

Medical Negligence in India – A Critical Study

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Abstract

The patients while in pain approach the doctors for their treatment with a simple hope of speedy recovery. However, sometimes there are situations where the treatment do not go as planned, it may be because the result of natural course of life or due to the doctor's fault. One thing which should be kept in mind is the fact that even they are humans and prone to making mistakes. However, any harm due to the negligent act on part of the doctor or medical staff shall attract liability. ¹Any person aggrieved due to the medical negligence shall approach the abovementioned authorities/courts for compensation. Few would disagree that delinquency, like in every other profession, needs to also be dealt with sternly in the field of medicine. The reasons are not difficult to discern. The question only is of defining the contours of "delinquency" which may give rise to adverse legal consequences. This paper deals with some legal issues related to medical negligence.

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 a minimum standard of care.

1. Introduction

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

Medical profession is considered to be a noble profession however, it has been time and again placed under scrutiny and so have all persons working in this profession. ²Medical negligence is considered to be one of the most crucial concerns not just in our country but throughout the world. The primary reason is that numerous cases have been reported where an under qualified

¹Medical Negligence: Law, Statistics and Challenges in India, NJA Law Journal, Vol. 6, pp. 135, Parajuli, Ramesh, 6 NJA L.J. 130 (2018)

²Medical Negligence and Laws in India, Supremo Amicus, Bharadwaj, Animesh Vol. 21, pp. 688-699.

medical professional has been taken under inquiry for not taking reasonable care during the time of operation, diagnosis, etc. The term “medical negligence” is an omnibus one, which has come in vogue to refer to wrongful actions or omissions of professionals in the field of medicine, in pursuit of their profession, while dealing with patients. It is not a term defined or referred to anywhere in any of the enacted Indian laws. This project seeks to outline the basic features of “medical negligence” with minimal usage of legal phraseology. Furthermore, rather than exploring the thorny issues surrounding the subject matter, this piece is intended to be informative. The methodology adopted is descriptive; it is based on judicial opinions of the higher courts of India and is limited to select judicial opinions rather than being an encyclopedia of authorities.

The consequences of medical negligence under broad heads are outlined at the outset in this project, which are followed by an outline of the basic constituents of medical negligence and the ³duties of doctors together with certain illustrations and the minimum standards of care required under law. Thereafter, the project deals with the nature of information required to be imparted to the patient for the purposes of consultation and treatment and concludes after a reference to the general advisory issued by the Supreme Court for doctors to be taken as precautionary measures and the guidelines issued by the Supreme Court for protection of doctors from harassment if criminally prosecuted.

2. Negligence

It is very difficult to define negligence; however, the concept has been accepted in jurisprudence. The authoritative text on the subject in India is the ‘Law of Torts’ by Ratanlal and Dhirajlal.⁴ Negligence has been discussed as: Negligence is the breach of a duty caused by the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do. ⁵Actionable negligence consists in the neglect of the use of ordinary care or skill towards a person to whom the defendant owes the duty of observing ordinary care and skill, by which neglect the plaintiff has suffered injury to his person or property. The definition involves three constituents of negligence: (1) A legal duty to exercise due care on the part of the party complained of towards the party complaining the former's

³Ibid pp 690.

⁴Law of Torts, Ratanlal & Dhirajlal, Twenty-fourth Edition 2002, edited by Justice G.P. Singh; pp.441-442.

⁵Legal Implications Governing Medical Negligence in India, Arya, Vikas, Vol. 62, Issue 5 (2020), pp. 417.

conduct within the scope of the duty; (2) Breach of the said duty; and (3) Consequential damage. 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.

Negligence as a Tort

A tort is a residuary civil wrong. Duties in tort are fixed by the law and such duties are owed in rem or to the people at large generally. Such wrongs can be remedied by filing for unliquidated damages.⁶ There may also be cases where concurrent liability may exist under tort and contract. For instance, if there is a contract existing between a patient and a doctor, then the doctor, for his negligence, will be liable under contract.

Negligence under Contract

A contract may have express or implied terms. There are situations where there is a contract between medical practitioners and patients.⁷ Even in the absence of an express stipulation to the effect that the practitioner will exercise reasonable skill and care in treatment of a patient, it is taken as an implied duty arising out of the contract. Breach of this duty thus results in violation of the contract.

