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Medical Negligence in India: Current Issues and Ethics

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Abstract: *This paper discusses the growing incidences of medical negligence in India in the recent years and also explores the factors contributing to the ongoing raise in these incidences. It is important to know what the factors that constitute medical negligence. As we are all aware that the duty of a doctor is to examine, diagnose and treat patients, to give consultation to the patients who come for the treatment or due to having any kind of illness. But on the other hand, an insufficiency or carelessness in this duty results in negligence. A fundamental understanding of how medical negligence is arbitrated in the various judicial courts of India will help a doctor to practice his profession without undue worry about facing litigation for alleged medical negligence.*

Keywords: *Medical Negligence, Reasonable Care, Breach of Confidentiality, Consumer Protection Act 1986,*

INTRODUCTION

According to Winfield, negligence is defined as the breach of a legal duty to take care of a person who is suffering from illness and results in damage, undesired by the defendant to the plaintiff. It is the breach of duty to care, meaning thereby carelessness in a matter related in which the law mandates carefulness. A breach of this duty gives a patient the right to initiate action against negligence. More recently, Indian society is experiencing a growing awareness with regard to the patient's rights. This inclination is clearly noticeable from the recent spurt in proceedings with reference to medical professional or establishment liability, claiming redressal for the distress caused due to medical negligence, impaired permission and breach of confidentiality arising out of the doctor-patient relationship. The patient-centered initiative of rights protection is required to be appreciated in the economic context of the rapid decline of State spending and massive private investment in the sphere of the health care system and the Indian Supreme Court's painstaking efforts to constitutionalize a right to health as a fundamental right.

Currently, the arbitration process with regard to medical professional liability is it in a consumer forum or a regular civil or criminal court, considers common law principles relating to carelessness or negligence, vitiated consent and breach of confidentiality. The Hon'ble Apex Court in the matter '*Dr. Balram Prasad vs. Dr. Kunal Saha & Ors.*' & other connected cross appeals have recently awarded a historic verdict having a major impact on medical negligence and standard of medical care in India. Likewise, it is equally essential to note that the protection of patient's right shall not be at the cost of professional honesty and sovereignty. There is definitely a need for striking a subtle balance. Otherwise, the consequences would be inexplicable. Likewise there is a case – *Kunal Saha* – which had been pending in the courts for almost fifteen years for award of adequate and just compensation was finally decided by the Supreme Court on 24 October 2013 and was awarded a little more than Rs. 6 crores plus interest, which had been so far the highest compensation ever awarded by any court in India for medical negligence. Although the lawyers for the hospital and the doctors argued that the multiplier method should have been used for calculating compensation, the Supreme Court was clearly of the view that the method was not suitable for determining the quantum of compensation for medical negligence.

As far as acquiring procedure, there is a justifiable call for a bilateral approach. But on the other hand, the desirable trend point towards recognition of bare, minimum reasonable standards in the light of the social, economic and cultural context that would strengthen the progress of the judges' or adjudicators to decide concerns of legal responsibility on an objective basis.

Alternatively, such recognition enables the medical professionals to internalize such standards in their day-to-day discharge of professional duties, which would confidently prevent to a large extent the development of protection of patient's rights in a litigative atmosphere. In the long run, the present adversarial placement of doctor and the patient would undergo a transformation to the advantage of the patient, doctor, and society at large.

Medical Professional and COPRA

COPRA, Consumer Protection Act, is an Act of parliament of India enacted in 1986 to protect the interests of consumers. It makes provision for the establishment of consumer councils and other authorities for the settlement of consumers' disputes and for matters connected therewith also. The relationship between doctor and patient is to defend the significance of the consumers of different commodities available to them for which they pay but do not get the standard quality of service. E.g. patient pays for the treatment but does not get the correct treatment. Any sufferer consumer, State / Central govt. may lodge the complaint against the erring trader or suppliers, etc. for the deficient service which causes some harm to the consumer in the different redressal forum. E.g. District Forum, State Commission, National Commission.

Medical Negligence Laws in India

As far as medical negligence laws in India are concerned, it is in the evolutionary stage and has not only been associated to the criminal liability of a medical practitioner but also been associated with the deficiency of services leading to civil consequences of damages under the civil laws as well as consumer laws. These laws are not as such defined under any statute but the same has been enclosed under the common laws like the Indian Penal Code, Consumer Protection Act, 1986 etc. Various judgments of the National Consumer Disputes Redressal Commission, Supreme Court of India have further defined the Medical Negligence Laws in India in their pronouncements.

Medical negligence laws in India under the Indian Penal Code

Indian Penal Code is the foundational criminal law considering various provisions for punishments under various categories of offences committed in India. Some sections related to the medical negligence laws in India from the IPC Section 52, Section 80, Section 81, Section 83, Section 90, Section 91, Section 92, Section 304-A, Section 337, Section 338.

