

INDIAN LAW PERSPECTIVES ON MEDICAL NEGLIGENCE

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INTRODUCTION

Mahatma Gandhi said “That service is the noblest which is rendered for its own sake”. The famous Frenchman Voltaire said “Men who are occupied in the restoration of health to other men, by the joint exertion of skill and humanity, are above all the great of the earth. They even partake of divinity, since to preserve and renew is almost as noble as to create”. The two sayings by the great people are simply suggesting that the person who practices the profession of a doctor is doing a noble work towards the mankind. The world contains two noble professions a teacher and a doctor. A teacher educates and teaches values to an individual for the progress of the humanity and doctor saves life of an human being. But as we observe now that there are many cases and issues raising in the field of medical practices. With increase of business rivalry and competition to earn as much amount of money as possible people in professional field are much in demand and have a high value especially doctors and physicians. If we see in every place there is always a need of paramedics and physicians. A patient who is pain would pay any amount asked by the doctors for his cure. It is because psychologically a person in necessity would do every possible attempts to remove himself from the pain. A doctor duty is to cure the patient. But if this medical professional does any kind of malpractice which leads to the pathetic condition of the patient he should be punishable for the offence committed. An offence done by a Doctor to patient while curing him amounts to ‘Medical Negligence’.

First of all we will define what is negligence? Negligence is the breach of 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 a reasonable man would not do.² According to Winfield negligence as a tort is the breach of a legal duty to take care which results in damage and undesired by the defendant to the plaintiff. By these two definitions we can see that the law always see the

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² RATANLAL & DHIRAJLAL, THE LAW OF TORTS 457-58 (ed.25 2010).

negligence act in comparison to the act done by any common man in ordinary course of business. Medical Negligence can be read under the ambit of professional negligence. To broaden the definition we can see that under the tort of negligence there is essentiality of breach of duty. So if a person who is capable and ready to give medical advice and treatment in respect of the patient owes certain duty of care and reasonability in deciding whether to undertake the case and a duty of care in deciding what treatment to give in administering the treatment. A patient gives consent to the doctor to cure him and the doctor does his duty and it is implied that the doctor will do his duty with all diligence. The doctor has no doubt a discretion in choosing the procedure for the treatment. The doctor can be held liable if his diagnosis is so palpably wrong as to prove the negligence and also there is the absence of duty of care and reasonable skill done by the doctor.³ Where the failure to perform emergency operation resulted in the death of the patient the doctor has to be held negligent. In the cases of medical negligence the burden of proof is on the plaintiff in the case where general duty aroused and there was failure to take necessary precaution.⁴ Then the very damage to be followed and the burden of proof lays on the defendant.⁵

COMPARISON OF MEDICAL NEGLIGENCE LAW OF INDIA WITH OTHER COUNTRIES

In India there is no law codified specifically to Medical Negligence. Mostly the compensation given to the victims are based on the Judicial Precedence. The offence committed can be dealt under the criminal law and civil law. Under Indian Penal Code, 1860 sections 52, 80, 81, 83, 88, 90, 91, 92 304-A, 337 and 338 contain the law of medical negligence in India. In general the provision says that the doctor can be charged under the criminal negligence if the patient dies by the effect of the anesthesia or the kind of treatment if it can be proven that the death caused was the result of the malicious intention resulting into gross negligence. In such case the physician has to prove that he did the treatment with all reasonable care and also with full diligence. Law expects that a person a duly qualified physician to use degree of skill and care which an average man of his qualification ought to have and guarantees cure.⁶ In

³ Philip India Ltd v. Kunju Punna AIR 1975 Bom 306.

⁴ TT Thomas v. Elisa AIR 1987 Ker. 52.

⁵ *Id.*

⁶ MediIndia Agency, *Consumer Protection Act and Medical Profession - Indian Penal Code and Medical Negligence*, MEDINDIA (23 NOV 2014, 11:30 AM), available at

civil law these kinds of cases are mostly dealt in the Consumer Protection Act,1986. In India doctors can be held liable for their services individually and vicariously unless they come within the exceptions.⁷ In the case of **Indian Medical Association v. V P Santha**⁸ it was held that the doctors are not liable for their services individually and vicariously if they do not charge fees. Free treatments done in nursing homes, government hospitals would not be considered as a service as defined in S.2(1)(o) of COPA,1986. 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 the landmark case of **Dr Laxman Balkrishna Joshi v. Dr Trimbak Babu Godbole**⁹ the Supreme Court ruled that if the treatment done by the doctor is proper according to the body of medical professionals who are skilled in that particular field he cannot be held negligent just because something went wrong in the treatment.