Negligence as a Crime

Negligence as a crime has a different yardstick. Negligence under tort is determined on the extent of the loss caused whereas negligence under criminal law is dependent on the degree or amount of negligence.⁸ Courts have repeatedly held that the burden of proving criminal negligence rests heavily on the person claiming it. Criminal law requires a guilty mind. If there is a guilty mind, a practitioner will be liable in any case.

But if, under the criminal law, rashness and recklessness amount to crime, then also a very high degree of rashness would be required to prove charges of ⁹criminal negligence against a medical practitioner. In other words, the element of criminality is introduced not only by a guilty mind, but by the practitioner having run the risk of doing something with recklessness

⁶Ibid pp 419.

⁷Ibid pp 420.

⁸Ibid pp 421.

⁹Medical Negligence and Rights Violation, Abhijit Das, Ramakant Rai, Dinesh Singh, Vol. 39, No. 35 (Aug. 28 - Sep. 3, 2016), pp. 389.

and indifference to the consequences. It should be added that this negligence or rashness or must be 'gross' in nature.

Negligence under Consumer Protection Legislations

Ever since professions have been included under the purview of consumer protection laws; medical practitioners too have felt the heat. It is on a footing different from any other kind of negligence. ¹⁰Under consumer protection laws, medical negligence is another form of deficiency in service. It is most akin to the liability under the law of torts. But there is stricter and broader liability in this situation as failure to exercise skill and care as is ordinarily expected of a medical practitioner is the test under consumer protection laws.

Admittedly, doctors have an extremely difficult duty to perform. They are the ones in whose hands a patient places what is most valuable to each human – their lives. It is for this reason that doctors are expected to exercise a very high degree of skill and care, but this is also the precise reason why they should not be inhibited in the exercise of their duty. Therefore the laws imposing liability on medical practitioners have been tailored to accord to practitioners maximum possible protection.

Negligence By Professionals

Professionals are persons professing some special skill or job, who are trained to profess in that area specially and bear the responsibility of professing with due care. Such professionals include lawyers, doctors, architects etc. The Apex Court in **Jacob Mathew v. State of Punjab**,¹¹ explained: a professional entering into certain profession is deemed to have knowledge regarding that profession and it is assured impliedly by him that a reasonable amount of care shall be taken to profess his profession. The person can be held liable under negligence if he did not possess the required skills to profess or he failed to take essential amount of care to profess the said profession.

The law nowhere states that a professional shall be held liable if he fails to perform his skills, it states that a professional shall take reasonable amount of care and shall possess knowledge as compared to any practitioner in the same field. ¹²The skills of different professionals surely differs from one another even if they are practicing in the same field but what is required is that

¹⁰Medical negligence: Indian legal perspective, Amit Agrawal, 2016 Oct; 19(Suppl 1):pp 9–S14, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5109761/>

¹¹A.I.R. 2005 S.C. 3180

¹²Medical Negligence, By Aakarsh Shah, <https://www.lawctopus.com/academike/medical-negligence/>

a professional has knowledge of new advances, discoveries and developments in his field so as to give essential care to the consumers of his profession. The failure to comply with this which any ordinary professional would have done properly amounts to professional negligence liable under the law.

3. Concept of Medical negligence

We can define 'Medical negligence' as the improper or unskilled treatment of a patient by a medical practitioner.¹³ This includes negligence in taking care from a nurse, physician, surgeon, pharmacist, or any other medical practitioner. Medical negligence leads to 'Medical malpractices' where the victims suffer some sort of injury from the treatment given by a doctor or any other medical practitioner or health care professional.

Examples of medical negligence

Some examples of medical negligence are as follows:

- improper administration of medicines.
- performing the wrong or inappropriate type of surgery.
- not giving proper medical advice.
- leaving any foreign object in the body of the patient such as a sponge or bandage, etc. after the surgery.

Types of medical negligence

Medical negligence can occur in different ways. ¹⁴Generally, it occurs when a medical professional deviates from the standard of care that is required. So, we can say that any kind of deviation from the accepted standards of medication and care is considered to be medical negligence and if it causes injury to a patient then the doctor who operated on him, other staff and/or hospital may be held liable for this.

