> Dr. Ramcharan Thiagarajan Facs vs Medical Council of India on 3 April, 2014. Karnataka High Court. Writ Petition No. 11207/2013.

<sup>16</sup> [1957] 1 WLR 582.

<sup>17</sup> [2015] UKSC 11.

Mr. M Ramesh Reddy v. State of Andhra Pradesh<sup>18</sup>, the hospital authorities were directed by the court to pay compensation for keeping the bathroom in an unhygienic condition which led the patient to slip and in her demise.

### ***Criminal Liability: Section 304A***

Section 304A of the Indian Penal Code deals with 'death by negligence'. The degree of negligence in the cases initiating prosecution against the medical professionals is deemed to be very high. If the act of the doctor is so gross or negligent so as to endanger the life of the patient, he can be held criminally liable for his act.<sup>19</sup> In order for the court to establish that the penalty must be imposed under section 304A, the death must be a direct result of the rash and negligent act and must have a proximate connection with such act of the accused.<sup>20</sup>

In the case of Poonam Verma vs Ashwin Patel<sup>21</sup>, the court distinguished between rashness, negligence and recklessness and held that a doctor cannot be held liable until he is shown to exhibit a complete and utter disregard for the life of the patient.

As far as the determination of liability is concerned, the court established its position in the case of State of Haryana vs. Smt. Santra<sup>22</sup>, where it held that whereas the liability in a civil claim is determined by the amount of damages incurred, the liability in a criminal prosecution under section 304 A is determined by the degree of negligence.

There is no set standard to establish the degree which may be determined on a case to case basis. The Supreme court elaborated on the guidelines for the prosecution of medical professionals under the Jacob Mathew case.

### ***Jacob Mathew Case***

In an attempt to protect medical professionals from frivolous legislations, the Supreme Court of India in the case of Jacob Mathew vs. State of Punjab<sup>23</sup>, set forth guidelines that must be followed before lodging a criminal complaint against a doctor. In the present case, a patient who was admitted in the ward of a private hospital was provided with an empty oxygen cylinder. In the time consumed to replace it with a new one, the said patient passed away. The complainant made out an offence against the doctor under section 304-A and 34 of the Indian Penal Code. The court while holding that the doctors cannot be held criminally liable stated that,

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<sup>18</sup> AIR 2004 SC 4091.

<sup>19</sup> Dr.Suresh Kumar Gupta v. Govt. of NCT of Delhi & anr. AIR 2004 SC 4091.

<sup>20</sup> Emperor v. Omkar Rampratap [1971] WLR 661.

<sup>21</sup> 1996(4) SCC 332.

<sup>22</sup> (2000) 5 SCC 182.

<sup>23</sup> (2005) 6 SCC 1.

*“In order to hold the existence of criminal rashness or criminal negligence it shall have to be found out that the rashness was of such a degree as to amount to taking a hazard knowing that the hazard was of such a degree that injury was most likely imminent.”*

The court further stated that there exists a very high degree of distinction that exists between a ‘simple lack of care’ and ‘a very high degree of negligence’. The latter is required in criminal cases. The standard, established in this case for judging whether a person would be liable for negligence or not would be that of an ordinary man exercising ordinary skills in that profession. It would not be necessary for the professional to possess a very high degree of expertise.

Further the court stated that adopting different approach from the ordinary manner of practice will not make a person guilty of negligence. Further, the court, in this case directed the government to frame guidelines to protect the doctors from vexatious claims. It provided interim guidelines until such governmental action, which inter alia, included the need to obtain a credible opinion of another doctor as a prima facie evidence to support negligence claim and the formation of an investigating opinion.

### ***Consumer Protection Act, 1986***

The Consumer Protection Act defines a consumer as any person who hires or uses a service upon the payment of a consideration.<sup>24</sup> In case the services provided to the consumer suffer from any deficiency, the consumer can seek redressal from a consumer court. Deficiency is defined under the act as a fault, shortcoming or imperfection in the quality, quantity, or standard.<sup>25</sup> In the year 1992, the Kerala State Commission appealed to the National Commission to include the services rendered by the medical professionals under the Consumer Protection Act and hold them liable for any act of negligence as a deficiency of service. An action upon the same was taken by the National Commission.

The medical profession was, however, officially brought within the ambit of the Consumer Protection Act, via the judgment of the Supreme Court in the case of *Indian Medical Association vs. V.P. Shantha*<sup>26</sup>. The court, in this case found that the services which are rendered by doctors fall under three primary categories:

- Services which everyone avails free of cost
- Services which are paid for, by everyone

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<sup>24</sup> Consumer Protection Act, Section 2(1)(7) (2019).

<sup>25</sup> Consumer Protection Act, Section 2(1)(11) (2019).

<sup>26</sup> 1995 (6) SCC 651.

- Services which are usually paid for, but are made available free of cost to indigents.