In USA, the laws of medical negligence are dealt by the states not the federal government. They have been derived from the common law. The legal system is designed in such a manner that extensive discoveries and negotiations between the parties is to resolve the dispute without going into the judicial proceedings. The plaintiff party has to prove that they had been provided with substandard medical care that caused their injury. Certain steps needed to be followed in United States for filing a suit against the physician.¹⁰

- (1) A person who is injured during treatment must determine whether or not they have been harmed by inadequate care.
- (2) Physicians and other providers generally are not legally required to tell their patients that they were hurt by medical care that was not as good as it should have been, so patients who suffer adverse outcomes, or their families, usually must consult with others to make this determination.
- (3) The suit must be filed in certain prescribed period in accordance with the statute of limitation.

www.medindia.net/indian_health_act/consumer_protection_act_and_medical_profession_indian_penal_code_and_medical_negligence.html (Last accessed on 26/0/2016)

⁷ K K S R Murthy, *Medical negligence and the law* Vol IV No 3 INDIAN JOURNAL OF MEDICAL ETHICS, 116,116(2007).

⁸ AIR 1996 SC 550.

⁹ AIR 1969 SC 128.

¹⁰ Peter P. Budetti et al., *Medical Malpractice Law in the United States*, KAISER FAMILY FOUNDATION, 1,2(2005).

It depends on the person in some states of United States suit filing starts when the person is injured and in other case it is not initiated until the person knows that they have been injured. Damages take into account both actual economic loss such as lost income and cost of future medical care as well as noneconomic losses such as pain and suffering. Doctors in United States generally have medical negligence insurance to protect themselves from the case of malpractice and unintentional injuries. In some cases this insurance is required if the doctor wants to attain hospital privileges or employment in the medical field.¹¹ Lawsuits alleging medical malpractice in US are filed in a state trial court. Such trial courts have jurisdiction over medical malpractice cases which has the legal authority to hear and decide the case. Legal rules guide venue and jurisdiction in each state. Some towns may be located in two judicial districts, thereby giving the aggrieved patient an option to file suit in more than one trial court.¹² Once damages have been assessed by a court, the losing party can apply for a new trial, or appeal the judgment to the next higher level of court; appeals courts exist in every state and in the federal system for this purpose. In some jurisdictions parties can appeal the size of the judgment at the same court thus dissatisfied plaintiffs may want more money, while defendant physicians can appeal for a reduction in the amount awarded. In practice however, the legal system of the United States is extremely deferential to the finality of a jury trial successful legal appeals usually concern a specific point of law or procedure that may have been misapplied during trial. If a jury applied the correct law, and the trial court followed proper legal procedures, the outcome of a trial is unlikely to be disturbed on appeal, even if it appears unfair or incorrect.¹³

Australia has the highest rate of medical negligence in world according to the reports of World Health Organisation (WHO). According to the statistics of the reports of WHO - 18,000 people may die every year in hospitals through preventable medical negligence in Australia; 50,000 people suffer from permanent injury annually as a result of medical negligence in Australia; 80,000 Australian patients per year are hospitalized due to medication errors.¹⁴ The present law that prevails in Australia regarding the medical negligence was given in the case *Rogers v. Whittaker*¹⁵ where the patient sued a doctor for failing to warn about a slight risk of debilitating side effects following an operation. The

¹¹ B Sonny Bal, *An Introduction to Medical Malpractice in the United States*, NCBI (26 Nov 2008).

¹² *Id.*

¹³ *Id.*

¹⁴ Clinical Negligence Australia, *Medical Negligence in Australia & What every patient should know*, UNITED MEDICAL PROTECTION OF AUSTRALIA, (23 NOV 2014, 11.30 AM), available at www.medneg.com.au/clinical_negligence_lawyers.html (LAST ACCESSED ON 24/0/2016)

¹⁵ (1992) 175 CLR 479.

court in Australia now do not judge a doctors competence by reference to the generally accepted practices of his profession but whether it conforms to the standard of reasonable care demanded by the law. That means that questions of competence are decided by the court as opposed to any group of doctors. Earlier Australia used to follow the law that was Given by UK through *Bolam Test*. This test laid down the rules regarding the appropriate standard of reasonable care in negligence cases involving skilled professionals. The Hon'ble Justice McNair gave the judgement in this case and stated that if a doctor reaches the standard of a responsible body of medical opinion he is not negligent. We will discuss about Bolam's test later when we will see UK legislations on the malpractice. In Australia with a period of significant torts law reforms we can observe to what extent civil liability legislation has limited the liability of health professionals in Australia. The Rogers case which changed the outlook of the medical negligence practices in the Australia just reformed the regulations and points given in the Bolam's Test.¹⁶ The changes are that a medical practitioner is not negligent if the treatment provided was in accordance with an opinion widely held by a significant number of respected practitioners in the field unless the court considers that the opinion was irrational. This is a defence and not an integer of breach and so must be specifically pleaded by the defendant.¹⁷ This is the peer acceptance defence provided by the Australian courts. Then there are general defences like the contributory negligence and voluntary assumption of risk (*volenti non fit injuria*) which can be taken by the defendant.

