

# Towards Curbing Medical Negligence – An Exposition

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## ABSTRACT:

According to a study conducted by Mahendra Kumar Bajpai advocate of Supreme Court, who specialises in Medical Law in 2016 has stated that there is 110% rise in the number of medical negligence cases in India every year and the study also revealed that 90% cases of medical negligence in hospitals. Whenever the medical practitioner's act falls below the standards of a reasonably competent practitioner in his field or without reasonable care, skill and knowledge or willfully acting negligently in treating the patients, there arises the Medical Negligent. In this article, an attempt is made to point out the medical negligence vis-à-vis its consequences on the public and the failure of the public and the private hospital in fulfilling its object in providing better medical services to the patients while pointing out the concept of the right to health. So also, an enduring is put to trace out the practical predicament the people face amid his pathetic conditions in medical facilities in government hospitals. The higher compensation and effective implementation of the Charter of Patients' Rights may help in curbing medical negligence.

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## I. INTRODUCTION

Health is a paramount consideration for the living of human being. A healthy man is an asset to society. A healthy society is necessary for a State to flourish. In case of any dent to the health of a human being, he will rush to the hospital with the hope that medical practitioner will treat him well and with an abundant hope that he will make him fit. But if there is a problem in the very treatment itself, his hope for good health is spoiled. Of late, negligence has become an order in the society, the hospitals are no exception to it.

In this article, an attempt is made to point out the medical negligence vis-a-vis the consequences on the public while pointing out the concept of the right to health. So also, an endeavour is put to trace out the practical predicaments the people face amidst the pathetic conditions of government hospitals.

Medical Negligence is said to be an act which is done by the doctors or staff of the hospital which causes direct injury or to get worse the existing condition of the patient. "The failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation"; any conduct that falls below the legal standard established to protect others against unreasonable risk of harm, except for conduct that is intentionally, wantonly, or wilfully disregarding of other's rights.<sup>1</sup>

According to Wharton's Law Lexicon, the term 'Negligence' means acting carelessly.

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<sup>1</sup>Bryan A. Garner, *Black's Law Dictionary* (19<sup>th</sup> ed.)

In *Blyth v. Birmingham Watermarks company*,<sup>2</sup> the term 'Negligence' is defined as Negligence is the breach of a duty caused by the omission to do something which 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.<sup>3</sup>

The definition of the term 'negligence' involves three constituents namely:

- A legal duty to exercise due care on the part complained of towards the party complaining the former's conduct within the scope of the duty.
- Breach of the said Duty
- Consequential damage.<sup>4</sup>

According to Black's Law Dictionary, the term 'Medical negligent' means the failure to provide medical, dental, or psychiatric care that is necessary to prevent or to treat serious physical or emotional injury or illness.<sup>5</sup>

In *Hedley Byrne & Co. Ltd v. Heller & Partners Ltd.*,<sup>6</sup> the Court held that though the person is honest, his breach of the duty without due care may rise to an action to claim damages.<sup>7</sup> In *Kusum Sharma and Ors. v. Batra Hospital and Medical Research Centre and Ors.*,<sup>8</sup> the apex court has laid down the principles to determine the guilty of medical negligence or otherwise. Some of the principles are:

- Negligence is the breach of a duty exercised by 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.
- Negligence should be an essential ingredient of the offence and must be culpable or gross but not just merely based upon an error of judgment.
- The medical practitioner is expected to bring a reasonable degree of skill and knowledge and must exercise a reasonable degree of skill and knowledge and must exercise a reasonable degree of care which is neither the highest or the lowest degree of care. He will be liable if he falls below the standards of a reasonably competent practitioner in his field.
- There may be a genuine difference of opinion from one to another practitioner in the realm of diagnosis and treatment which is clearly not negligence. The professional is often called upon to adopt a procedure

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<sup>2</sup>(1856) 11 Ex Ch 781

<sup>3</sup>Ratanlal&Dhirajlal, *The Law of Torts*, (24<sup>th</sup> ed., Wadhwa & Company Nagpur)

<sup>4</sup>Poonam Verma v. Ashwin Patel, AIR 1996 SC 2111

<sup>5</sup>Supra note 2

<sup>6</sup>(1964) AC 465

<sup>7</sup>Supra note 4

<sup>8</sup>AIR 2010 SC 1050.

involving a higher element of risk then he should honestly believe that there involves the greater chance of success rather than adopting a lesser risk procedure with a higher chance of failure.

