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PATIENT'S LEGAL RIGHTS AGAINST MEDICAL NEGLIGENCE

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ABSTRACT

Medical jurisprudence is nothing but a medicine Science which opens all gateways to a healthy life and increases the longevity of one's life. In other words, it is worthy to state that Medical Science deals with very serious aspects of human life, and hence negligence is a very grave word in the dictionary of Medical Science. As per the law, the liability of a doctor for medical negligence shall be civil or criminal or both, Where in a civil liability i.e., torturous liability, an aggrieved person or entity can claim damages in a court. But, in the case of a criminal liability, there is a problem, since it is very difficult to trace out mens rea (mental elements) along with actus rea which are the important ingredients of a criminal liability. And thus, it means a civil liability is the sole legal system for resolving the problem of medical negligence, where the sufferer will only receive damages that may not always suffice the costs or losses/damages incurred by medical negligence.

INTRODUCTION

"A faithful friend is the medicine of life; and they that fear the Lord shall find him." - Bible¹

A medical error executed by medical practitioner or a professional negligence by any act or commission which is not accepted by the prudent medical practice is known as medical malpractice or medical negligence. Medical science deals with a very serious aspect of human life, and thus negligence is a very grave word in the dictionary of medical science. The term negligence means a careless activity by a person without any intention. In reference to legal phenomenon negligence means the breach of a legal duty to take reasonable care.

For patients, doctor is no less than God. A patient approaches a doctor for relief from his suffering whether physical or physiological, for this service a patient provides remuneration to the doctor. Thus, as a Sec 2(d) of Consumer Protection Act, any person who buys any goods against consideration or who hires services against consideration is a Consumer. Due to this, a patient comes under the preview of a consumer and thus has all right as a Consumer under the Consumer Protection Act. Even in the matter of medical malpractices, patients may file a case against the hospital authority directly on the basis of vicarious liability between the doctor and hospital.

As per the law, the liability of a doctor for medical negligence shall be civil or criminal or both, Where in a civil liability i.e., torturous liability, an aggrieved person or entity can claim damages in a court. But, in the case of a criminal liability, there is a problem, since it is very difficult to trace out mens rea (mental elements) along with actus rea which are the important ingredients of a criminal liability. And thus, it means a civil liability is the sole legal system for resolving the problem of medical negligence, where the sufferer will only receive damages that may not always suffice the costs or losses/damages incurred by medical negligence.

MEDICAL NEGLIGENCE

Medicine Science opens all gateways to a healthy life and increases the longevity of one's life. Medical science is the science which deals with the upkeep of one's health by preventing and providing treatment for respective diseases. Thus, medical science is the science or practice of diagnosis, treatment, and prevention of diseases.²

The word medicine was derived from the Latin words *ars medicina* means 'the art of healing'. This branch of science, which deals with medicine, encompasses treatment by drugs, diet, exercise and other surgical and non-surgical means. Medical science has been divided into different branches, which have been taken care of by specialized personnel. Medical branches such as etiology, bioengineering, biomedicine, cardiology, cytology, hematology, medicine, neurology, obstetrics, pathology, urology, obstetrics, pathology, urology, virology,

¹ Bible; *Medicine Quotes* (185quotes); (Feb. 3, 2015,12:33AM), <http://todayinsci.com/Quotations/Categories/M-Cat/Medicine-Quotation.htm>;

² Oxford Dictionary, *Medicine*, (Feb. 3, 2015,12:32PM), www.oxforddictionaries.com/definition/English/medicine.



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gerontology etc. and for this purpose, along with medicine, there are different types of treatment such as medication, Chemotherapy, Immunotherapy, Radiation Therapy, Targeted Therapies, Transplantation etc. thus, with these different ways of health care, medical service now a days have become a major institution of Social Control[1].

In other words, it is worthy to state that Medical Science deals with very serious aspects of human life, and hence negligence is a very grave word in the dictionary of Medical Science. There are many different ways of medical negligence by which patients can be seriously injured and can even die, such as Nursing negligence, Surgical malpractice, Birth injury, Gastric Bypass errors, Medication errors, Chiropractic mal practice, Diagnosis error, delay in Medical treatment, Misdiagnosis of a disease or problem errors in Anesthesia etc. which can only be performed by doctors, nurses, or other medical & trained professionals.

