

A Changing Scenario under Medical Negligence in India

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Abstract: In today's world, medical negligence has become one of the most serious and challenging issue in respect to overcome it, and to obstruct negligence as it is an issue which can cause complete / partial impairment of limbs, or death of patient, or leads into another misery, or sometimes leaves the patient in permanent or partial vegetative state. There are instances when due to causation from doctors may leave the family's soft corner one's at stake. There are instances wherein most incompetent doctors, on their causation, have made prey the innocent patients. The magnitude of negligence of the medical professionals has many times led to litigation in the courts.

Keywords: medical negligence, challenging, doctors, causation, medical professionals.

1. INTRODUCTION

Negligence is a term of art, but has different meanings in different jurisdictions. In 'Tort', damage is an essential ingredient but that element is not necessary in master servant relationship. In criminal law, there are channels of offences based on negligence in which loss or injury is immaterial; it is enough if the act is likely to cause injury or endanger life.¹ Operating a patient without consent is an example of negligence even without actual damage. Dictionary meaning of term 'Negligence' is 'Lack of Proper Care'. The term negligence defined by Baron Alderson negligence means: "Omission to do something which a reasonable man guided by that consideration which regulate conduct of human affairs would do, or doing something which a reasonable man would not do". Similar definition is quoted in many decisions of the court.² 'Criminal Negligence' is an offence against the State on the other hand 'Civil Negligence' is an offence against the individual act, which leads to injury, injury can be physical injury or even grievous hurt. Loss of property due to some negligent act can be termed as a civil negligence.³ Recent decision of the Supreme Court⁴ delivered on August 4, 2004 raises a fresh debate on the issue of 'Criminal Negligence by the Doctors'. In this case the Supreme Court relied on various decisions of the House of Lords⁵.

The Consumer Protection Act, 1986 was passed with a view to protect the interest of the consumer. The detailed definition of Consumer and service is given in the Civil Procedure Code.⁶ A huge conflict arose amidst the decision of the various High Courts as to the Service as defined under the Consumer Protection Act would also include medical practitioner.

The Supreme Court in Indian Medical Association v VP Shantha held that medical profession is well within the purview of service as defined in the Consumer Protection Act.⁷ After the S.C landmark Judgment the number of cases rapidly increased against the doctors.. The SC made an attempt to rejuvenate the medical profession by its decision in Jacob Matthew vs The State of Punjab.

¹ Kedar Nath vs. State, AIR 1965, Allahabad 233.

² M/S Krishna Roadways, Nathdwara vs. Madanlal, 1984 R.L.W. 25.

³ Smt. Beti Bai Saxena vs. S.L. Mukherjee (Dr.) 2001 (2) CPR 405- Punjab & Haryana State Commission, para 13)

⁴ Dr. Suresh Gupta vs. Govt. of NGT of Delhi & another (Criminal Appeal No. 778 of 2004, SLP (Cri) No. 2931 of 2003

⁵ R. vs. Ademako [1994 (3) All E.R. 79].

⁶ The Consumer Protection Act, 1986.

⁷ Indian Medical Association v VP Shantha AIR 1996 SC 550: 1995 (6)SCC 651, para 51, pp 678-79.

2. NEGLIGENCE

Negligence is a type of tort it can be either of civil nature or of criminal nature. Negligence can be termed as an act or omission or a breach of duty by a man of ordinary prudence guided by some principles relating to human affairs which a man of ordinary prudence would not do.⁸

Negligence by Professionals:

Professionals like Lawyers, Chartered Accountant or doctors are persons having expertise over a particular thing and have specialized knowledge about it and also have the requisite qualifications to profess that profession with reasonable care and caution.

Medical negligence can be defined as willful negligence or breach of duty by the medical practitioner towards the patient and resulting into physical injuries or even loss of life to the patient.⁹

There are three main requisites for the liability of medical negligence.

- a. The duty to take care,
- b. The failure maintain standard care as prescribed by the law and thereby committing a breach of such duty and
- c. Occurrence of Damage.