- The professional should not be liable of medical negligence if he performs his duties with reasonable skill and competence and also if he chooses one course of action preference to another one available which is actually acceptable to the medical profession.
- It is our bounden duty and obligation of the civil society to ensure that medical professionals are not unnecessarily harassed or humiliated so that they can perform their professional duties without fear and apprehension.
- The medical practitioners have to be saved timely from the malicious proceedings and for extracting the uncalled compensation mainly targeting the private hospitals/practitioners.
- The medical professionals are entitled to get protection so long as they perform their duties with reasonable skill and competence and in the interest of the patients. The interest and welfare of the patients have to be paramount for medical professionals.

## II. PUBLIC AND PRIVATE HOSPITALS NEGLIGENCE

### Public or Government Hospital

The readers may have a question as to why authors used the term Public hospital or government hospital. The term 'Public' defined as relating or belonging to an entire community, State or nation.<sup>9</sup> Authors would like to state as to why some hospitals called public or government hospitals in the State. Because these hospitals are organised and maintained by the appropriate government for the benefit of the people and also to render the good quality of health services to the people in the State. The government hospitals shall treat the patients equally irrespective of their stature in society. By and large, in all the States, except some slight change as to the nomenclature of the hospitals are known as Primary Health Centre, Community Health Centre, Area Hospital, District Hospital and Government General Hospital.

The authors' concern is that the term public hospital has not fulfilled its object, as its main object is to provide better health services to the people but some of the doctors of the public hospitals are irregular and opening their own hospitals by terming it as a clinic or nursing home. Most of the time, the government doctors will not be available in public hospitals but will be available at their private clinic. One of the authors' personal experience and as heard from the poor people is that government doctors will suggest the patients come to their private clinic rather to the government hospital. The poor people will approach the public or government

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<sup>9</sup> Supra note 2

hospital because they can't afford to the private hospitals but some of the government doctors are charging the poor people in their clinic as the private hospital. Due to non-availability of the government doctors in the hospitals during the emergency, people are facing fatal consequences.

The government hospitals failed in fulfilling their object, the authors would like to enlighten that the public hospitals which are established in every corner of the rural and urban areas and there should be a committee, to ensure the quality of health services provided by the hospitals regularly within reasonable time period and also to make easy access to the hospitals by the people. Due to the deficiency in services rendered by the doctors and the staff of the hospitals the country is facing proliferating death rate every year. The summit courtin **A.S. Mittal &Anr v. State of U.P. &Ors**<sup>10</sup> observed that though the Government, States and Union incur enormous expenditure public money on health care, the public hospitals are failed to maintain the cleanliness and hygienic.

### **Private Hospitals**

The term 'Private' is defined as that relating or belonging to an individual and opposite to the public or government.<sup>11</sup> The private hospitals will be owned by the individuals who possess the sole authority to control and run the same. Private hospitals will hire the doctors with lucrative remuneration to vie among their competitors, because of this reason the management of the private hospitals charge high fee and exorbitant expenditure on the patients. The patients approach the private hospitals, aware of the fact that they will charge more but the people approach the same with a hunch that they will get the best quality of health services rather in the government hospitals. Believing the colourful advertisement as to the quality of health in private hospitals, they rush the same. As a matter of fact, there may not a separate line of treatment to combat the diseases in between the private hospital and government hospitals, the people rush the private hospitals at the cost of exorbitant expenditure due to paltry attention and feeble attendance of doctors at government hospitals. Heavy compensation should be ordered if there is any deficiency of services in private hospitals. In 2017, more than 60 children died. This is not due to any viral infection or contagious diseases but due to insufficient oxygen equipment, and the parents were unable to pay bills for supply of oxygen equipment on their own.<sup>12</sup>