How to File a Complaint

A consumer or any recognized consumer association, i.e., voluntary consumer association registered under the Companies Act, 1956 or any other law for the time being in force, whether the consumer is a member of such association or not, or the central or state government.

Defining a Consumer

A consumer is a person who engaged in any services or avails of any services for a contemplation that has been paid or promised or partly paid and partly promised or under any system of deferred payment and includes any recipient or beneficiary of such services other than the person hires or avails of the services for consideration paid or promised or under any system of deferred payment, when such services are availed of with the approval of the first mentioned person. This definition is wide enough to include a patient who merely promises to pay.

Definition of a Complaint

A complaint is an allegation in writing made by a Complainant, i.e., a consumer that he or she has suffered loss or damage as a result of any deficiency of service.

Deficiency of Service

It is defined as the deficiency of service or any fault, imperfection, shortcoming, or inadequacy in the quality, nature, or manner of performance that is required to be maintained by or under any law for the time being in force or has been undertaken to be performed by a person in pursuance of a contract or otherwise in relation to any service.

Place to file a Complaint

A complaint can be filed in following three places:

- 1) The District Forum if the value of services and compensation claimed is less than 20 lakh rupees,
- 2) Before the State Commission, if the value of the goods or services and the compensation claimed does not exceed more than 1 crore rupees, or
- 3) In the National Commission, if the value of the goods or services and the compensation exceeds more than 1 crore rupees.

Cost Involved in Filing a Complaint

There is a minimal fee for filing a complaint before the district consumer redressal forums. We are all consumers of goods and services in one way or the other. The time when one person is born on this earth, he/she becomes a consumer and is entitled to search for relief under the Consumer Protection Act. Now a days, we observe that consumers are deceived, cheated and harassed in many ways. From time to time, they are provided with the inferior quality of goods, sometimes with less quantity than actually demanded whereas at other times the consumer is charged with excess prices than otherwise fixed for the commodity.

Provisions for Appeal

An appeal against the decision of the District Forum can be filed before the State Commission. An appeal will then go from the State Commission to the National Commission and from the National Commission to the Supreme Court. The time limit within which the appeal should be filed is 30 days from the date of the decision in all cases.

Powers of the Consumer Redressal Forum

The forums have a variety of powers. They are:

- 1) The summoning and enforcing of the attendance of any defendant or witness and examining the witness under oath
- 2) The discovery and production of any document or another material object producible as evidence
- 3) The reception of evidence on affidavits
- 4) The summoning of any expert evidence or testimony
- 5) The requisitioning of the report of the concerned analysis or test from the appropriate laboratory or from any other relevant source
- 6) Issuing of any commission for the examination of any witness, and
- 7) Any other matter which may be prescribed

Adjudications of Liability

When the complainant files a written complaint, the forum, after admitting the complaint, sends a written notice to the opposite party asking for a written version to be submitted within 30 days filing the complaint. Thereafter, subsequent to proper scrutiny, the forum would ask for either filing of an affidavit or production of evidence in the form of interrogatories, expert evidence, medical literature and judicial decisions.

Definitional Characteristics of Medical Negligence

In simpler forms, negligence is simply the malfunction to exercise due care. The three components of negligence are as follows:

1. The defendant owes a duty of care to the plaintiff.
2. The defendant has breached this duty of care.
3. The plaintiff has suffered an injury due to this breach.

Medical negligence is no diverse phenomenon. It has been found that in a medical negligence case, most frequently, the doctor is the defendant.

Questioning the Duty of a Doctor

It is a well-known fact that the prime duty of a doctor to provide care, aid to his patients. However, this duty can either be a contractual duty or a duty arising out of tort law. Although, in a number of cases, if the doctor-patient relationship is not established, the courts impose a duty upon the doctor. As per the supreme court order, “every doctor, at the governmental hospital or elsewhere, has a professional obligation to extend his services with due expertise for protecting life” (Parmanand Kataria vs. The Union of India. www.legalservicesindia.com/article)

These cases are, however, clearly limited to certain circumstances where there is a danger to the life of the person. Therefore, in other circumstances, the doctor does not owe a duty.

Again in an order of the Supreme Court of India, if a doctor shows any negligence towards his patient, “bring to his task a reasonable degree of skill and knowledge” and to exercise “a reasonable degree of care” (Laxman vs. Trimback). The doctor, in other words, does not have to adhere to the highest or sink to the lowest degree of care and competence in the light of the circumstance. A doctor, therefore, does not have to ensure that every patient who comes to him is cured. He has to only ensure that he confers a reasonable degree of care and competence.