Duty of Care:

The word 'duty' can be conceptualized as a relationship between two parties, in which one party has some obligations to take reasonable care of the other party. There are certain duties which a person owes when he holds himself out to give medical advice and treat other patients. Those duties are;

1. A duty of care in understanding the case and giving proper advice.
2. A duty of care in deciding what kind of treatment has to be given.
3. A duty of care to administer that treatment and to maintain standard level of caution in that treatment.¹⁰

Here the standard of care and skill are to be construed in a narrow sense a person need not possess very highest level of skill or very low level of skill, it should be reasonable average.

Proof of Negligence:

A doctor or a medical practitioner should not be held liable for medical negligence if simply something goes wrong. He shouldn't be held liable for the chances taken by him keeping reasonable care. The medical practitioner can only be held liable if he fails to maintain the basic caution as a man of ordinary prudence would have. The standard of reasonable care is ductile in nature. Here the person need not have the highest degree of care or caution but like a man of ordinary prudence. The standard reasonable care cannot be fixed mathematically or through a formula. What constitute negligence is different in different circumstances and it varies from time to time in determining whether the act of the doctor would constitute negligence in a particular case.¹¹

In **Bolam v Friern Hospital Management Committee**¹² the test for establishing medical negligence was set out. It was held that the medical practitioner is required to exercise the ordinary skill that of a competent medical practitioner of his field. The doctor must exercise this ordinary skill in accordance a skilled person of that area. A doctor cannot be held liable if there's no other possible alternative and another competent doctor would have acted in the same manner in treating the patient.

⁸ Ratanlal and Dhirajlal, Laws of Torts, 24th edition, 2002, edited by Justice G.P.Singh, pp 441 – 442.

⁹ Subrahmanyam B. V., Modi's: Medical Jurisprudence & Toxicology, 22nd edition, 2004, publisher: LexisNexis Butterworths, pp 704.

¹⁰ L.B. Joshi (Dr.) v. T.B. Godbole (Dr.) AIR 1969 SC 128, 131

¹¹ New India Assurance Co. Ltd. v. Ashok Kumar Acharya, 1994 (2) TAC 469 (Ori)

¹² Bolom v Friern Hospital Management Committee (1957) 1 WLR 582,586.

Criminal Negligence:

Criminal negligence can be defined as carelessly acting without taking reasonable care and putting others like in danger.¹³ The principle of Criminal negligence applies to medical practitioner when he shows gross negligence in the treatment of patient and ultimately leading to physical injury to the patient and in some case even death of the patient. The doctors are not being held criminally responsible for the patient's death unless there is some negligence on his part while treating the patient. The most important factor to prosecute any medical practitioner under the medical negligence is the degree of negligence.

The Supreme Court in **Jacob Mathew v State of Punjab**¹⁴ has provided some grounds relating the degree of negligence and safe guards for doctors. The Supreme Court held that the criminal prosecution is filed by the private parties and by police when ant FIR is lodged. The investigating officer always cannot have the perfect knowledge as to whether the act of the medical practitioner amounts to negligence or not and if they come within the ambit of section 304-A of the Indian Penal Code. Once the criminal prosecution is initiated it will amount to serious embarrassment to the medical practitioner. He has to seek for bail and if he's not granted the bail it will affect his reputation and he'll be the talk of the town. At the end the medical practitioner may be convicted or he may be acquitted, if acquitted the amount of loss to his reputation which he has suffered is irreplaceable.

The increase in the number of litigation against the medical practitioner has made them overcautious. Many times it has been seen that the doctors refuse to treat the patient having serious complications from the fear of being criminally prosecuted for negligence.

The Supreme Court in (**Jacob Mathew v State of Punjab**)¹⁵ has given following guidelines for prosecuting medical professionals against the charge of criminal negligence.

- 1) A private complaint may not be entertained unless the complainant has produced prima facie evidence before the court in the form of a credible opinion given by another competent doctor to support the charge of rashness or negligence on the part of the accused doctors.
- 2) The Investigating Officer should, before proceeding against the doctor accused of rash or negligent act or omission, obtain an independent and competent medical opinion, preferably from a doctor in government service qualified in that branch of medical practice who can normally be expected to give an impartial and unbiased opinion.
- 3) Unless the arrest is necessary for furthering the investigation or for collecting evidence or unless the investigation officer feels satisfied that the doctor proceeded against, would not make himself available to face the prosecution unless arrested, the arrest may be withheld.¹⁶

The nucleus of Supreme Court judgment is that, 'lack of care or caution' and 'intention' 'intention' is the major ingredients before filing a criminal complaint against a medical practitioner in the case of negligence.

