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Parameters of Liability For Medical delinquency in India–An Appraisal

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Abstract

Medical negligence can be defined as misconduct by a medical practitioner or doctor, and causes many deaths and illnesses each year. The victim of medical negligence can approach the courts under various laws such as Torts, Penal Law, Indian Contract Act, Consumer Protection Act, etc.In this article researcher focuses on explaining negligence under various laws, the legal aspects and consequences of medical negligence, discussing landmark cases of medical negligenceand aims to spread awareness regarding the same amongst the masses in India.

Introduction

Negligence is an act recklessly done by a person resulting in foreseeable damages to the other. Medical Negligence basically is the delinquency by a medical practitioner or doctor by not providing enough care resulting in breach of their duties and harming the patients who are their consumers. A professional is deemed to be an expert in his field at least. A patient getting treated under any doctor surely expects to get healed and at least expects the doctor to be careful while performing his duties. Medical negligence has caused many deaths as well as adverse results to the patient's health.

Medical negligence is, as the term suggests, relates to the medical profession and is the result of some irregular conduct on the part of any member of the profession or related service in discharge of professional duties. Medical negligence also known as medical malpractice is improper, unskilled, or negligent treatment of a patient by a physician, dentist, nurse, pharmacist, or other health care professional.[2] Medical misconduct occurs when a health-care provider strays from the recognized "standard of care" in the treatment of a patient.

Key words:- Medical Negligence, Liability, Compensation

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[2]www.legalmatch.com/law-library/article/what-is-medical-negligence.html, visited on March 10,2020

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Research Methodology

The present study has been carried out by using the Doctrinal method of research. For the completion of this paper the researcher has tried to analyze the topic by studying various Acts of Parliament and State Legislatures, Case Laws, Books, Law Reports, Journals, Articles, Newspapers, Web references etc. An analysis of the various provisions dealing with medical negligence under civil and criminal laws, and the landmark case laws has been done in detail to understand the legal parameters dealing with the cases of medical negligent and the remedial measures available to the ignorant victims.

Civil AndCriminal Liability For Medical Negligence

Every case of medical negligence is different. There are certain criteria that determine whether the negligence case is a civil or criminal offence.

Civil Liability

Negligence is the breach of a legal duty to care. It means carelessness in a matter in which the law mandates carefulness. A breach of this duty gives a patient the right to initiate action against negligence. Thus legal duty of a person means the duty the law imposes on every person to respect the legal rights of the other. The infringement of every legal right, gives a legal remedy which is expressed in the maxim *ubi jus ibiremedium* under civil law or right to file a criminal case for extreme recklessness.

In a civil proceeding, a mere probability of negligence is sufficient, and the defendant is not necessarily entitled to the benefit of every reasonable doubt. The persuasion of guilt must amount to such moral certainty as convinces the mind of the court, as a reasonable man, beyond all reasonable doubt. In such situations, the negligence is the main element. The negligence established by the prosecution must be legally, morally or absolutely done in ignorance and should not be merely based upon the error of judgment.

The person who possesses special knowledge and skill in the medical field and uses this knowledge to treat the sick person then he owes a duty of care to the other person. Civil liability usually includes the claim for damages suffered in the form of compensation. If there is any breach of duty of care while operating or while the patient is under the supervision of

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the hospital or the medical professional they are held to be vicariously liable for having committed such wrong and are liable to pay damages in the form of compensation. At times the senior doctors are even held vicariously liable for the wrongs committed by the junior doctors.

In *Mr. M .Ramesh Reddy v. State of Andhra Pradesh*[3], the hospital authorities were held to be negligent, inter alia, for not keeping the bathroom clean, which resulted in the fall of an obstetrics patient in the bathroom leading to her death. A compensation of Rs. 1 Lac was awarded against the hospital.[4]

Cases of medical negligence in India are growing these days. Hospital managements are increasingly facing complaints regarding the facilities, standards of professional competence, and the appropriateness of their curative and diagnostic methods more so after the enactment of The Consumer Protection Act, 1986. Consequently a number of legal decisions have been made on what constitutes negligence and what is required to prove it.

