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Legal Scrutiny of Medical Negligence Malpractice vis-à-vis Liability

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ABSTRACT

Human life is the most valuable thing on earth, and it does not matter how much wealth one has, but one cannot acquire human life since the medical profession deals with human life, so it is one of the most novel profession. Nevertheless, not forgetting the other side of the coin, medical negligence and malpractice are also done by these medical practitioners, which result in loss of human life. As we move forward with innovations in the medical sector, the quality of life should evolve, but it is deteriorating day by day over the numerous years; there is a relatively more minor improvement because the negligence and malpractice done to fill the pockets had overshadowed the good. The professionals and the medical universities are also liable for poor health services because of old teaching methods. Mistakes happen by people, not forgetting doctors are human too, some incidents might happen out of misfortune. However, the health industry should work more upon improvement and curb down the graph of negligence and malpractice.

Keywords: *Medical Negligence, Malpractice, Liability.*

I. INTRODUCTION TO MEDICAL NEGLIGENCE

Richard Selzer, an American author, quoted that – "*If people understood that doctors were not divine, perhaps the odor of malpractice might diminish,"* But adding to the quote making a statement that in India, the doctors do are treated as divine and as a god. Now the question is that why doctors are treated as god they are just humans, and the key to the answer lies in itself it is the only profession where the humans professionally trained to save our beloved once from any danger to life or critical illness which can eventually become a factor of death. For these reasons, doctors are considered a god. Adding to it, Is all doctors can be treated as god as in many cases it's been noted that the cause of death is because of the negligent behavior of the doctors, as even if the condition of the patient is critical, they do wait for hefty payment of charges even before examination of the patient and the abusive nature of the doctors in government hospitals and not forgetting the black marking of organs, false examination and

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 [ISSN 2581-5369]

defective medical reports of the patients and even selling corpse to private institutions for medical research and experiment without the approval of the necessary authorities. No category wise, but both the government and private hospitals doctors fall under the domain of some of these kinds of negligence and malpractice.

Medical negligence is a demonstration or inability to act, or it can likewise be lucid as the offense done by the Doctors, Specialists, or an expertly certified clinical professional bringing about the harm caused to the patient, or in specific cases, genuine sicknesses for their rest of the existence which can even be a factor to death or in the more regrettable instance of carelessness coming about failure to move. 'Medical Negligence can likewise be noted as the synonym to 'Medical Malpractice' as legally speaking Malpractice' is the critical element for medical negligence, and it can make up a reasonable cause for legal claims. [2]

II. MEDICAL NEGLIGENCE: 4 D'S

Chael Sonnen, an American athlete, said, *"All medicine is made to make you better. If it did the opposite, it would be a Malpractice"* notable that malpractice is the key element of negligence. There are certain requirements in order to establish or to identify the medical malpractice. Derivatively there is a presence of 4 D's through violation of which the negligence / malpractice can be identified.

(A) Duty of care

As the name proposes, the duty of care is the relationship established between the patient and doctor; the doctors do own a duty of care for the patient they are treating as with diligence and responsibility and not forgetting to mention the degree of skill and the clinical pledge taken to take the case of their patients. Nevertheless there is an exception to it is that the duty of care is only between the doctors and the patients they are treating and not merely with the other patients or with any sufferer per se victims.[3] Dissecting a theoretical circumstance assumes a patient with cardiac arrest conceded to the Medical Clinic and a specialist allotted with the duty of care for that patient. Regardless of negligence or malpractice, that appointed doctor will be mindful. Yet, for another situation, if a similar doctor or another specialist is out for shopping or theater and if there is an individual with cardiac arrest there, the specialist isn't under commitment to play out his obligations. However, as a specialist, he ought to perform with quintessential responsibilities to give clinical guide the obligation for duty of care is absent

[2] David Goguen, J.D. , (Member of State Bar, California)

[3] F. Gregory Barnhart, Searcy Denney Scarola Barnhart & Shipley, The "Four D's" of Medical Malpractice, [Online] Available at - https://www.jdsupra.com/legalnews/the-four-d-s-of-medical-malpractice-99112/ [Accessed 10-05-2021].

there.