¹⁵Some of the common categories of medical negligence are as follows:

¹³Medical Negligence: Law, Statistics and Challenges in India, NJA Law Journal, Vol. 6, pp. 130-137
Parajuli, Ramesh, 6 NJA L.J. 130 (2018)

¹⁴Medical Negligence and Laws in India, Supremo Amicus, Bharadwaj, Animesh, Vol. 21, pp. 697.

¹⁵Medical Negligence Claims, International Journal of Law Management & Humanities, Vol. 4 Issue 2, pp. 242

- **Wrong diagnosis** – When someone goes to a hospital, clinic or medical room, etc. the first step after admittance is the diagnosis. Diagnosing symptoms correctly is critical and important to provide medical care to any patient. ¹⁶However, if a patient is not treated properly due to any mistake in diagnosis, the doctor can be made liable for any further injury or damages caused as a result of the wrong diagnosis.
- **Delay in diagnosis** – A delayed diagnosis is treated as medical negligence if another doctor would have reasonably diagnosed the same condition in a timely fashion. A delay in diagnosis can cause undue injury to the patient if the illness or injury is left to worsen with time rather than being treated. Obviously, any delay in the identification and treatment of an injury can reduce the chance of recovery for the patient.
- **Error in surgery** – Surgical operations require an enormous level of skill and it should be done with due care and caution because even the slightest mistakes can have profound effects on the patient. The wrong-site surgery, lacerations of any internal organ, severe blood loss, or a foreign object being left in the body of the patients, all this comes under Surgical error.
- ¹⁷**Unnecessary surgery** – Unnecessary surgery is usually associated with the misdiagnosis of patient symptoms or a medical decision without proper consideration of other options or risks. Alternatively, sometimes surgery is chosen over conventional treatments for their expediency and ease compared to other alternatives.
- **Errors in the administration of anesthesia** – ¹⁸Anesthesia is a risky part of any major medical operation and requires a specialist (anesthesiologist) to administer and monitor its effect on the patient. Prior to any medical procedure requiring anesthesia, the anesthesiologist has to review the patient's condition, history, medications, etc. to determine the most suitable of all the medicine to use. Anesthesia malpractice can happen even during the pre-operation medical review or during the procedure itself.
- **Childbirth and labor malpractice** – Childbirth is a difficult event for a woman and it becomes worse if not handled properly by the doctors and nurses. There are many

Subramaniam, Shuvetha, 4 Issue 2 Int'l J.L. Mgmt. & Human. 242 (2021).

¹⁶Conceptual Analysis on Medical Liability in India, Parvathy, R. Gowri, Vol. 4 Issue 3, pp. 422., (2021)

¹⁷Ibid pp 423.

¹⁸Ibid pp 424.

instances of medical negligence during childbirth including the mishandling of a difficult birth, complications with induced labor, misdiagnosis of a newborn medical condition, etc.

- **Long-Term negligent treatment** – Medical negligence can also occur in subtle ways over the course of a long treatment period. Usually, the negligence can take the shape of a failure to follow up with treatment, or a doctor's failure to monitor the effects of the treatment properly.

4. Essentials of medical negligence

The term ¹⁹**'Medical negligence'** consists of two words – medical and negligence. Negligence is solely the failure to exercise reasonable care. Medical negligence is no different. It is only that, in case of medical negligence, the doctor is the defendant.

In an action for negligence, the following essentials are required:

- The defendant owed a duty of care to the plaintiff.
- The defendant made a breach of that duty.
- The plaintiff suffered damage as a consequence of that breach.

A doctor owes certain duties of care to his patients, they are as follows:

- It is his duty to decide whether he wants to undertake the case or not,
- It is his duty to decide what treatment to give and;
- It is his duty to decide the administration of treatment.

If a doctor fails to perform the aforesaid duties it results in breach of duty and gives a right of action to the patient. A breach of duty is committed by a doctor when he does not perform the degree of care like a reasonable doctor.

In ²⁰**Kusum Sharma v. Batra Hospital**, it was held by the Supreme Court that a doctor often adopts a procedure which involves a higher element of risk, but in doing so he honestly believes that it will provide greater chances of success for the patient. If a doctor has taken a higher risk

¹⁹Negligence and Medical Negligence ,Jus Corpus Law Journal, Nagpal, Kashin,Vol. 2, Issue 4 (June-August 2022), pp. 115.