As far as the criminal liability of the medical practitioner is concerned, the Supreme court in the case of **Dr. Suresh Gupta vs. Govt. of Delhi**¹⁷ went on to support the medical practitioner and held that a medical practitioner cannot be held punishable for every mishap or death during medical treatment. The medical practitioner cannot be held liable for every act of his nor can be liable for the death of the patient which results from accident or error of judgment. Mere inadvertence or some degree of want of adequate care and caution might create civil liability but would not suffice to hold him criminally liable.

The degree of negligence must of such nature that it shows that the medical practitioner is completely lethargic for the life of the patient and that would amount to crime of medical negligence.

In **Suresh Gupta's case**, the patient was operated for nasal deformity and during the operation the patient died. The operation was not a complex or complicated operation. On investigation it was found that the cause of death was "not

¹³ www.thefreedictionary.com/criminal+negligence.

¹⁴ **Jacob Mathew v state of Punjab and another**, Criminal Appeal No. 144-145 of 2004 decided by Supreme Court on August 5, 2005.

¹⁵ Ibid

¹⁶ http://www.lawyersclubindia.com/articles/MEDICAL-NEGLIGENCE-1952.asp#.VdS7-_mqkko

¹⁷ 1968 2 SCR 551

introducing a cuffed end tracheal tube of proper size to prevent the aspiration of the blood from the wound in the respiratory passage¹⁸. The Supreme Court held that even if it to be assumed that the Appellant was negligent, he would not be criminally liable as the alleged act was not grossly negligent. At the most the accused can be liable for negligence in tort for damages and nothing more than that. The Court further expressed that if the liability of the medical practitioner were to be extended to the criminal law then it would result into fear amongst the medical practitioner to be held criminally liable in the case of slight mishap and would restrict them to treat the patients to best of their ability. The Court also went on to state that extending medical practitioners liability to criminal law would affect the society at large and would shake the mutual confidence between the doctor and the patient.

Another landmark judgment in medical negligence is the high profile case of **Kunal Saha vs. Advance Medical Research institute**, here in this case the patient was suffering from a drug allergy and the doctors of AMRI negligently prescribed her the medication which further aggravated her condition and finally lead to death of the person. The Supreme Court in this case gave the compensation around Rs 6.08 crore for the death of the patient.

Another landmark judgment was given in the case of **V.Krishna Rao vs Nikhil Super Special Specialty hospital**, the complainant was filed against the hospital for their negligent conduct in treating the patient. In the present case the principle of **Res Ipsa Loquitur**(the thing speaks for itself) is applied. Here in this case the wife of the complainant was treated for wrongly treated for typhoid fever wherein she had malaria fever and due to this she got wrong medication which resulted into further aggravation of her health. The Supreme Court in its final verdict awarded the compensation of Rs 2 Lakh to the complainant.¹⁹

The most important element in case of gross negligence is that prima facie case must be established before the court, this principle was first observed in the case of **Dr. Anand R. Nerkar vs. Smt. Rahimbi Shaikh Madar**²⁰ The Court held that cases where professionals like doctors, lawyers are involved and a criminal complaint is filed against them the court must be slow in entertaining such application if there isn't adequate material before it, because one case can result into disastrous consequences like end of career and reputation of a professional.

The Supreme Court in the case of **Poonam Verma vs Ashwin Patel** went on to explain the difference between negligence, rashness and recklessness²¹. A person who unwittingly commits and cat or omission is a negligent person. A person who is aware of the consequences but is of the view that they will not occur as a result of his act is rash person. And a person who is fully aware of the consequences of his act but does not care about it is a reckless person. The Supreme Court also held that any act which is short of recklessness and intentionally wrongdoing should not be subjected to criminal liability. A medical practitioner cannot be held criminally liable for the injury caused to patient unless it is proved that the medical practitioner was negligent in his approach and that lead to injury.²²

Finally the Supreme Court in **Santra case** rightly pointed out that the civil liability is based upon **the amount of damages incurred** and the criminal liability is based on **the degree of negligence by the medical practitioner**. Nonetheless to determine any liability by a medical professional in any particular case there must be, 'motive behind the offence', the degree or level of offence and lastly the character of the offence.