(B) Dereliction

In layman's language, it can be said that when the doctors failed to perform their duty of care or fail of the medical profession is called be well articulated as dereliction. The synonym of dereliction is a breach of duty. Breach of duty arises when a doctor failed to take proper care of their patients or acted negligently. [4] In a circumstance where a patient had developed an issue of the sharp throat and the doctors, after negligently examining the patient, endorsed that the patient was having tuberculosis and gave the patient clinical aid for tuberculosis. Because of it, the patient built up an intense skin illness and inward contamination. As in this case, the doctor performed with negligence and improper medication; this demonstration of the doctor considered dereliction.

(C) Direct Causation

To establish the third D that is Direct Causation, it is essential to build up grounds through which it may be very well sealed that the shortfall of absence' duty of care' the first D and the second, 'dereliction' was the sole cause for the damage caused to the patient. These establishments are necessary to prove that damage while this is done on a straightforward basis. [5] Further, the direct causation can be well understood if, in some instances, the doctor had opted to perform a surgery without prior approval of the patient itself or, in rare cases from the family members didn't sign off for it. In layman's terms, the doctor's action was the direct cause of harm towards the patient can be described as direct causation.

(D) Damages

Lastly, the fourth D damages deal with the harm and damage caused or sustained by the patient. It's when the court of law will follow up with the suit of damages. It may deal with both the mental and physical harm caused to the patient by the doctor for their act of negligence. But to stand up for these claims, the patient must have a testimony, medical reports, or prescription. [6] Dissecting an incident where the patient might be in trauma if he/she being the sole bread earner for the family and just because of negligently acting by the doctor resulting in bedridden and stoppage of earnings for such instances the court of law may grant necessary compensation to the party dealing with the damage.

[4] Ibid
[5] Ibid
[6] Ibid

 [ISSN 2581-5369]

III. LAWS FOR MEDICAL NEGLIGENCE: INDIA

"In the case of medical man, negligence means failure to act by the standards of reasonably competent medical men at the time. There may be one or more perfectly proper standards, and if he conforms to one of these proper standards, then he is not negligent".

– The High Court of Kerala [7]

(A) Medical Negligence and the Constitution of India

Protection of life and personal liberty discussed under Article 21, which is the central core of the Constitution of India, and the concept of"Protection of Health" is also addressed under Article 21, ***Bandhua Mukti Morcha v. Union of India*** [8]. Article 21 incorporates and intends to preserve individual life. It is the commitment of the doctors to attend to every patient promptly to protect the life of the injured and protect his fundamental right to live. [9] In the case of ***Parmanand Katara v. Union of India*** [10] Non-accessibility of medical aid by government hospitals even in cases of emergency/crisis, these points were well considered by the Supreme Court of India. The apex court laid down that if the medical officer or doctor is being appointed to meet the state obligation and has been posted to the government hospital, he/she will be duty-bound to treat the patient in the best possible way to preserve the life. In this case, the Supreme Court noted that the patient was denied admission to the private hospital based on some legal formalities. Fittingly for both the private and government emergency clinics saying something, the court expressed that "No law or State activity can mediate to stay away from delay, in the release of the central commitment, heaps of the clinical calling."[11]Further in the case of ***PaschimBangaKhetMazdoorSamityv. State of West Bengal*** [12] The petitioner met with an accident and was in a severe condition; it was fundamental to concede him to a hospital for proper medical aid, but when the petitioner was taken to a government hospital, they denied admission stating non-availability of bed, ultimately resulting in the admission of the petitioner in a private hospital and family has too high borne prices for treatment. Further, the Supreme Court allowing the petition and order compensation of Rs. The Court made 25000/- and an establishment that the constitution envisages the establishment of a welfare state at the federal level and the state level, and it is the utmost duty of the government for establishing adequate facilities for the welfare of the people.