Persons offering medical advice and treatment in a way give "implied undertaking" that they have the skill and knowledge to do so, that they have the skill to decide whether to take a case, to decide the treatment, and to administer that treatment. In the case of the *State of Haryana v. Smt.Santra,*[5] the Supreme Court held that every doctor "has a duty to act with a reasonable degree of care and skill"

Doctors in India may be held liable for their services individually or vicariously unless they come within the exceptions specified in the case of Indian *Medical Association v. V. P. Santha*[6]. According to The Consumer Protection Act,1986 Doctors are not liable for their services individually or vicariously if they do not charge fees. Thus free treatment at a non-government hospital, governmental hospital, health centre, dispensary or nursing home would not be considered a "service".[7]

In a key decision on this matter in the case of *Dr. Laxman Balkrishna Joshi v. Dr. TrimbakBapuGodbole,*[8] the Supreme Court held that if a doctor has adopted a practice that is

[3] 2003 (1) CLD 81 (AP SCDRC)
[4]Sharma. J and V.Bhushan, *Medical Negligence & Compensation* , Bharat Publications; New Delhi,2004
[5]AIR 2000 SC 3335
[6]AIR 1996 SC 550
[7]Section 2 (1) (o) ,The Consumer Protection Act, 1986.
[8]AIR 1969 (SC)128

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considered "proper" by a reasonable body of medical professionals who are skilled in that particular field, he or she will not be held negligent only because something went wrong.

The position regarding negligence under civil law is very important as it encompasses many elements within itself. Under the Torts law or civil law, this principle is applicable even if medical professionals provide free services.[9].It can be asserted that where Consumer Protection Act ends, Tort law begins. Here, the onus (burden) of proof is on the patient, and he has to prove that because of doctor's or the hospital's negligent act, he suffered injury thereby.

Criminal Liability

A criminal case can be filed under Section 304A of the Indian Penal Code for allegedly causing death by rash or negligent act. Indian criminal Law has placed the medical professional on a different footing as compared to an ordinary human. Section 304A[10]of The Indian Penal Code of 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."

In *Kurban Hussein v. State of Maharashtra*,[11] in the case pertaining to Section 304 (A) of I.P.C., 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."

There was considerable ambiguity on the standard of care required to be exercised by medical practitioners in order to discharge possible criminal liability arising out of their acts or omissions. Section 304-A of the Indian Penal Code, prescribes punishment for death due to rash or negligent conduct of a person. It is under this section that doctors or other medical practitioners have generally been proceeded against under criminal law. Even though there is

[9]Smreeti Prakash, *A Comparative Analysis of various Indian Legal System Regarding Medical Negligence: Criminal, Consumer Protection And Torts Law* ,available at http://www.legalserviceindia.com/medicolegal/mlegal.htm , visited on March 5,2020
[10]Section 304 A ,The Indian Penal Code ,1860
[11](1965) 2 SCR 622

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protection given to accidents caused during performance of lawful acts[12] and acts not intended to cause death and done for the person's benefit by his consent and in good faith[13], the fear of criminal liability has been lingering while performance of their duty even today.

In *Poonam Verma v. Ashwin Patel*the Supreme Court distinguished between negligence, rashness, and recklessness[14]. A negligent person is one who inadvertently commits an act of omission and violates a positive duty. A person who is rash knows the consequences but foolishly thinks that they will not occur as a result of his act. A reckless person knows the consequences but does not care whether or not they result from his act. Any conduct falling short of recklessness and deliberate wrongdoing should not be the subject of criminal liability.

Burden of proof – Vital Considerations

The burden of proof of negligence, carelessness, or insufficiency generally lies with the complainant. The law requires a higher standard of evidence than otherwise, to support an allegation of negligence against a doctor.

In *Calcutta Medical Research Institute v. BimaleshChatterjee*[15]it was held that the onus of proving negligence and the resultant deficiency in service was clearly on the complainant. In *Kanhaiya Kumar Singh v. Park Medicare & Research Centre[16],* it was held that negligence has to be established and cannot be presumed.

The National Consumer Disputes Redressal Commission and the Supreme Court have held, in several decisions, that a doctor is not liable for negligence or medical deficiency if some wrong is caused in his treatment or in his diagnosis if he has acted in accordance with the practice accepted as proper by a reasonable body of medical professionals skilled in that particular art, though the result may be wrong. In various kinds of medical and surgical treatment, the likelihood of an accident leading to death cannot be ruled out. It is implied that

[12]Section 80, The Indian Penal Code,1860
[13]Section 80, The Indian Penal Code,1860
[14](1996) 4 SCC 332
[15]I (1999) CPJ 13 (NC)
[16]III (1999) CPJ 9 (NC)

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a patient willingly takes such a risk as part of the doctor-patient relationship and the attendant mutual trust.

The Supreme Court in *Dr. Suresh Gupta v. Govt. of NCT Delhi*[17]put the standard for fastening criminal liability on a high pedestal and required the medical negligence to be "gross" or "reckless." Mere lack of necessary care, attention, or skill was observed to be insufficient to hold one criminally liable for negligence. It was observed in Dr. Suresh Gupta that mere inadvertence or simply a want of a certain degree of care might create civil liability but will not be sufficient to attract criminal liability.