### **III. CONSTITUTIONAL MANDATE OF "RIGHT TO HEALTH"**

The Ministry of Health and Family Welfare of India has released, the "Charter of Patients' Rights" for Adoption formulated by National Human Rights Commission. Some of the rights from the Charter, are as

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<sup>10</sup>1989 AIR 1570

<sup>11</sup> Supra note 2

<sup>12</sup> Farah Mohammed, *The Cautionary Tale of India's Private Hospitals*, JSTOR DAILY (Jan. 26, 2018) (<https://daily.jstor.org/the-cautionary-tale-of-indias-private-hospitals/>) [as visited on Feb 22, 2019]

follows:

1. **Right to information:** The patients have right to get the information about the nature, cause of illness, provisional/confirmed diagnosis, and possible complications and it should be explained to them in the language that they understand. The expected cost of treatment and any additional amount to be incurred due to any change in physical condition of the patients should be communicated to the patients and their caretakers and it is also the duty of the hospital management. They have the right to receive the itemized bill after the completion of the treatment irrespective of the source or mode of payment. They have the right to know the identity and professional status of the doctors, nurses and also whoever providing service to the patients.
2. **Right to records and reports:** The patients and their caretakers have the right to access the reports namely original/copies of case papers, indoor patient reports and investigation reports within 24 hours if the person dies then it can be accessible within 72 hours. Its duty of the hospitals to provide those documents.
3. **Right to Emergency medical care:** In *Parmanand Katara v. Union of India* (1989), the Supreme Court directed the government and private hospitals to give the basic care and treatment to the patients who are in an emergency without demanding the payments or advances and without compromising the quality and safety of the patients.
4. **Right to informed consent:** The duty of the hospital management to get the consent of the patients if the treatment is hazardous test/ treatment and to explain the risks involved in the procedure. If the patient is not in the state to give consent, then the hospital management has to get consent from the elders of the patient or the relatives of the patient as the manner prescribed in Drugs and Cosmetic Rules 2016.
5. **Right to confidentiality, human dignity and privacy:** Its duty of the hospital management to keep the confidentiality about the health condition of the patient, it should not be revealed without consent from the patient and the hospital is to maintain the dignity of every patient. Female patients have the right to have the presence of a female care-taker if there is a male practitioner.
6. **Right to second opinion:** The patients have right to take the second opinion, the hospital management shall not deny in providing the documents necessary for such second option taken by the patients or their care-takers and this should not rise any negative influence on the quality of the treatment otherwise it may deem to be the violation of Human Rights.

7. **Right to transparency in rates, and care according to prescribed rates wherever relevant:** Its duty of the hospital management to transparency in billing the patients' treatment, the management has to follow the prescribed procedure in the prescribed manner.
8. **Right to non-discrimination:** Every patient has the right to get equal treatment irrespective of caste, community, greed, gender, age, etc. those who discriminate based on the category which is prescribed in the constitution they are said to be violated the fundamental rights and human rights of the patients.
9. **Right to safety and quality care according to standards:** Patients have the right to safety and security in the hospital premises. The hospital management should provide cleanliness, and should take infection control measures and safe drinking water, sanitation facilities as per BIS/FSSAI Standards.
10. **Right to choose source for obtaining medicine or tests:** It is the right of the patients or caretakers to choose any pharmacy, diagnosis centre or laboratory where they are willing, they should not be coerced to choose their sources or their prescribed source.
11. **Right to take discharge of patient or receive body of deceased from hospital:** The patients and caretakers have right to discharge, the hospital management should not deny taking discharge the patient or dead body based on payment dispute. The caretakers have the right to the dead body of the patients and they cannot be detained against their wishes as there is non-payment of billing charges and any other procedural grounds.