²⁰(2010) 3 SCC 480

to redeem the patient out of his/her suffering and it did not yield the desired result, this may not amount to medical negligence.

In **Jasbir Kaur v. State of Punjab**,²¹ a newly born child was found missing from the bed in a hospital. The child was found bleeding and near the wash-basin of the bathroom. The hospital authorities argued that the child had been taken away by a cat which caused the damage to him. The court held that the hospital authorities were negligent and had not taken due care and precaution. Thus, awarded the compensation amounting to Rs. 1 lakh.

Standard of care

²²A standard of care specifies the appropriate treatment and medication procedure as per the requirements that should be taken into account by a doctor while providing the treatment to his patients. The care should not be of the highest degree nor the lowest. Here, the degree means the level of care an ordinary health care professional, with the same training and experience, would render in similar circumstances in the same community. This is the critical question in medical malpractice cases and if the answer is “no,” and you suffered injury as a result of the poor treatment, you may file a suit for medical malpractice. In the case of ²³**Dr. Laxman Balkrishna Joshi Vs. Dr. Trimbak Bapu Godbole and Anr.**, the Supreme Court held that a doctor has certain aforesaid duties and a breach of any of those duties can make him liable for medical negligence. A doctor is required to exercise a reasonable degree of care that is set for this profession.

The Bolam Test

Under the English Law as laid down in ²⁴**Bolam v. Friern Hospital Management Committee**, a doctor, who acts in accordance with a practice accepted as proper by a responsible body of medical men, is not negligent merely because there is a body of opinion that takes a contrary view. In Bolam’s case, Mc Nair, J., in his summing up of jury observed: “The test is the standard of the ordinary skilled man exercising and professing to have that special skill.”²⁵ A man need not possess the highest expert skill; it is well established law that it is sufficient if he exercises

²¹1995 ACJ 1048

²²Legal Implications Governing Medical Negligence in India, Arya, Vikas, Vol. 62, Issue 5 (2020), pp. 420.

²³1969 AIR 128 1969 SCR (1) 206

²⁴[1957] 1 WLR 582.

²⁵Medical Negligence and Fixation of Liability, Ragini, Riya, International Journal of Law Management & Humanities, Vol. 4 Issue 4, pp. 152 (2021)

the ordinary skill of an ordinary competent man exercising that particular art. In the case of a medical man, negligence means failure to act in accordance with the standard of reasonably competent medical man at that time. There may be one or more perfectly proper standards and if he conforms to one of these proper standards, then he is not negligent.” The above test laid down by *Mc Nair, J.*, has been repeatedly approved by the House of the Lords. The test covers the entire field of liability of a doctor namely liability in respect of diagnosis; liability in respect of a doctor’s duty to warn his patients of risks inherent in treatment, liability in respect of operating upon or giving treatment involving physical force to a patient who is unable to give his consent; and liability in respect of treatment.

Duty of care

²⁶A duty of care in cases of medical negligence is an obligation on one party (doctor) to take care to prevent harm being suffered by another (patient). Generally, doctors owe an obligation to take care of their patients. The National Consumer Disputes Redressal Commission in **Chandigarh Clinical Laboratory vs Jagjeet Kaur**²⁷ upheld the findings of the District and State commission wherein the appellant was directed to pay the complainant a compensation of Rs.25,000 along with cost of Rs. 2,000. The appellant laboratory had issued the patient with wrong reports for which the Hon’ble Commission held that the appellant had “duty of care” to give accurate findings to the patient and failure of the appellant to take due care shall amount to medical negligence.

Consequential Damages

In an action for negligence the plaintiff must prove not merely that the defendant was negligent but also that there was actual damage. This damage must be resulted to the defendant in consequence of negligent act which was the direct and proximate cause of damage. ²⁸Damages are awarded to compensate the plaintiff for the damage caused to him and to place him in the same position in which he would have been, if injury was not sustained. In actions of tort, compensation is the principle of Redressal and the measure of damages is the exact amount of the injury which the plaintiff has suffered in his person, earnings, life expectancy, etc

Burden of proof

²⁶Ibid pp 153

²⁷2007) CPJ 157 (NC)

²⁸Medical Negligence India, SS Rana & Co, <https://www.lexology.com/library/detail.aspx?g=b271f61b-9bc7-4d12-9e88-4c058fd8951b>.