The term negligence means, the breach of a legal duty to care. It is well said “*ubi jus ibi remedium*” where there is legal right, there is legal remedy. That is, the breach of duty of care that results in loss or injury to the person or entity, the duty is owed. Negligence usually includes doing something that an ordinary reasonable and prudent person would not do, or not doing something such a person would do considering the circumstances, and the knowledge of the parties involved. Both Civil and Criminal arise for Negligence, where in a Civil Liability (tortious liability), an aggrieved person or entity is entitled to claim damages in a court while in a Criminal Liability, it is usually an unaccepted defense to claim that one was doing one’s best to avoid injury or loss if his or her conduct or performance falls below the expected or required level.³ Thus, negligence is the omission to do something that a reasonable would do, or doing something that a prudent and reasonable man would not do.⁴

DOCTOR – PATIENT RELATIONSHIP

A patient is a person, who is sick or suffering from physical or mental pain or under observation of medical care or seeking medical treatment to alleviate his suffering. A doctor, who is trained from a medical school, to provide medical services to the society and for which, patients, provide him with remuneration or money for the same. For this reason, a Patient comes under the preview a Consumer under Consumer Protection Act 1986, hence patients have all right as a consumer under Consumer Protection Act.

The term Consumer defined under section 2 (d) [2], where any person who buys any goods against consideration or who hires services against consideration is a Consumer. Thus, a patient in relation to his doctor is a consumer [3]. If a person filed a complaint against the failure of an operation, but has not paid the fees, then the complainant is not a consumer [4].

The main objective of this Act is to protect the consumer, for this reason, this act provide number of legal remedies to the injured consumers. Hence, victims of negligent doctors can not only ask for a civil remedy under a tortious liability and Consumer Protection Act 1986 but can even file for a criminal liability. Even the Supreme Court stated that “every doctor, of the governmental hospital or elsewhere has a professional obligation to extend his service with due expertise for protecting life” [5]. In *Laxman vs. Trimback* [6], regarding the duty owed by a doctor towards his patient, the Supreme Court stated that to ‘bring to his task a reasonable degree of skill and knowledge’ and to exercise ‘a reasonable degree of care’.

MEDICAL NEGLIGENCE: A TORT OR CRIME

In Medical Negligence, the liability of the doctor shall be civil or criminal or both. But for the sake of criminal liability, there should exist a mens rea (mental element) along with the actus rea. And due to this reason, it is difficult to make criminal liability upon a doctors for their negligent work, as it is not easy to trace out the actual mens rea with the negligent act.

³ Business Dictionary.com, *Negligence*, (Feb. 4, 2015,12:39PM) www.businessdictionary.com/definition/negligence.html;

⁴ Featuring Black’s law Dictionary free Online legal Dictionary 2nd Ed., *What is negligence?*, (Feb. 4, 2015,12:15PM), <https://thelawdictionary.org/negligence/>.



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Thus, the doctor's liability is basically a tortious liability, where in a patient not only has the right as a consumer by legal provision but also as per the situation has protection under section 80 & 88 of IPC and liability will be treated as a criminal liability along with Section 52, 81, 83, 91, 92, 304-A, 337 & 338 of IPC.

Section 80⁵ states that (Accident in doing a lawful Act) Nothing is an offence which is done by accident or misfortune, and without any criminal intention or knowledge in the doing of a lawful means and with proper care and caution and Section 88⁶ states that, (Act not intended to cause death, done by consent in good faith for the persons benefit). Nothing, which is not intended to cause death, is an offence by reason of any harm which it may cause, or be intended by the doer to cause, or be known by the doer to be likely to cause, to any person for whose benefit it is done in good faith⁷ and who has given a consent, whether express or implied, to suffer that harm, or to take the risk of that harm.

Again under Sec 81⁸, a person can be held liable for the act likely to cause harm, but done without criminal intent, and to prevent other harm, even in case where known to be given under fear or misrepresentation.. Even under Sec 304 A⁹, whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both. Again in section 336¹⁰, whoever does any act so rashly or negligently as to endanger human life or the personal safety of others, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to two hundred and fifty rupees, or with both. It is almost same under section 338¹¹, where whoever causes grievous hurt by act endangering life of a person by performing any act so rashly or negligently as to endanger human life, or the personal safety of others, shall be punished with imprisonment of either description for a term which may extend upon two years or with a fine which may extend to 1000 or both.

Different situations arise in case of occupational negligence and professional negligence. The simple lack of care or accident is not sufficient as proof of negligence in case of medical professionals [8]. A doctor can't be liable for negligence merely because a better alternative course or method of treatment wasn't available or simply because a more skilled doctor would not have chosen to follow or resort to that practice.¹² Thus, in case of medical negligence it is the duty to take proper care and precaution which a prudent medical trained person has found to be sufficient.