In UK Bolam Test case is the backbone of emerging laws on medical negligence. The Bolam Test came from the case of **Bolam v Friern Hospital Management Committee**¹⁸ the judgement was given by McNair J. Here the facts were that Mr Bolam was a voluntary patient at Friern Hospital a mental health institution run by the Friern Hospital Management Committee. He agreed to undergo electro-convulsive therapy. He was not given any muscle relaxant, and his body was not restrained during the procedure. He flailed about violently before the procedure was stopped, and he suffered some serious injuries, including fractures of the acetabula. He sued the Committee for compensation. He argued they were negligent for not issuing relaxants; not restraining him; not warning him about the risks involved. The court held that a doctor is not guilty of negligence if he has acted in accordance with the practice accepted as proper by a responsible body of medical men skilled in that particular

¹⁶ Jenifer Yule, *Defences in Medical Negligence: To What Extent has Tort Law Reform In Australia Limited the Liability of Health Professionals?*, JOURNAL OF AUSTRALASIAN LAW TEACHERS ASSOCIATION, 53,2012.

¹⁷ *Id.*

¹⁸ [1957] 1 WLR 582.

art. Putting it the other way round a man is not negligent if he is acting in accordance with such a practice merely because there is a body of opinion who would take a contrary view. Then further legal developments occurred in UK like in the case of in **Whitehouse v. Jordan**¹⁹ where the claimant was a baby who suffered severe brain damage after a difficult birth. The defendant, a senior hospital registrar, was supervising delivery in a high-risk pregnancy. After the mother had been in labour for 22 hours the defendant used forceps to assist the delivery. The Lords found that the doctor's standard of care did not fall below that of a reasonable doctor in the circumstances and so the baby was awarded no compensation. In other case of **Sidaway v. Benthlem Royal Hospital Governors**²⁰ Lord Scarman said that the Bolam principle should not apply to the issue of informed consent and that a doctor should have a duty to tell the patient of the inherent and material risk of the treatment proposed. Where it can be shown that the decision-maker was not merely negligent, but acted with malice the tort of misfeasance in public office may give rise to a remedy. An example might be a prison doctor refusing to treat a prisoner because he or she had previously been difficult or abusive. Although proof of spite or ill-will may make a decision-maker's act unlawful, actual malice in the sense of an act intended to do harm to a particular individual, is not necessary. It will be enough that the decision-maker knew that he or she was acting unlawfully and that this would cause injury to some person or was recklessly indifferent to that result. In Conclusion we can say that professional negligence is problematic because, to a certain degree, each profession sets its own standards and may to that extent be considered self-regulating.

SUPREME COURT OF INDIA'S RULING:

The issue of medical negligence involving gross negligence has been dealt by the Supreme Court in recent years. Many opinions have been given by the Judges on medical negligence. In **Achutrao Haribhau Khodwa v. State Of Maharashtra**²¹ where a towel was left inside a woman's peritoneal cavity while she was operated for sterilization in the government hospital causing peritonitis resulting in her death. The government and the doctor were made liable for the negligence. The Supreme Court gave certain opinion and also applied the principle of

¹⁹ [1981] 1 All ER 267.

²⁰ [1985] AC 871.

²¹ AIR 1996 SC 2377.

*res ipsa loquitor*²². The court laid the opinion that the treatment may differ from doctor to doctor depending upon his skill. The nature of this profession is that there may be more than one course of treatment which may be advisable for the cure of patients. This leads to the courts that it may be slow in attributing negligence on the part of the Doctor if he has given his full efforts. Medical opinion may be different in regard to course of action to be taken by the doctor in treating the patient but if the patient still suffers permanent ailment it will be difficult to adjudge the doctor as guilty of negligence. In the case of **V. Krishan Rao Vs Nikhil Super Speciality Hospital**²³ Krishna Rao, an officer in malaria department filed a complaint against the hospital for negligent conduct in treating his wife. His wife was wrongly treated for typhoid fever instead of malaria fever, due to the wrong medication provided by the hospital. Finally, the verdict was given and Rao was awarded a compensation of Rs 2 lakhs. In this case, the principle of *res ipsa loquitor* was applied and the compensation was given to the plaintiff. There were recent rulings in the case of medical negligence before the case of **Jacob Mathew v. State of Punjab**²⁴ the Supreme Court of India delivered two different opinions on doctors liability. In the case of **Mohanani v. Prabha G Nair & Anr.** The court ruled that doctor's negligence can be proven only by the expert evidence and the scanning of the material which should be presented during the trial. In **Dr. Suresh Gupta v. Govt. of NCT Of Delhi & Anr**²⁵ the standard for proving negligence had to prove to held doctor for criminal liability and the proof of gross negligence and recklessness is on the onus of the plaintiff. According to the Supreme Court the criminal prosecution without proper medical opinion would led to dishonor them in the community. Doctors cannot be tried for culpable homicide on medical mishaps.