The burden of proof of negligence generally lies with the complainant. The law requires a higher standard of evidence to support an allegation of negligence against any doctor. In cases of medical negligence, the patient must establish a claim against the doctor in order to succeed. In ²⁹**Calcutta Medical Research Institute vs Bimalesh Chatterjee**, it was held that the onus of proving proofs against negligence and deficiency in service was clearly on the complainant.

5. The Doctrine of Res ipsa loquitur

The Latin maxim “**res ipsa loquitur**” means that “the thing speaks for itself.”

Black’s Law Dictionary, Eighth Edition, explains *Res Ipsa Loquitur* as “***the doctrine providing that, in some circumstances, the mere fact of an accident’s occurrence raises an inference of negligence so as to establish a prima facie case.***”

³⁰Thus, whenever an accident or an injury occurs, the doctrine of *Res Ipsa Loquitur* may come into play to demonstrate that the nature or the manner of the injury or the accident raises a presumption of negligence against the wrongdoer. In cases of medical negligence, this doctrine is particularly helpful as the Court may apply the same to ascertain *prima facie* guilt of an accused person or a medical professional or a medical establishment, in relation to performance of any surgery or administration of a particular treatment. In order to understand this in a better manner, let us go through the pertinent observations by the Court.

In terms of medical malpractice, it refers to the cases where the doctor’s treatment was far below the set standards of care under that negligence is assumed.

The doctrine assumes the following:

- Nature of injury gives the clue that without negligence it could not have happened.
- There was no involvement of the patient himself in the injury in any way.
- The injury happened under the circumstances which were under the supervision and control of the doctor.

²⁹(1999) CPJ 13 (NC)

³⁰Medical Negligence, By Aakarsh Shah, <https://www.lawctopus.com/academike/medical-negligence/>

It means that by applying the principle the judge has accepted that the negligence has occurred. After this, the doctor will have to rebut this thing and if he fails to do so then the patient would be considered as successful in the case of medical negligence.

Some Examples of Res Ipsa Medical Cases

Some common scenarios of res ipsa cases are given below:

- Leaving some object inside the body of the patient after surgery.
- If a wrong patient gets operated.
- If the wrong part of the patient gets operated.

Medical Negligence Laws in India

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

- Criminal negligence
- Civil negligence
- Negligence under consumer protection Act

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

Criminal Law And Medical Negligence

Indian Penal Code has laid down the medical professional on a different footing as compared to an ordinary human. ³¹Section 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 negligence³². Similarly, other general provisions of IPC, such as Section 337 (causing hurt) and 338(causing grievous hurt), are also often deployed in relation to medical negligence cases.

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

³¹Fallibility of God: Revisiting the Criminal Liability of the Medical Professionals for Negligence in India Medicine and Law, Vol. 31, Issue 3 (2012), pp. 405

³²Available at <http://lawcommissionofindia.nic.in/reports/rep196.pdf>.

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**³³, 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”

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 services³⁴. It can be said that where the consumer protection act ends tort law starts.³⁵ 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. Doors of permanent lok adalats, constituted pursuant to the Legal Services Authority Act, 1987, can also be knocked at by a complainant seeking relief in the relation to services “in a hospital or dispensary” which are considered to be “public utility services” within the meaning thereof, wherein first a conciliation is attempted and thereafter determination on merits of the matter is made. Permanent lok adalats are conferred powers akin to that of a civil court in specified matters (such as summoning and enforcing the attendance of witnesses) and have jurisdiction in the matters up to Rs. 1 Crore.

In the case of **State of Haryana & Ors. v. Smt. Santra**³⁶ 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

³³1965 AIR 1616, 1965 SCR (2) 622.

³⁴Smreeti Prakash, ‘A Comparative Analysis of various Indian legal system regarding medical negligence.’

³⁵M.K. Balachandran, Consumer Protection Act and Medical Profession, Department of Consumer Affairs, Govt. of India in association with I.I.P.A., New Delhi, 2006, Reprint 2008

³⁶AIR 2000 SC 1888

Kanhaiya Kumar v. Park Medicare & Research Centre³⁷ it was held that negligence has to be established and it cannot be presumed.