In *Balram Prasad vs. Kunal Saha & Ors* [9], the verdict marked the highest compensation ever ordered in a case of medical negligence in India. This case took a course of 15 long years for justice and finally came to an end by the judgment of the apex court (Supreme Court) on 24th Oct 2013 with an order of compensation of Rs. 596 cr. which with interest crossed Rs 11 crore.

In the case of *Indian Medical Association vs. Santha* [10], court had decided that the skill of a medical practitioner differs from doctor to doctor and it is incumbent upon the complainant to prove that a doctor was negligent in the line of treatment that resulted in the death of the patient. Therefore, a judge can find a doctor guilty only when it is proved that he has fallen short of the standard of reasonable medical care.

The Act of medical negligence by a medical professional may be liable in civil context or in criminal context or even in both. The compensation awarded to the doctor, who committed the mistake, and even to the owner of the Hospital or doctor, because they have the relationship of an employer – employee, the plaintiff has also the right to claim damages from the hospital who employed that doctor on the basis of vicarious liability, only when the defendant is in the position of paying the compensation amount.

⁵ IPC 1860

⁶ ibid

⁷ IPC §52 (1860)

⁸ IPC of 1860

⁹ ibid

¹⁰ ibid

¹¹ ibid

¹² ibid



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Even though the whole section of medical negligence comes under civil liability, in some cases when that act becomes so grievous that the compensation amount would not provide proper justice to the aggrieved party then the doctor who committed the act must be punished severely under criminal liability.

MEDICAL NEGLIGENCE: JURISDICTION UNDER CONSUMER COURT:

The Consumer Protection Act and also amendment act of 2002, provides better protection of consumer. Amendment Act of 2002 along with Restrictive and Monopolistic Trade Practice Act includes provisions to safeguard the consumer from unfair trade practices. The Consumer Protection Act provides efficient redress of individual grievances, where section 12(2) read with Sec 30(1) has introduced the concept of fees. The Central Government may prescribe the amount of fees and the manner of payment. Even the Act provides appeal provision from the District Consumer Forum to the State Consumer Forum, and finally to the National Consumer Forum.

The main advantage of invoking Consumer Jurisdiction is that, one can be his own lawyer before the Consumer Courts. Under Consumer Protection Act a consumer of any voluntary consumer organization registered under the societies Registration Act 1860 or under Companies Act 1956 or under any other law for the time being in force and also any authority from Central Government, State Government and Union Territory. Can file a complaint directly, Complaint means any written allegation made by the Complainant whether, it is to mention about losses he suffered or damages as a result of any unfair activity or negligence. The complaint has to be filed within 2years¹³ from the date on which the cause of action arose. A complaint should be filed in a District forum, State Commission or national Commission depending on the quantum of amount involved and within the limits of whose jurisdiction all the opposite parties reside or carry on business or where the cause of action wholly or partly arose. Hence, it can be stated that, the Consumer Protection Act provides for three tier quasi-judicial consumer dispute redressal mechanism. Firstly, the District Consumer Dispute Redressal Forum, has pecuniary jurisdiction upto Rs. 20 Lakhs and, from the receipt of the order, the appeal lies to the State Commission within 30 days. The State Commission is the Second tier, whose pecuniary jurisdiction is upto 1crore from Rs. 20 Lakhs and from here the appeal lies to the National Commission (third tier), within 30 days.

The Parliament is not empowered to establish hierarchy of Courts like the District Fora, State Commission and the National Commission parallel to the hierarchy of Courts established under the Constitution, namely, District Courts, High Courts and Supreme Court in the absence of a suitable amendment made in the Constitution of India in terms of Article 368 thereof [11].

RIGHT TO MEDICAL FACILITIES: A CONSTITUTIONAL RIGHT

Fundamental rights are guaranteed by the Constitution of India, where Article 21[12], states that ‘no person shall be deprived of his life or personal liberty except through procedures established by law’. Thus, the right to health is inseparable from medical facilities as a concomitant of right to health is also a part and parcel of Right to life [13]. Again, Part IV of Constitution lists to Directive Principle of State Policy, where it is obligatory for the state to provide health care facilities, under Article 38, 39 & 47¹⁴. In a Leading case, S.K. Garg vs. State of UP¹⁵, a petition has been filed, raising the issue regarding the worst conditions of public hospitals in Allahabad, where court held that the right to health is a part of the right to life guaranteed by Article 21 of the Constitution [14]. Again in CESC Ltd. Vs, Subash Chandra Bose [15], Court held that right to health is a fundamental right.