[7] Moni v. State of Kerala, SA. No. 832 of 2000(G)
[8] (1984) 3 SCC 161: AIR 1984 SC 802
[9] Mamta Rao, Constitutional Law, 233 (2013)
[10] (1989) 4 SCC 286: AIR 1989 SC 2039
[11] Supra note 9
[12] (1996) 4 SCC 37: AIR 1996 SC 2426

 [ISSN 2581-5369]

(B) Medical Negligence and Civil Liability

1. Negligence under the Law of Torts

As we know that Torts is a civil wrong plaintiff usually file a suit under the civil laws to get compensation for the damages caused by the defendant. Further, to establish the vicarious liability and to receive compensation, the breach of 'Duty of Care' must be established. The hospital or the doctor must be liable for the damage caused to the patient, and most importantly, it must be proved before the court of law to receive compensation. Further, if a junior doctor commits negligence, the junior doctor and the senior doctor and the hospital authorities must be booked for negligence. The hospital authorities cannot shift the birder of negligence solely to the junior doctor. In the history of India, the Supreme Court of India ordered the most considerable amount for compensation that is 12 crores which were paid to the petitioner in a medical negligence case where the wife of the petitioner died due to negligence. The case went long for fifteen years; it was the case of ***Dr Balram Prasad v. Dr Kunal Shah and Ors*** [13]

2. Negligence under the Consumer Protection Act

First inquiry which emerges is that whether the patient is a consumer, and the answer to that is yes, the patient is a consumer because a consumer is a person who has opted to avail services by paying a consideration equivalently the patient also falls under the same domain of consumer as he had paid to receive services or medical aid, in case if the doctor act negligently or committed malpractice he/she will be liable for punishment under the Consumer Protection Act. The notable historical judgement of ***Indian Medical Association vs V.P. Shantha 14*** in 1995 brought the medical profession within the domain of a 'service' as defined in Section 2(1)(o) of the Consumer Protection Act, 1986. Further Section 2(1) of the Consumer Protection Act, 1986 will also be one of the essential element to note the deficiency of service cum negligence committed by the doctors as it defines the deficiency of service as seen in the case of ***Indian Medical Association vs V.P. Shantha 15 .*** Further, this case establishes a way for cheap and quick redressal for medical negligence claims, and it also distinguished between the contract of service and contract for services as after critical analysis, it is clear that it is not a contract of personal service as the relationship of the master-servant is absent. The court further referred to the Case of ***Bolam v. Friern Hospital Management Committee*** [16] for legal analysis concerning the present case.

[13](2014) 1 SCC 384
[14] 1996 AIR 550, 1995 SCC (6) 651
[15] Ibid
[16](1957) 1 W.L.R. 582

 [ISSN 2581-5369]

(C) Medical Negligence and the Criminal Liability

Doctors could be changed under Criminal law if the doctor had acted negligently, and mens rea is proved. The specialist can be arraigned for crime or against the infringement of the legal standards set down. Taking apart a circumstance where a specialist is in a situation to play out the careful transfer of kidney yet the specialist neglected to play out his obligation of care as opposed to presenting the body with all organs and all around sewed he perpetrated wrongdoing of smuggling the kidney of the dead patient at a significant expense, in the present circumstance the specialist is liable for disciplinary and legal action under the penal code set up by the country. The doctor is considered as a great human being and following a profession to save the life of our loved ones and a profession of great honour; if the doctor only commits such crime, then the people will start losing faith in them. In Haryana, a judicial magistrate sentenced a doctor and his assistant to imprisonment for two years and with a fine of Rs 5000/- each for violation of Pre Natal Diagnostic Techniques under the Regulation and Prevention of Misuse Act 1994. [17] Before enacting the consumer protection act, the Indian Penal Code, 1860, has laid down some legal actions for prosecution. The law of medical malpractice has developed around Sections 52, 80, 81, 88, 90, 91, 92, 304-A, 336, 337 and 338 of the I.P.C. in the context of criminal proceedings. The Supreme Court has held that to affix risk in criminal procedures, the level of negligence must be higher than the negligence, which is sufficient to attach responsibility in civil cases. [18]