Reasonable Degree of Care

It is defined as the extent of care and competence that an “ordinary competent member of the profession who confesses to having those skills would exercise in the circumstance in question.” At this point in time, it may be necessary to note the distinction between the standard of care and the degree of care. The standard of care is a steady process and remains the same in all cases. It is the prerequisite and conduct of a doctor that he be practical and logical in his/her approach and need not be essentially conventional to the maximum degree of care or the lowest degree of care possible. The extent of care is erratic and changes or depends upon the prevailing circumstances. It is used to refer to what actually amounts to reasonableness in a given situation.

(Number of Reported Cases in Newspaper)

CASES OF NEGLIGENCE			
Year	Received complaint	Decided/ disposed	Balance/ pending
2005	54	9	45
2006	31	6	25
2007	28	8	20
2008	63	19	44
2009	61	20	41
2010	62	9	53
2011	119	63	56
2012	59	4	55
2013	107	13	94
2014	142	NIL	142
2015	20	NIL	20
(31/3/2015)			
Total	746	151	595

**Source: RTI*

Important Medical Negligence Cases in India

1. Dr. Balram Prasad and Others vs. Dr. Kunal Saha and Another; Supreme Court of India; 24 October 2013.
2. Indian Medical Association vs V. P. Shantha & Ors on 13 November 1995.
3. Dr. Laxman Balakrishna Joshi vs. Dr. Trimbarak Babu Godbole AIR 1969, SC 128 and A.S Mittal .vs State of U.P, AIR 1989 SC 1570.
4. Dr. (Mrs.) Indu Sharma vs Indraprastha Apollo Hospital on 22 April 2015
5. Dr. V. K.Dixit vs Smt. Sangita Dubey & Ors. On 8 April 2015.
6. Ramdev Food Products Private. vs State Of Gujarat on 16 March 2015.
7. Sarla Verma and Others Vs Delhi Transport Corporation and Another; Supreme Court of India 15th April 2009.

Vicarious liability of Hospitals

1. Aparna Dutt .V. Apollo Hospital Enterprises Ltd. (2002 ACJ 954 (Mad. HC).
2. Paschim Bengal Khet Mazdoor Samity and Ors. v. State of Bengal (1996(4) SC260).

Medical Negligence Cases and Ethics

1. Pravat Kumar Mukherjee vs. Ruby General Hospital and ors 2005 CPJ 35 (NC).

Landmark Judgment on Medical Negligence

1. Kunal Saha Vs AMRI (*Advanced Medical Research institute*) famously known as *Anuradha Saha Case*, this case was filed in 1998 with the allegation of medical negligence on Kolkata based AMRI Hospital and three doctors namely Dr. Sukumar Mukherjee, Dr. Baidyanath Halder and Dr. Balram Prasad.
2. V. Krishan Rao Vs Nikhil Super Speciality Hospital, 2010

Reasons for Liability

The question of liability of a doctor occurs not only when the patient has undergone any injury, but when the injury is an outcome of the conduct of the doctor, which has dropped down because of reasonable care. In other words, the doctor is not liable for every injury suffered by a patient. He is liable for only those that are a consequence of a breach of his duty. Hence, once the existence of a duty has been established, the plaintiff must still prove the breach of duty and the causation.

Usually, the liability occurs only when the plaintiff is able to discharge the burden on him of proving negligence. On the other hand in some cases, like a swab left over the abdomen of a patient or the leg amputated instead of being put in a cast to treat the fracture, the principle of '*res ipsa loquitur*' (meaning thereby 'the thing speaks for itself') might come into play. The principle codes are as under.

1. It is believed that the complete control rests with the doctor.
2. It is the universal practice of mankind that the accident in question does not happen without negligence.

"This principle is often misunderstood as a rule of evidence, which it is not. It is a principle in the law of torts. When this principle is applied, the burden is on the doctor/defendant to explain how the incident could have occurred without negligence. In the absence of any such explanation, the liability of the doctor arises."

A distinctive instance is associated with the cases of surgery. While performing any surgical operation where a junior doctor is involved as a part of the team, then his function as far as the exercise of the expert skill is concerned, has to seek the suggestion or help of a senior doctor. He will have discharged his duty once he does this and will not be liable even if he actually commits the act which causes the injury. In such a case, it is the duty of the senior doctor to have advised him properly. If he did not do so, then he would be the one responsible for the injury caused to the patient, though he did not commit the act.

JUDICIAL INTERPRETATION OF MEDICAL NEGLIGENCE LIABILITY

By and large, the following legal issues have been addressed and responded to by different forums and Courts in India. These are as under:

1. Charge of Medical Negligence against Professional Doctors

It has been observed that doctors are prosecuted for obvious criminal activity and violations of statutory provisions of Acts like the Transplantation of Human Organs Act. There is newspaper headline from where we come to know about the first conviction for fetal sex determination that sent shock waves throughout the country. In this case, a sub divisional judicial magistrate in Haryana sentenced a doctor and his assistant to 2 years imprisonment and fine of Rs. 5000/- each for violating the Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994.