MEDICAL NEGLIGENCE INCLUDES:

A medical mal-practice case involves a mistake or error executed by a medical professional that damage or harms patients. But the standard of reasonable care is different according to the situation. E.g., In this case, a patient of 60 years having asthma and a patient of 20 years having the same problem, the standard of care differs, depending on the patient’s age and medical problem.

The Medical Standard of care means ‘the type and level of care an ordinary prudent, health care professional, with the same training and experience, would provide under similar circumstances in the same community’ [16]. There

¹³ Consumer Protection Act §28 (1986)

¹⁴ Constitution of India

¹⁵ Decided on 21.12.98



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are certain specific health care professionals, who are considered specialized in their respective field, after going through a rigorous training and examination. Accordingly, they are expected to deliver to a higher standard of care. Thus, simply failure of an operation and side effects are not considered negligence. The mere allegation will not make a case of negligence, unless it is proved and supported by reliable and expert evidence. Thus, only if the negligence of the doctor is proved, a victim is entitled to compensation [17].

BURDEN OF PROOF:

The burden of proof is correspondingly greater on the person who alleges negligence against a doctor. It is a known fact that even in the case of a doctor with the best skills; things sometimes go wrong during medical treatment or surgery. A doctor is not to be held negligent simply because something went wrong.

There is a need of expert evidence in cases of medical negligence. In *Ns. Sahota vs. New Ruby Hospital and ors [18]*, There was a false allegation of urinary stone not being removed as shown by a shadow in the X-Ray “the burden of proving the negligent act or wrong diagnosis was on the Complainant” and the appeal was dismissed in another case of alleged medical negligence as no expert evidence was produced.

In *Calcutta Medical Research Institute vs. Bimallesh Chatterjee [19]*, it was held that the burden of proving negligence and the resultant deficiency in service was clearly on the complainant. Again in *Kanhaiya Kumar Singh vs. Park Medicare & Research Center [20]*, it was held that negligence has to be established and cannot be presumed.

Generally the burden of proof lies on the complainant, but under particular circumstances, i.e. when the conduct of medical men betrays proper management, the burden shifts on the doctor. Under English Law, shifting of burden taken place with the application of the maxim ‘res ipsa loquitur’, that means, the act speaks for itself. Thus, the act of medical negligence by a medical professional may be liable in civil context or in criminal context or even in both. The compensation awarded on the doctor, committing the mistake and also the management, under the principle of vicarious liability wherein the doctor is the employee of the hospital, in case where the defendants is not in the position of paying the compensation amount.¹⁶ Even though the whole section of medical negligence comes under civil liability, in some cases the negligent act committed is so grievous that the injured party is not interested in compensation as it would not make a difference to them and they believe that the doctor who committed the act must be punished severely.

In case of medical negligence, the outcome of the treatment is of secondary importance, but the method adopted is primary and of much greater importance. In case if a doctor fails to follow one of the accepted methods and instead departs from the conventional course of treatment, still the burden of proof lies upon the doctor to show that whether he had taken all proper care before deciding to depart and he had informed the patient and taken his consent or not. There may be one or more perfectly proper standards and if he conformed to one of those proper standards, he will not be considered negligent. In the case of *State of Haryana vs. Santara [21]*, the court has decided that in absence of gross mismanagement, liability of gross negligence will not be succeeded.

Any person who enters into a particular profession which requires some special knowledge or a particular level of learning, are known as professionals of that branch. This implies that the person dealing with him that the skill which he professes to possess shall be exercised, in discharge of such skill; he is expected to take reasonable degree of care and caution. Like a lawyer does not tell his client that the client shall win the case in all circumstances, similarly, a physician would not assure the patient of full recovery in every case. A surgeon cannot and does not guarantee that the result of the surgery would invariably be beneficial, much less to the extent of 100% for the person operated on. The only assurance which such a professional can give or can be understood to have given by implication is that he is possessed, of the requisite skill in that branch of profession which he is practicing and while undertaking the performance of the task entrusted to him, he would be exercising his skills with reasonable competency. This is what all the people approaching the professional can expect. Judged by this standard, a professional may be held liable for negligence on one of the two findings, that either he was not possessed of the requisite skill when he professed to have possessed, or he did not exercise, with reasonable competency in the given

¹⁶ The Consumer Protection Act, §6,(1986)



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case, the skill which he did possess. The standard to be applied for judging, whether the person has been negligent or not, would be that of an ordinary competent person exercising ordinary skill in that profession.