In the case of ***Kurban Hussein Mohamedalli Rangawalla v State of Maharastra***[19] where reference from Emperor v. Omkar Ram- Pratap was taken, and Sir Lawrence Jenkins had interpreted S. 304-A and observed as *"To impose criminal liability under Section 304-A, Indian Penal Code, it is necessary that the death should have been the direct result of a rash and negligent act of the accused, and that act must be the proximate and efficient cause without the intervention of another's negligence. It must be the causa causans; it is not enough that it may have been the causa sine qua non."* [20]

Remedies available to the Doctors under IPC - Section 80 of I.P.C. which states if the doctor had acted reasonably and with a lawful intention, with due care and in that case if an accident had occurred out of misfortune, then the doctor will not be liable for punishable nor constitute

[17]M. S. Pandit and ShobhaPandit, Medical negligence: Criminal prosecution of medical professionals, Indian Journal of Urology, (Online), Available at https://www.ncbi.nlm.nih.gov/pmc/articlesPMC2779964/#!po=10.2941, [Accessed 11-05-2021].
[18]The Association of Surgeons of India, Available at https://asiindia.org/medical-negligence-the-judicial-approach-by-indian-courts/ [Accessed 11-05-2021].
[19] 1965 AIR 1616 1965 SCR (2) 622
[20]Ibid

any criminal offence. *Section 81 of I.P.C.* states that Anything which is done merely because of it is being done with the knowledge that it is likely to cause them harm, if it is done without any criminal intention to cause harm, and in good faith to prevent or avoid other harm to person or property is not an offence. Thus in these situations, the doctor is not punishable. *Section 88 of I.P.C.* states that No person can be accused of an offence if he/she performs an act in good faith for the other person's benefit, does not intend to cause harm even if there is a risk, and the patient has explicitly or implicitly given consent.[21]

IV. RIGHTS OF THE PATIENT

Every Nation has established certain rights to the patient and an obligation to follow them by the hospitals and doctors if the patients' rights are violated, and the respective authorities shall take necessary actions. Most importantly, the citizens must be aware of their legal rights and responsibility to curb the graph of malpractice conducted by the hospital's authorities, staff, and doctors to fill their pocket with the money of patients. The Ministry of Health and Family Welfare (MOHFW) has released a 'Charter of Patients Rights' prepared by the National Human Rights Commission (NHRC) that includes all the lawful rights of the patients. There are three fundamental rights reserved for the welfare of the patients, and the same is to be observed by the hospitals.

(A) The essential requirement at the time of Admission at the hospital

Upon affirming a patient at the hospital or in case the family members had approached the hospital for admission of a patient, the first thing to be done by the doctors or authorities is to inform the patient about the discharge procedure. The hospitals usually have a form called Discharge Procedure Information form in the form the release date of the patient conceded ought to be referenced upon cautiously assessment by the specialist, imperative to note is that this release date ought to be based on sole assessment and recovery time required and not be founded on long expansions only for make high bills and since the referenced date depends on presumption by the specialist. Hence there is another statement referenced in the structure that in the event of treatment, if the patient has been recuperating quick or if the patient appeals to the specialist that he/she had recuperated and should be released, then upon practical assessment and endorsement by the doctor he/she can leave the clinic as it is a right given to the patients.