However, it is familiar to connect doctors in criminal cases alleging negligence in the death of a patient under treatment. For instance in the case of Dr. Suresh Gupta's (*Dr. Suresh Gupta vs. Govt. of NCT Delhi*, AIR 2004, SC 4091: (2004)6 SCC 42), where the bench declared that extreme care and caution should be exercised while initiating criminal proceedings against medical practitioners for alleged medical negligence.

2. Constituents of Medical Negligence

The operation and its side effects do not come under Medical negligence. The term negligence is defined as the absence or lack of care and in the allegation of negligence in a case of wrist drop. Nothing has been mentioned in the complaint or in the grounds of appeal about the type of care desired from the doctor to whom he failed. It is not said anywhere what type of negligence was done during the course of the operation. The allegation of medical negligence is a serious issue and it is the person who sets up the case to prove negligence based on material on record or by way of evidence.

3. Standard of Care

It is now an established principle of law that a medical practitioner should be a highly skilled person imparting all reasonable care. Neither the very highest nor the very lowest degree of care and competence judged in the light of circumstances in each case is what the law requires.

4. Proof of Medical Negligence

It has been held in different judgments by the National Commission and by the Hon'ble Supreme Court that a charge of professional negligence against a doctor stood on a different footing from a charge of negligence against a driver of a vehicle. The burden of proof is correspondingly greater on the person who alleges negligence against a doctor. It is a known fact that even with a doctor with the best skills, things sometimes go wrong during medical treatment or in a surgery. A doctor is not to be held negligent simply because something went wrong.

5. The Need for Expert Evidence in Medical Negligence Cases

In the cases related to medical negligence, it is for the patient to set up his case against the medical professional and not for the medical professional to prove that he acted with sufficient care and skill. In case of Madhya Pradesh High Court, Smt. Sudha Gupta and Ors. vs. State of M.P. and Ors., 1999 (2) MPLJ 259. The National commission has also taken the same view observing that a mishap during operation cannot be said to be deficiency or negligence in medical services.

6. Criminal Prosecution of Doctor

Doctors can be prosecuted for an obvious criminal activity like violations of statutory provisions of Acts like the Transplantation of Human Organs Act. The newspapers tell us that the first conviction for fetal sex determination has sent shock waves throughout the country. According to these reports, a sub divisional judicial magistrate in Haryana sentenced a doctor and his assistant to 2 years imprisonment and fine of Rs. 5000/- each for violating the Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994. It is expected that weeding out the black sheep in the profession will go a great way in restoring the honor and prestige of a large number of doctors and hospitals who are devoted to the profession and scrupulously follow the ethics and principles of this noble profession.

RECENT SUPREME COURT'S JUDGMENT

In a recent article published in *The Indian Express* dated, April 9th, 2017, states that Supreme Court pardoned a doctor of medical negligence charge after 20 years of an incident in which a road accident victim succumbed to injuries at a hospital. The apex court relied on its earlier verdict to say that in cases where negligence is alleged against professionals like doctors the court should be careful before instituting criminal proceedings.

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 vs V. P. Santha 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 center, dispensary or nursing home would not be considered a "service" as defined in Section 2 (1) (0) of the Consumer Protection Act, 1986.

Criminal Negligence

Criminal Negligence as per Section 304A 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 the Santra case, the Supreme Court has pointed out that liability in civil law is based upon the number of damages incurred; in criminal law, the amount and degree of negligence is a factor in determining liability. However, certain elements must be established to determine criminal liability in any particular case, the motive of the offence, the magnitude of the offence and the character of the offender.

Burden of Proof and Chances of Error

Generally, the burden of proof of negligence, carelessness or insufficiency lies with the complainant. The law requires a higher standard of evidence than otherwise, to support an allegation of negligence against a doctor. In cases of medical negligence, the patient must establish her/ his claim against the doctor.

In case of *Calcutta Medical Research Institute vs Bimalesh Chatterjee*, it was held that the responsibility of proving negligence and the resultant deficiency in service was clearly on the complainant. In *Kanhaiya Kumar Singh vs Park Medicare & Research Centre*, it was held that negligence has to be established and cannot be

CONCLUSION

The Hon'ble Mr. Justice Markendeya Katgi has done yeoman service for society by rendering this judgment. On one hand, it sets at rest the speculative nature of our judicial adjudication of medical negligence liability and on the other, it abundantly clarifies that unless there is prima facie evidence indicating medical negligence, notice either to a doctor or hospital cannot be issued. At the same time, the core essence of the judgment makes it very clear that there cannot be an assumption that doctors cannot be negligent while rendering care and treatment. I think this timely intervention should be disseminated at a popular level so that the mandated Supreme Court's prescription will be observed more in practice than in breach.

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