3. LIABILITY OF THE HOSPITAL

The hospitals can be either directly or vicariously liable with regard to medical negligence. If the hospital is unable to provide a safe and suitable environment for the treatment of the patient then it can be directly liable whereas if any employee of the hospital does any negligent act then the hospital is liable for the cat of its employee, this is vicarious liability. The employer is not only responsible for his own acts but also for the acts of his employees which occur within their employment. The principle upon which this vicarious liability is enacted is, 'Master servant relationship'. The Employers are also liable under principle represented in the Latin phrase, "**qui facit per alium facit per se**", i.e. the one who acts through another, acts in his or her own interests. Hospitals can be charged with medical negligence if by any

¹⁸<http://jajharkhand.in/judg/sc/pdf/CRIMINAL%20LAW/Professional%20negligence/Jacob%20Mathew%20V%20St%20of%20Punjab%20and%20Anr-%20AIR%202005%20SC%203180.pdf>

¹⁹ <http://blog.ipleaders.in/important-cases-on-medical-negligence-in-india/>

²⁰ 1991 (1) BomCR 629

²¹ Poonam Verma vs Ashwin Patel (1996) 4 SCC 332

²² House of Lords decision in R vs Adomako (1994) 3 All ER 79

means there is transmission of infection like HIV, HBsAg, etc. if any patient is affected by any infection during his treatment at the hospital and if it is proved that the same has occurred because the hospital staffs was negligent.

The hospitals can in many ways be charged with negligence like if there are any misleading signboards, or advertisements of the hospital the same can be construed as unfair trade practice under the Consumer Protection Act, 1986, and damages can be awarded for the same. Wrong claims of many high-tech also construes negligence and finally wrong depiction of the qualifications of the employers working at the hospital also construes negligence.

The hospital can also be vicariously held liable for the misconducts of its staff in due course of employment. In **Joseph @ Pappachan vs, Dr. Goerge Moonjerly**²³ supporting the duty as envisaged by the other courts the high Court of Kerala held that, the persons who run the hospital are same as the doctors under the law, whenever they accept a patient to treat him reasonable care should be taken by the hospital authorities as well.

The Madras High Court in **Aparna Dutta vs. Apollo Hospitals Enterprise Ltd**²⁴ had taken a crucial view in the matter of medical service. It was argued by the accused that the surgeon was called from the different hospital to treat the patient and the surgeon does not have master servant relationship with the hospital so the hospital authorities are not liable for the acts done by the surgeon. The High court quashing all the arguments of the Apollo hospital held that , the hospital authorities cannot escape from the liability by stating that it does not have master servant relationship with the surgeon, it is no longer a defense to say that surgeon is not a employee of the hospital. The **West Bengal in Paschim Bengal Khet Mazdoor Samity and Ors. v. State of Bengal**²⁵ held that the hospitals are also liable for not providing adequate medical facilities. The Andhra Pradesh High Court in **Mr. M Ramesh Reddy .V. State of Andra Pradesh**²⁶ held that the hospital authorities can be held liable if the patients are not provided with proper sanitation facilities.

Now it is well known fact that the hospital authorities are not only liable for the acts done by their staff but also for the acts of the surgeons, who practice independently. The nature of the employments is also not given any importance, whether temporary or permanent. The hospital authorities are held liable for any acts done by the above mentioned personnel.

Doctor-Patient Relationship:

The doctor –patient relationship is totally based on mutual trust and faith and that’s what makes it unique and different from other relations. Medical Profession is considered as one of the oldest professions and most humanitarian one. Doctors in India are treated as second life savers after God. But in recent times the relationship seems to but deteriorating, this is because of various reasons like increase in consumer awareness, communication gap between the doctors and patient or more expectations from the doctors. The main root cause for the deterioration of the doctor-patient relationship is the increase in the number of the litigations against the doctors.

Code of Medical Ethics and Etiquette:

The medical profession is governed by the code of medical ethics and etiquette as given in the Medical Council of India. The medical practitioner has to abide by these codes of conduct. Even though the ethics are for the self regulation but still the medical practitioner owes certain obligation towards the patient and has to fulfill his expectations. The main purpose of the medical practitioner is human service which seems to be long lost in the current world, as the professional misconduct is fast spreading amongst the professionals. There are certain unethical practices which can be seen easily in today’s world are fee hiking, prescribing a particular company’s medicine for the monetary gains. Few more unethical practices like this has truly deteriorated the medical profession, which once was considered to be the noblest professions amongst all.