The recent case of 2013 of Anuradha Saha were the Supreme Court has awarded the Highest Compensation in the cases of Medical Negligence where it was shown by the petitioner that gross negligence was done by the doctors to the Patient. The Supreme Court enhanced compensation paid to US-based NRI Dr Kunal Saha from Rs 1.73 crore to Rs 5.96 crore for the death of his wife at the age 36 in a Kolkata hospital due to maltreatment. The three doctors found guilty of medical negligence have to pay a total of Rs 25 lakh to Dr Kunal Saha while the rest of the money has to be paid by Kolkata's Advanced Medicare and Research Institute (AMRI) Hospital where Dr Anuradha Saha herself an NRI doctor, died in May

²² Res ipsa Loquitor means things speak for itself.

²³ Civil Appeal No.2641 of 2010 of Supreme Court of India.

²⁴ (2005) 6 SCC 1.

²⁵ Appeal (crl.) 778 of 2004.

1998.²⁶ The court granted the Highest Compensation because petitioner had to suffer for around 15 yrs due to delay judgement. The three doctors were made liable to pay Rs. 10 lakh to the petitioner. In this case the patient suffered skin sloughed off all over her body, except for her skull. She was encased in bandages meant to prevent infections that had already lodged in her system. Her immunity had been compromised after receiving a high dosage of steroids from some of the top doctors in Kolkata.²⁷

ISSUES

After going through all the case laws and judgment certain issues can be raised. As the author of the paper, certain questions come into the mind for the improvement of the laws regarding medical negligence.

- (1) Whether there should be a codified law for medical negligence?
- (2) Whether to prevent the increasing medical negligence cases the doctors practicing in India should have an insurance of medical malpractice done unintentionally by them?
- (3) Whether the Doctor being proved guilty of being medically negligent with the cancellation of license should also be imprisoned for three yrs?

POSSIBLE SOLUTIONS

In India to counter the problem of medical negligence certain changes can be done:

- (1) Introduction of practice of medical transcription in India. It is the practice in which transcription of doctor's reports is done by the dictation of his audio recordings. In simple terms where a person converts all the dictation of the doctor regarding the patient's symptoms, medication given to him, diagnosis etc. This can make the things easy. All the doctors by this practice can have record of the patients and can be used as an evidence if any allegations raises on them.
- (2) Introduction of Paramedic Tribunal which will deal cases related to medical malpractices and negligence in which doctors or medical professionals can solve the

²⁶ News Report, *Medical negligence: SC orders damages of Rs 5.96 cr in Anuradha Saha case*,

²⁷ Gayathri Vaidyanathan, *A Landmark Turn in India's Medical Negligence Law*, N.Y. TIMES, October 31, 2013.

cases regarding it. It will help in solving the cases speedy manner and also the person adjudging this kind of cases can give decisions easily as he will be of that field.

(3) Introduction of Doctor's medical negligence insurance. This practice is adopted in the United States. Here doctors have an insurance to protect themselves from medical negligence litigations and suits if filed against them. This helps in solving the suits and also protects the doctors from frivolous cases filed by the patients.

(4) A general online portal should be developed by the Ministry of Health & Family Welfare where there should be general information by the government about the surgeries and practices followed by doctors in certain operations. Also there should be general description of the medicines that are commonly used by the public and the information of the substitute medicines should be there. It is important that the online portal should be in English and other Indian languages so that people from all over the country can easily access it and read it.

CONCLUSION

After seeing all the cases, opinions and issues we can derive the conclusion that in India we need stricter laws for medical negligence. Professionals found guilty should be punished and their license should be cancelled. A Doctor while doing his practice should always keep in mind that they are serving the humanity and the people trust them fully. We have also seen that what other countries like UK, USA and Australia do whenever any professional negligence occurs. India can adopt some measures to improve its standards. We say that doctor is equivalent to God. Currently what India is facing problem in medical field is that right now there are mediocre doctors practicing in the country who may have not passed the examinations of the medical colleges and who have fake degrees. The doctors with fake degrees is the main reason why medical negligence cases increase. During the surgery they may destroy some or the other organ of the patient. Most of them leave medical equipment in the patient's body. Quality of doctors should improve otherwise there would be so much deterioration in the society. Regulatory bodies need to keep check on Doctor's license. For the courts like Australian Courts have adopted the approach of Bolam Test and have made some changes according to their jurisdiction Indian Courts can also do that. At the end we can say that there is always a scope of improvement in any field but it needs to be done rapidly.

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