Three-judge bench in landmark case of *Jacob Mathew v. State of Punjab*[18]*on* a reconsideration endorsed the approach of high degree of negligence being the prerequisite for fastening criminal liability as adopted in Dr. Suresh Gupta, and it was observed that" 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." Supreme Court in Jacob Mathew observed that the subject of negligence in the context of medical profession necessarily calls for a treatment with a difference. In this case, an aged patient in an advanced stage of terminal cancer was experiencing breathing difficulties and the oxygen cylinder connected to the mouth of the patient was found to be empty. By the time replacement could be made, the patient had died. Supreme Court set aside the judgment of the High Court and held that the doctors could not be criminally prosecuted.The conceptual principles sometimes do pose difficulty in their application to facts, much like in the practice of medicine.

In the case of *Laxman Balkrishna Joshi (Dr.) v. Dr. TrimbakBapuGodbole*[19] the honorable court had held "Neither the very highest nor a very low degree of care and competence judged in the light of the particular circumstances of each case is what the law requires," as the standard of care from a doctor. It has been held by the courts that in the cases of medical negligence, Bolam test is to be applied, i.e., "standard of the ordinary skilled man exercising and professing to have that special skill," and not of "the highest expert skill."[20].This is

[17] (2004) 6 SCC 422.
[18] (2005) 6 SCC 1.
[19] AIR 1969 SC 128.
[20]BolamTest , propounded by McNair J in *Bolam v. Friern Hospital Management Committee* (1957) 2 All ER 118 in the UK.

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applicable to both "diagnosis" and "treatment." It is noted that the Supreme Court in the case of *V Kishan Rao v. Nikhil Super Speciality Hospital*[21]has now observed the need to reconsider the parameters set down in Bolam test.

Earlier in landmark decision in the case of *Spring Meadows Hospital v. HarjotAhluwalia*[22] the court had observed Errors of judgment do not necessarily imply negligence. Gross mistakes would, however, invite the finding of negligence such as use of wrong drug or wrong gas during the course of anesthetic process, delegation of the responsibility to a junior with the knowledge that the junior is incapable of performing the duties properly, removal of the wrong limb, performing an operation on the wrong patient or injecting a drug which the patient is allergic to without looking at the outpatient card containing the warning, and leaving swabs or other items inside the patients.

While dealing with medical negligence cases, the opinions of the medical experts are often called for from both sides. The Indian Evidence Act, 1872,[23] provides that when a court has to form an opinion on a point of science, the opinion of a person especially skilled in such science is considered "relevant." It is to be noted that a "relevant" opinion is not synonymous to the opinion being "conclusive" and law reports are abounding with illustrations of expert opinions being discarded for one reason or another. The honorable court in *Titli v. Alfred Robert Jones*[24], observed that the real function of the expert is to put before the court all the material together with reasons which induce him to come to a certain conclusion so that the court, even though not an expert, may form its own judgment using its own observation of those materials. .The Apex court in the case of *Ramesh Chandra v. Regency Hospital Limited*[25]observed that Experts only render opinions and those that are "intelligible, convincing, and tested"become important factors in the determination of the matter together with other evidence. Therefore, while the courts do not substitute their views for the view of the experts but if they determine that the course adopted by the medical professional concerned was inconceivable or highly unreasonable, it would be open to the court to return a finding of medical negligence.

[21] (2010) 5 SCC 513.
[22] (1998) 4 SCC 39.
[23] Section 45 , The Indian Evidence Act, 1872
[24]AIR 1934 All 273
[25](2009) 9 SCC 709

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The existence of doctor–patient relationship is a prerequisite to fasten liability on the doctor. The relationship is fiduciary in nature, and the obligation on the medical practitioner is greater when the patient ordinarily has an imprecise understanding of the ailment, diagnostic process, treatment, and all its attendant consequences. Duty to act in the best interest, however, cannot be stretched to a level where actions are taken against the will of the patient or without the consent of the patient if the patient is capable of understanding.Medical practitioners can, however, act on the substituted consent, if the primary consent is not available for a variety of reasons such as patient being a minor, mentally unsound, and unconscious.

In *Samira Kohli v. Dr. Prabha Manchanda*,[26] It was held by the Supreme Court that consent taken for diagnostic procedure/surgery is not valid for performing therapeutic surgery either conservative or radical except in life-threatening or emergent situations. It was also held that where the consent by the patient is for a particular operative surgery; it cannot be treated as consent for an unauthorized additional procedure involving removal of an organ on the ground that such removal is beneficial to the patient or is likely to prevent some danger developing in future, if there is no imminent danger to the life or health of the patient.