4. DEFENSES FOR MEDICAL PROFESSION

If there are wide open loopholes in the medical profession as to their liability extended to criminal liability there are certain safeguards as well. The Supreme Court in the case of **Kusum Sharma & Ors vs. Batra Hospital and Medical Research** held that each every case has different facts and circumstances. One cannot ignore that medicine is an evolving

²³ [1994 (1) KLJ 782 Ker. HC]

²⁴ [2002 ACJ 954 (Mad. HC)]

²⁵ (1996(4)SC260).

²⁶ [2003 (1) CLD 81 (APSCDR)].

subject and one cannot always predict its outcome. The operations done by the medical practitioners contain certain calculated risk and if that risk taken doesn't work out then it cannot be construed as negligence in the part of the medical practitioner if he has taken reasonable care and caution at the time of taking the calculated risk. In another landmark case of **Jacob Mathew .V. State of Punjab**, the Supreme Court was of the view that in some cases of medical profession the doctors are required to make difficult choices. In some cases there will be great risk in operating the patient but the chances of success will be higher and on the other hand there wouldn't be much risk but the chances of failure are higher. So each and every case has to be judged only on the basis of its facts and circumstances.

The Indian Penal Code, 1860, also contains defences for the medical practitioner. If any medical practitioner is charged for criminal liability, he can avail the defence under section 80 (accident in doing lawful act) of the Indian Penal Code, herein nothing is an offence if it is done by the way of accident or misfortune and without any criminal intention and the knowledge of the offence done if reasonable care and caution are taken. The second defence in the Indian Penal Code is given under section 88, it states that nothing is an offence if the person who commits that has done in good faith or for other's benefit and doesn't intend to harm, and if there is risk the patient has given his consent in operating him then that can be construed as a defence against the criminal liability.

5. CONCLUSION

The cases against the medical practitioner for their negligent conduct are rapidly increasing. Making the medical practitioner to testify in a self evident case is very difficult and now after the recent Supreme Court Judgment in the matters concerned with the criminal liability of negligence it is even more difficult to prosecute them. Though there isn't any reasonable standard or level by which a medical practitioner can avoid his liability but the medical practitioner has to ensure that whatever information is given to the patient it fall well within the ambit of the implied consent. In countries like India the medical practitioner has to be even more cautious because of the poor level of literacy and almost negligent amount of medical awareness amongst the people. So in places like India it is the pre-assumed duty of the medical practitioner to explain the entire things, the method of treatment, the cost and the risk involved in it to the people on a lucid manner. The relation of doctor-patient has to be very clear and confidential at the same time. The utmost duty of the doctor is to disclose every possible scenario of that particular case. Having said that the law of medical negligence is changing its scenario in India and recent Supreme Court judgments have proven that if the doctor fails to perform his duty or he willfully or recklessly performs his duty then he can be prosecuted under the criminal negligence.

6. SUGGESTIONS

On scrutinizing the current medical negligence cases in India, the author of this article has tried to give certain suggestions which can be considered while pronouncing the judgment in medical negligence cases;

- The degree of negligence should be estimated by the reasonableness of a man of ordinary prudence and negligence must be established in order to give compensation in certain cases.
- The medical profession requires special skill and knowledge to profess that skill so the standard of care should be high and the same should be taken into consideration while giving the judgment.
- A medical professional can be only held liable, when the standard of care is reasonably less than the reasonable care taken by a competent medical practitioner in that field.
- Whenever a choice has to be made between higher risk and great success rate and lesser risk and high chance of failure, the fact and circumstances of a particular case should be taken into consideration before determining the negligence by the medical practitioner.
- The medical practitioner should not be held liable for negligence when he performs his duty with utmost care and reasonable precautions are taken by him.
- The medical professional should not be harassed and an unwanted fear should not be created amongst the medical fraternity so that they can perform their duty to best of their ability and serve the human race. In certain cases the medical practitioner should be given liberty to take the decisions without being feared for litigations against them. So that it can be more beneficial for the society at large.