(B) Non – Coverage Notice

[21]Indian Penal Code,1860

 [ISSN 2581-5369]

When the patient's situation is improved, and there is no requirement for inpatient care, then the hospital as well the attending doctor, upon assessment, may agree to provide with a denial notice. Not confusing, it does not mean that the patient can leave the hospital upon receiving the denial notice as it mean that medicare will not continue coverage. Most importantly, the notice is to be given to the patient only and not to any other member of his family attending him; if the patient is not able to understand the notice under specific circumstance, then it is to be given to the patients next of kin. The notice is in writing, and the rights of the patient to appeal must be outlined. Under the title of right to appeal, the patient can request the PRO, i.e. Peer Review Organization, in case it is necessary to review the notice or decision of the hospital authority. Under the PRO, the hospital cannot ask the patient to pay the bills until the PRO gives a reviewed decision. After receiving the notice from the hospital authorities, it is necessary to ask the PRO to given a reviewed decision within the afternoon or within the first working day after the notice is being received. The patient can follow up with PRO through phone or writing about the status or convey any necessary information. If the PRO upholds the hospital's decision, the patient is entitled to reconsideration by PRO if a request is placed within 60 days.

(C) Discharge Planning

With a solicitation from the patient or without a solicitation, it is the obligation of the medical clinic for a legitimate release plan for the patient. In any case, the patient needs to endure unfavourable medical problems without an appropriate arrangement for release. The release plan should incorporate the patient's arrangement for proper post medical clinic administrations and the accessibility of those administrations. Post emergency clinic administrations

Incorporate home medical services. The release plan should be created under the management of enlisted nurture, social labourer or other qualified faculty and talked about with the patient (or the patient's representative). Only a doctor can demand that a release plan be created and executed; along these lines, it is critical to examine the release plan with the doctor.

V. MALPRACTICE INSURANCE

Malpractice insurance is protection for an expert set off by the carelessness or wrongdoing of the expert. Clinical misbehaviour protection is a form of professional indemnity insurance or can be articulated as insurance for a specialist or other clinical expert set off by the carelessness or wrongdoing of the specialist or other clinical expert.[22] If a doctor somehow is booked for

[22]Edward A. Nolfi, Legal Terminology Explained, 168 (2009)

 [ISSN 2581-5369]

the malpractice knowingly or unknowingly or maybe a case of misfortune, the insurance is to protect him for the expenses, but its limitations are set up to a 75percent of the cost, and the rest 25percent is to be borne by self. It covers the legal expenses, attorneys fees, cost to court, arbitration cost if there is a mutual decision to go for arbitration, or the settlement costs, and in addition, it covers the punitive and compensatory damages and medical damages. Nevertheless, most importantly, it does not cover the cost if booked under criminal negligence, sexual misconduct or alterations of medical records.

VI. CONCLUSION

"We don't classify all doctors as incompetent because of the infrequent instances of medical malpractice. We don't use the example of one bad teacher in our children's school to draw a negative conclusion of the entire teaching profession. We should apply that same rational standard when it comes to how we view law enforcement." [23] The assertion is very much defended as not all specialists act carelessly, some demonstration with due care and insurance, so passing judgment on each specialist under a similar light would do nothing but evil. It is a calling that needs equivalent help to structure the patient and his relatives. In some cases, it is seen that upon the appearance of the patient, the specialist educated the family that the condition regarding the patient is essential and would not be saved; however, the relative desire to concede the patient, the eventual outcome of these circumstances is that if the specialist neglected to save the patient, he would be severely beaten by the thugs employed by the relatives. Coming about to which the association when for the strike to defend their privileges and respect. It is vital to comprehend that the specialist is treated as god's, yet actually, they do not have the divine ability to save somebody's life. There is no power over life and demise. They are simply playing out their obligations to secure life to a specific degree. Presence of certain rules to be followed by medical professionals regarding the duties and responsibilities laid down in the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002. Further, the duties and responsibilities of a doctor and the authorities are prescribed in the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002 and Code of Medical Ethics Regulation, 2002 made under Indian Medical Council Act, 1956.

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[23]Thom Tills , American Politician

 [ISSN 2581-5369]