Subsequently, Supreme Court in *Malay Kumar Ganguly v. Sukumar Mukherjee*[27]without reference to its previous judicial opinion in Samira Kohli emphasized on the need of doctors to engage with the patients during treatment, especially when the line of treatment is contested, has serious side effects and alternative treatments exist, and observed that "in the times to come, litigation may be based on the theory of lack of informed consent."

Balance-The Need ofThe Hour

The legal system has to strike a cautious balance between the independence of a doctor to make judgments and the rights of a patient to be dealt with fairly. Indian courts tend to give sufficient plasticity to doctors and expressly recognize the complexity of the human body, inexactness of medical science, the inherent subjectivity of the process, genuine scope for error of judgment, and the importance of the autonomy of the medical professional.

[26](2008) 2 SCC 1
[27](2009) 9 SCC 21

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The Supreme Court in a significantcase*Martin F. D'Souza v. Mohd. Ishfaq*[28] laid down certain advisory Precautions which doctors and hospitals or nursing homes should take-

a. Current practices, infrastructure, paramedical and other staff, hygiene, and sterility should be observed strictly. Thus, in *Sarwat Ali Khan v. Prof. R. Gogi*[29]The facts were that out of 52 eye cataract operations in an eye hospital, 14 persons lost their vision in the operated eye. An enquiry revealed that in the operation theater, two autoclaves were not working properly. This equipment is absolutely necessary to carry out sterilization of instruments, cotton, pads, linen, etc., and the damage occurred because of its absence in working condition. The doctors were held liable for negligence.

b. No prescription should ordinarily be given without actual examination.

c. A doctor should make his own analysis including tests and investigations of the patient regarding his symptoms where necessary

d. A doctor should not experiment unless necessary and even then he should ordinarily get a written consent from the patient

e. An expert should be consulted in case of any doubt. Thus, in *IndraniBhattacharjee*[30]the patient was diagnosed as having 'mild lateral wall ischemia.' The doctor prescribed medicine for gastroenteritis but he expired. It was held that the doctor was negligent as he should have advised consulting a cardiologist in writing

f. Full record of the diagnosis, treatment, etc., should be maintained.[31]

Keeping in the view the rise in criminal prosecution of doctors, which is both embarrassing and harassing for them, and to protect them from frivolous and unjust prosecutions Supreme Court in the significant case of *Jacob Mathew v. State of Punjab*[32] laid certain binding

[28](2009) 3 SCC 1
[29]OP No. 181 of 1997, decided on July 18, 2007
[30]OP No. 233 of 1996 , decided on July 9 , 2007
[31] Amit Aggarwal, *Medical Negligence :Indian Legal Perspective ,Annals Of Indian Academy Of Neurology* , October 2016 ,available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5109761/ ,visited on March 6,2020
[32] (2005) 6 SCC 1.

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guidelines till statutory rules or instructions by the government in consultation with MCI be issued, which are as follows:

1. Private complaint may not be entertained unless the complainant has produced prima facie evidence in the court in the form of a credible opinion given by another competent doctor

2. Investigation officer should 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 applying Bolam test to the facts collected in the investigation

3. Doctor may not be arrested in a routine manner unless the arrest is necessary for furthering the investigation or for collecting the evidence or if the investigation officer is satisfied that doctor may flee.

The necessity for obtaining independent medical opinion was insisted upon considering that the knowledge of medical science to determine whether the acts of medical professional amounts to negligent act within the domain of criminal law could not be presumed. This requirement was subsequently sought to be made a necessity for a civil action by the Supreme Court in *Martin F. D'Souza v. Mohd. Ishfaq*[33] but was subsequently done away with.

Conclusion

In the process of fixing the parameters of liability for medical negligence two contendingbut equally important interests, need to be balanced. One relates to freedom of a professional in arriving at the judgment and the other of the victims in which the existence of discretion of the medical professional is not sought to be foreclosed but only its abuse and recklessness with which it may be made. Indian courts in the process of arriving at a balance lean, perhaps not unjustifiably, heavily in favor of the doctors.

However on one hand the law avoids unnecessary intrusion into the territory which technically belongs only to medical professionals, and on the other hand The legal system

[33] (2009) 3 SCC 1

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does not adopt complete hands off approach either and does scrutinize the actions of medical professional and seeks to punish those who fall below the minimum standard .The test for judging the minimum standard is also profoundly influenced by the prevailing medical practices and opinions, and the body of knowledge available as on the relevant date. In this regard, law zealously safeguards the autonomy of medical professionals and fully realizes that prescribing unreasonably high standards may have a kind of chilling effect which is not desirable, however, the law also seeks to protect and safeguard the interests of a patient to expect at least a minimum standard of care.