In *Bandhua Mukti Morcha v. Union of India*,<sup>13</sup> the Apex Court held that Article 21 includes the right to protection of health. In *State of Punjab and Ors. vs. Mohinder Singh Chawala and Ors.*,<sup>14</sup> the Apex Court held that it is settled law that the right to health is integral to right to life. In *Paschim Banga Khet Mazdoor Samity v. State of West Bengal*,<sup>15</sup> It has been cautioned that failure on part of the government hospital to provide a patient timely medical treatment results in the violation of the patient's right to life.<sup>16</sup>

Article 21 is regarded as a natural right, cannot be taken away by any means, yet has been violated by the hospital management without protecting the health of the patients, by imposing an exorbitant charge on the patients and by acting negligently in treating the patients in the emergency conditions. Thus, violation of the natural as well as the fundamental right of the patients. According to the study conducted by Harvard

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<sup>13</sup>AIR 1984 SC 802, MANU/SC/0051/1983

<sup>14</sup>MANU/SC/0277/1997

<sup>15</sup>AIR 1996 SC 2426

<sup>16</sup>K. Mathimaran, *The Fundamental Right to Health Care*, INDIAN JOURNAL OF MEDICAL ETHICS, (<https://ijme.in/articles/the-fundamental-right-to-health-care/?galley=html>) [as visited on Feb. 22, 2019]

University, nearly 50 Lakhs people were dying due to medical negligence and because of the lack of practical knowledge among the doctors and hospital staffs in handling the patients.<sup>17</sup>

The Apex Court eloquently held that a healthy body is a very foundation for all human activities. That is why the adage "SariramadyamKhalu dharma Sadhanam". In a welfare State, therefore, it is the obligation of the State to ensure the creation and the sustaining of conditions congenial to good health.<sup>18</sup>

#### IV. DEFICIENCY IN MEDICAL SERVICES

As per Section 2(1)(g) of Consumer Protection Act, "Deficiency" means any fault, imperfection, shortcoming or inadequacy in the quality, nature and manner of performance

- Which is required to be maintained by or under the law for the time being in force: or
- Which has been undertaken to be the person in pursuance of a contract or otherwise in relation to any service.

As per principle laid down in *M/S. Springs Meadows Hospital and another v. HarjolAhulwalia*,<sup>19</sup> even delegation of responsibility to another may amount to negligence in certain circumstances. In this case, the doctor delegated his duty to the nurse to prescribe the named injection, but the nurse prescribes the wrong injection due to the same child collapsed and got a cardiac arrest.

Notwithstanding the high medical expenses imposed on the public at large, the doctors and the management of private hospitals, perpetrating the deficiency of service.

#### V. CONCLUSION

As post-script, authors welcome the recent apex court judgment in *Shoda Devi v. DDU/Rippon Hospital Shimla and Ors*<sup>20</sup>, wherein the Lordships opined that, compensation should not be restrictive if the victim is very poor and rural background, the lordship has stated that this judgment is to send the message to the professionals that their responsiveness and diligence has to be equi-balanced to all consumers and all the human beings deserved to be treated with equal respect and sensitivity.

The authors will be glad if the Central government or State governments provide the safety, so also minimum and the maximum limit of charges to patients. There will be patients who are unable to afford even the minimum charges, those should be treated free of cost. Authors are looking forward that the effective

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<sup>17</sup> *Nearly 50 Lakh Indians Die Due to Medical Negligence every year in different hospitals*, NEWS, Oct. 28. 2018(<https://www.indiatimes.com/news/india/nearly-50-lakh-indians-die-due-to-medical-negligence-every-year-in-different-hospitals-355619.html>) [as visited on Feb. 22, 2019]

<sup>18</sup> *Vincent Panikurlangara v. Union of India (UOI) and Ors.*, 1987 AIR 990

<sup>19</sup> 1998 4 SCC 39

<sup>20</sup> 2019 SCC Online SC 334

implementation of Charter of Patients' Rights and constitution of monitoring committee<sup>21</sup> to ensure that patients are aware of their rights and to check upon the government doctors.

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<sup>21</sup>Government Doctors abandoning duties and developing private practice: Madras HC directs State to constitute 'Monitoring Committee', Live Law, <https://www.livelaw.in/news-updates/monitoring-committee-for-govt-hospitals-and-doctors-143553> [as visited on Mar 15, 2019]