In *Bolam vs. Friern Hospital Management Committee* [22], the Court explained “where you get a situation which involves the use of some special skill or competency, then the test as to whether there has been negligence or not is not that test of the man on the top of a clasp omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill. It is a well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular part” [23].

The classical statement made by the Court in *Bolam’s* [24] case has been widely accepted that a decisive standard of care requires both of professional men generally and medical practitioners in particular. It has been invariably cited with approval by the Courts in India and applied as a guideline to test the pleas of medical negligence. In tort, it is enough for the defendant to show that the standard of care and the skill attained was that of the ordinary competent medical practitioner exercising an ordinary degree of professional skill. The fact that a defendant charged with negligence, acted in accord with the general and approved practice is enough to clear him of the charge. Two things are worthy to mention in such situations. Firstly, the standard of care, when assessing the practice is adopted, is judged in the light of knowledge available at the time of the incident and not at the date of trial. Secondly, when the charge of negligence arises out of failure to use some particular equipment, the charge would fail if the equipment was not available at the time on which it is suggested as should have been used.

In *Syad Akbar vs. State of Karnataka* [25], the Supreme Court has dealt with and pointed out with reasons the distinction between negligence in civil law and in criminal law. Their Lordship had opined that there is a marked difference as to the effect of evidence, i.e., the proof, in civil and criminal proceedings. In civil proceedings, a mere preponderance of probability is sufficient, and the defendant is not necessarily entitled to the benefit of every reasonable doubt, but in criminal proceedings the persuasion of guilt must amount to such a moral certainty as convinces the mind of the Court, as a reasonable man, beyond all reasonable doubt. Where negligence is an essential ingredient of the offence, the negligence to be established by the prosecution must be culpable or gross and not the negligence merely based upon an error of judgment.

CONCLUSION & SUGGESTIONS

Medical Science deals with very serious aspects of human life, and thus negligence is very dangerous. The term negligence means, the breach of a legal duty to care. It is well said “*ubi jus ibi remedium*” where there is legal right, there is legal remedy. That is, the breach of duty of care which results in loss or injury to the person or entity, the duty is owed. Negligence usually includes doing something that an ordinary reasonable and prudent person would not do, or avoid something that a person would usually do after considering the circumstances situation and the knowledge of the parties involved.

As per the law, the liability of the doctor for medical negligence shall be civil or criminal or both, where in a civil liability i.e., tortious liability, an aggrieved person or entity can claim damages in a court. Thus, a patient comes under the preview of consumer and has all right as a Consumer under Consumer Protection Act, because, according to Sec 2(d) of Consumer Protection Act, any person who buys any goods against consideration or who hires services against consideration is a Consumer, and here also the patient provides remuneration for the services render by the Doctor.

But there is a problem, in case of criminal liability, where it is very difficult to trace out mens rea (mental elements) along with actus rea which are the important ingredients of criminal liability. Because of this problem civil liability becomes the sole legal system for resolving medical negligence problem, where the sufferer will only receive damages which may not always be sufficient for the cost which was incurred by medical negligence.

Another issue in case of medical negligence is related to where burden of proof lies, which is correspondingly greater on the person who alleges negligence against a doctor. A medical practitioner cannot be held liable simply because things went wrong from mischance or misadventure or through an error of judgment in choosing one reasonable course of treatment over the other. A medical practitioner would be liable only where his conduct falls



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below that of the standards of a reasonably competent practitioner in his field. At least three considerations can be pointed out which any forum trying the issue of medical negligence in any jurisdiction must keep in mind. These are:

- That legal and disciplinary procedures should be properly founded on firm, moral and scientific grounds;
- That patients will be better served if the real causes of harm is properly indentified and appropriately acted upon; and
- That many incidents involve a contribution from more than one person and the tendency is to blame the last identifiable element in the chain of causation.

Thus, to establish a medical negligence the above mentioned position must be kept in mind. From this test and situation, it can be summarized that to prove a doctor's negligence is hard and as a result, there is delay in delivery of justice.

As per the concept of Deterrent Theory, severe punishments are inflicted upon the offender so that he abstains from committing a crime in future and it would also be a lesson to the other members of the society, as to what can be the consequences of committing a crime. Hence, we suggest that the offender of medical negligence be penalized under criminal liability ensuring that this type of practice is not repeated in future. And also in every medical institution or organization there should exist a Medical Monitoring Body consisting of experts in the field. This expert body should monitor patient's diagnosis and treatment on a daily basis and provide skilled and professional advice to Doctors of the respective institutes, safeguarding and ensuring the medical protocols for diagnosis and treatment are accurate as per medical standards.

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