Consumer Protection Act and Medical Negligence

An aggrieved person can approach the consumer courts to file a case against the accused person and the hospital. In ³⁸**Indian Medical Association vs. V.P. Shantha & ors** the Hon'ble Supreme Court observed that the medical practitioners are covered under the ³⁹Consumer Protection Act, 1986 and the medical services rendered by them should be treated as services under section 2(1) (o) of the Consumer Protection Act, 1986. Similarly under the new Consumer Protection Act, 2019, the medical services shall fall under the ambit of services as mentioned in section 2(42) of the new Act. Any matter in medical negligence on the part of the service provider will be considered as deficiency under section 42(11) of the new Consumer Protection Act, 2019.

Any aggrieved person can claim damages for medical negligence against a doctor or a hospital. Section 69(1) of the Consumer Protection Act, 2019 lays down the time limit within which a complaint for medical negligence must be filed as 2 years from the date of injury.

Medical Council of India

Another consequence of medical negligence could be in the form of imposition of penalties pursuant to disciplinary action. Professional misconduct by medical practitioners is governed by the Indian Medical Council (IMC) (Professional Conduct, Etiquette, and Ethics) Regulations, 2002, made under IMC Act, 1956.⁷ Medical Council of India (MCI) and the appropriate State Medical Councils are empowered to take disciplinary action whereby the name of the practitioner could be removed forever or be suspended. Professional misconduct is, however, a broad term which may or may not include medical negligence within its fold.

Medical Negligence and Hospitals

Hospitals in India may be held liable for their services individually or vicariously. They can be charged with negligence and sued either in criminal/ civil courts or Consumer Courts

Liability of hospitals in cases of negligence

³⁷III (1999) CPJ 9 (NC).

³⁸1996 AIR 550, 1995 SCC (6) 651

³⁹Health Care System and Medical Malpractice in India, Surendra Varma.J, Vol 4, 2018, pp 14.

⁴⁰Hospitals liability with respect to medical negligence can be direct liability or vicarious liability. Direct liability refers to the deficiency of the hospital itself in providing safe and suitable environment for treatment as promised. Vicarious liability means the liability of an employer for the negligent act of its employees. An employer is responsible not only for his own acts of commission and omission but also for the negligence of its employees, so long as the act occurs within the course and scope of their employment. ⁴¹This liability is according to the principle of „respondeat superior“ meaning „let the master answer“. Employers are also liable under the common law 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.

6. Direct liability

A hospital can be held directly liable for negligence on many grounds. Failure to maintain equipments in proper working condition constitutes negligence. In case of damage occurring to a patient due to absence/ non-working equipment e.g. oxygen cylinder, suction machine, insulator, ventilator etc. the hospital can be held liable. Failure to hand over copies of medical records, X-rays, etc., constitutes negligence or deficiency in service. In India, a provision in respect of medical records has been made in The Indian Medical Council [Professional conduct, Etiquette and Ethics] Regulations 2002, Regulations 1.3.1 and 1.3.2 which state that every registered medical practitioner has to maintain medical records pertaining to its indoor or outdoor patients for a period of at least three years from the date of commencement of treatment in the prescribed form given by MCI and if any request is made for medical records either by patient/ authorized attendant or legal authorities involved, the same may be duly acknowledged and documents be issued within the period of 72 hours⁷. Also it must not be forgotten that it is the right of every patient to obtain in writing about his/her medical illness, investigations and treatment given on a prescription/ discharge ticket. Non-providing of medical records to the patients/ attendants may amount to deficiency in service under the Consumer Protection Act, 2019.

⁴⁰Medical Negligence-The judicial Approach by Indian Courts, Ankitha Ssharma Vol 5, <https://asiindia.org/medical-negligence-the-judicial-approach-by-indian-courts/>

⁴¹All Law about Medical Negligence ,<https://www.latestlaws.com/articles/all-about-law-on-medical-negligence-in-india-by-gargi>

Improper maintenance of cleanliness and/or unhygienic condition of hospital premises amounts to negligence. In ⁴²**Mr. M Ramesh Reddy v. State of Andhra Pradesh** the hospital authorities were held to be negligent, inter alia, for not keeping the bathroom clean [in this case the bathroom was covered with fungus and was slippery], 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.