The court held that the services availed by patients in the second and third category will come under the definition of services whereas the patients under the third category would be regarded as beneficiaries and will by default fall within the ambit of the Consumer Protection Act 1986.

Therefore, if any patient is aggrieved of a negligent act committed by a doctor, he can seek redressal in the National Consumers Dispute Redressal Commission, State Consumers Dispute Redressal Commission and the District Consumer Disputes Redressal Commission.

### ***Sec 45 Indian Evidence Act***

Section 45 of the Indian Evidence Act provides that in a case where the court is faced with forming an opinion on a point of science, the opinion of a skilled person in such science is considered as relevant. When the courts are therefore dealing with medical negligence case, the opinions of experts representing both sides are called for. The court, although don't regard the expert opinion as conclusive, but if the opinion is found to determine, along with the court's opinion that the course which was adopted by the medical professional was highly unreasonable in nature, the same will establish a case of medical negligence.

In the case of *Dr Kunal Saha v. Dr Sukumar Mukherjee*<sup>27</sup>, popularly known as the Anuradha Saha case, the patient was administered steroids which, in experts opinion and medical research development were alleged to deteriorate her condition of Toxic Epidermal Necrolysis. The court, however acquitted the doctors of the charge under section 304A and even though the experts had provided contrary opinion under Section 45 of the Indian Evidence Act, 1872, the court ruled that such opinion was merely advisory in nature and not binding on the court.

### ***Res Ipsa Loquitur***

Res Ipsa Loquitur is a latin phrase, commonly used in medical negligence case and means, 'the thing speaks for itself'. The principle of res ipsa loquitur can only be applied where it can be proved that the accident was solely a result of negligence on part of the doctor. In the case of *Shyam Sunder vs. State of Rajasthan*<sup>28</sup>, the court applied the doctrine to medical negligence cases while putting forth the accident could have been avoided with the want of reasonable care by the doctor.

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<sup>27</sup> (2006) CPJ 142.

<sup>28</sup> AIR 74 SC 876.

Similarly, in the case of *Jasbir Kaur vs. State of Punjab*<sup>29</sup>, the claimant's infant's eyes was injured by a cat since he was kept in a separate room by the hospital due to unavailability of cots. The court applied the said principle and held the hospital liable for negligence.

*Res Ipsa Loquitor*, has therefore held to be only a rule of evidence, the operation of which is limited to the civil domain.

### ***Medical Council of India Regulations***

Medical council of India has laid down a code of ethics for medical professionals and lays down four primary principles which are applied to the degree of medical care extended to the patient:

- Principle of non-maleficence: This principle states that the medical practitioner should not cause any harm to the patient.
- Principle of beneficence: This provides that medical care should be aimed to secure the benefit of the patient.
- Principle of autonomy: This patient stipulates the necessity to provide full information to the patient and obtaining due consent for the procedure in question.
- Principle of Justice: This emphasizes the responsibility that doctors owe to the patients and the need for them to follow a non-discriminatory approach to their practice.

It is, however, unfortunate that the number of medical professionals aware of and sensitized to the Code of Ethics issued by the Medical Council of India called the Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002 for all medical practitioners, and the Medical Profession in general is disappointing.<sup>30</sup>

## **IX. CONCLUSION**

We can therefore, arrive at a conclusion that a mere reading of the laws in India and the judicial approach in the evolution of medical negligence jurisprudence establishes that the approach is more 'doctor oriented'. The threshold of the degree of negligence to hold a medical professional liable for a criminal case of medical negligence is extremely high. The approach lies on a similar footing in the UK, whereas the US and Canada have adopted a more 'patient centric' approach while drafting their laws and delivering their judgments. The

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<sup>29</sup> (2001) 8 SCC 731.

<sup>30</sup> SHREEMANTA KUMAR DASH, *Medical Ethics, Duties & Medical Negligence Awareness among the Practitioners in a Teaching Medical College, Hospital-A Survey*;2010, J Indian Acad. Forensic Med, 32(2),p.155.

standard of care owed by the doctor to the patient in the latter countries, is of a high degree.

The doctor-patient relationship is in the nature of a fiduciary relationship. It is a relationship based on trust. The laws in India clearly embrace the sacrosanct nature of the medical profession and while the laws and the judiciary in the country do acknowledge such nature and frame doctor centric laws, the medical professionals are unaware of the ethical duties they are obligated to abide by. The research survey cited in the present paper corroborates the lack of awareness among the professionals with respect to the ethical standards set forth by the Medical Council and otherwise. The ideals of the medical profession establish that the responsibilities of the professionals are owed not only to the individuals but also to the society at large. Lastly, the author strongly suggests that the judiciary must put in place a more comprehensive test to determine the liability of doctors under the Indian Penal Code, 1860 while ensuring that medical ethics are not compromised with.

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