Judgments

The landmark judgment in medical negligence cases and the first judgment that comes into our mind with the highest amount of compensation granted till date is **Dr. Kunal Saha Represented By Sri vs Dr. Sukumar Mukherjee And Ors.**⁴³ Which is famous as the Anuradha Saha Case. In this case, the wife was suffering from drug allergy and the doctors were negligent in prescribing appropriate medicines for the same which ultimately aggravated her condition and led to the death of the patient. The court held the doctor liable for medical negligence and awarded compensation amounting to Rs. 6.08 crore.

In the case of ⁴⁴**V.Kishan Rao Vs Nikhil Super Speciality Hospital**, where a lady who was to undergo the treatment for malaria fever was treated differently. An officer in the Malaria Department filed a suit against the hospital authorities for performing the treatment of his wife negligently, who was undergoing the treatment for typhoid fever instead of malaria fever. The husband got the compensation of Rs 2 lakhs and in this case, the principle of *res Ipsa loquitor* was applied.

In **Achutrao Haribhau khodwa and Ors v. the State of Maharashtra**,⁴⁵ the Supreme Court noticed that the medical profession is very wide and there are a number of admissible courses for the same. Therefore, we cannot hold a doctor liable as long as he is performing his duty with due care and caution. Merely because he chooses any other course of action over another, he is not liable.

⁴²1975 36 STC 439 AP

⁴³(2006) CPJ 142 NC

⁴⁴ (2010) 5 SCC 513

⁴⁵AIR 1996 SC 2377

In ⁴⁶**Juggan Khan v. State of Madhya Pradesh**, the appellant who was a registered Homoeopathic medical practitioner. After seeing an advertisement a woman went to him for the treatment of guinea worms. After taking the medicine prescribed by him, she started feeling restless and even after the administration of some antidotes, she died in the evening. The appellant was convicted for murder under Section 302 of the IPC. The court held that it was a negligent act to prescribe poisonous medicines without proper checking and knowledge of the same.

In **A.S. Mittal and another V State of UP and Others**,⁴⁷ the Apex Court dealt with the case of a mishap in an 'Eye Camp' in Uttar Pradesh. In the camp, about 108 patients were operated out of which 88 underwent cataract surgery. Out of all these people 84 suffered permanent damage to the eyesight. It was found that this mishap was due to normal saline which was used in the operations. The court held the doctor liable as this amounts to medical negligence. A PIL was filed in this case under Article 32 of the Constitution.

In ⁴⁸**Vinod Jain v. Santokba Durlabhji Memorial Hospital & Anr.**, the Supreme Court has mentioned the factors to be considered while establishing the liability in medical negligence cases. In this case, the appellant challenged the NCDRC in the apex court i.e. the Supreme Court of the country. The Supreme Court upheld NCDRC's judgment and made the below-mentioned observations:

- A doctor cannot be said to be negligent if his acts are in accordance with the set guidelines, merely because a body is there which holds a contrary view.
- A doctor need not have special expertise in medicine and it is enough if he exercises ordinary skills that an ordinary man of that profession would be able to do.
- A doctor cannot give assurance for any recovery as it is not in his hands and he can only try his best. The only assurance he can give is that he holds requisite skills in the profession and while undertaking this he should perform his duties as a reasonable man of the profession and in accordance with the standard of care in the medical profession.

7. Conclusion

⁴⁶ AIR 1963 MP 102, 1963 CriLJ 296.

⁴⁷(AIR 1989 SC 1570).

⁴⁸AIR 2019 SC1143

The outcome of treatment is of minimal significance for the imponderables are many in the practice of medicine. Two competing interests, and each being equally important as the other, need to be balanced in the process of fixing the parameters of liability: 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. The law does not seek to make any unnecessary intrusion into the territory which rightfully belongs only to medical professionals, and judges do not seek to impose their own wisdom on to them. The legal system 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, and the test for judging the minimum standard is also heavily influenced by the prevalent medical practices and opinions, and the body of knowledge available as on the relevant date. The standards are not too high and by fastening the liability in certain cases accountability is reinforced for no one can remain immune to scrutiny. 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 a minimum standard of care.

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