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Medical Negligence and Consumer Protection Act

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ABSTRACT

The doctor in all realms is considered to be light of God. However, they still are humans and are made up of human elements, which definitely include committing a wrong that may be in the form of an act or omission. This wrong can also be from the end of the support staff. So, in such a scenario, it is imperative to determine who was negligent, and under what circumstances. In India, such matters are delved upon the India Judiciary to decide. But the difficulty arises upon the Judges to decide the matter as they are not medical professionals. They have to put reliance upon the expert's opinion and then apply the basic principles of law of the land.

In this paper the authors have talked about the legal aspects associated with Medical Negligence. The paper talks in depth about the treatment of Medical Negligence under Consumer Protection Act, 2019 and Indian Penal Code, 1860.

Keywords: *Medical Negligence, Consumer Protection Act, IPC.*

I. INTRODUCTION

The definition of negligence has always been wide, but the concept has been accepted in jurisprudence. In the domain of Tort Law, it is when a person breaches his duty of care towards another person due to which he has suffered some kind of legal injury[3]. For a pragmatic view the definition consists of[4]:

- Legal duty with due care and within the scope of the duty too.
- Breach of the abovementioned duty
- Damage or legal injury

Damage plays a vital role while establishing the cause of action[5]. The *Bolam*[6] Case became the guiding factor for the establishment of negligence and held that:

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[3] Ashby v White (1703) 92 ER 126.
[4] Grant v. Australian Knitting Mills Ltd., 1935 AC 85; Bourhill v. Young, 1943 AC 92.
[5] RATANLAL & DHIRAJLAL, Law of Torts.
[6] Bolam v Friern Hospital Management Committee [1957] 1 WLR 582.

 [ISSN 2581-5369]

In a normal case which does not entail any particular skill, negligence is non-fulfillment to do some act which a reasonable man in situation would do; or perfuming some act which the reasonable man in situation would not do; and if such non fulfillment or preforming such act amounts to injury, then there is cause of action.

Therefore, it is imperative to understand 'reasonable man' is in the case of negligence. Generally, the English Courts have judged the conduct of any defendant by comparing it with a hypothetical ordinary man would do[7].

(A) Statement of Objective

1. To understand the concept of negligence by professionals
2. To discuss the concept of medical negligence be medical professional
3. To analyze the degree of Medical Negligence through case analysis
4. To determine the relationship between Medical Negligence and Consumer Protection Act
5. To determine the relationship between Medical Negligence and IPC

(B) Hypothesis

The present paper talks about medical negligence with reference to tort claims. It discusses the malpractices involved in medical practices. The fact that the contract theory has an upper hand over the negligence theory in the medical profession has also been discussed. As we further discuss the degree on the basis of which medical negligence is considered, various cases have been analyzed to get a better perspective. The paper further submits how medical negligence is related to Consumer Protection Act and IPC.

(C) Method of Study

Doctrinal method of research has been adopted by the researcher to complete the following research. The research has been done with the data collected from case laws, National Surveys, Newspapers, Articles etc. Books on both Torts and Forensic Sciences have been referred to in order to complete the research.

(D) Literature Review

Modi K Kannan, *Medical Negligence in India,* A TEXTBOOK OF MEDICAL JURISPRUDENCE AND TOXICOLOGY, 26th ed.

From this paper, the author has made an attempt to showcase the development of the concept

[7] Rich v Pierpont, (1862) 3 F&F 35.

of medical negligence in India and derives the constitutional scheme backing it up. This paper has further broadened our horizon in the spectrum of the rationale of establishing negligence and how the Supreme Court inculcated this concept in 1995. This approach taken by the author turned out to be beneficial for the researchers as the Author has discussed the linkage of Consumer Protection Act with medical negligence. Furthermore, the Author concludes by elaborating on the notions which the Supreme Court had from time to time. The researcher had to limit the use of this Article as the paper was going in complete intricacies of Consumer Protection and not in the realm of medical negligence.

Rema Srinivasan Iyengar, *Medical Negligence and The Law,* MADRAS LAW JOURNAL – CIVIL (2009)

This article presents a summary of legal decisions related to medical negligence, what constitutes negligence in civil and criminal law, and what is required to prove it. This article describes the various laws which govern the medical negligence in India. It highlights that health has always been a matter of universal concern not only in India but also throughout the world. The author also elaborates legal aspects of medical practice have always constituted an important component of medical education. However, the author has strictly adhered to the civil liability aspect which leaves the criminal end for this particular paper.

Ratanlal & Dhirajlal, The India Penal Code (34th ed.)

This Book has briefed the researchers about the question pertaining to the method of establishing criminal liability in the medical negligence domain. The aspects of section 304 A have been deeply discussed. The aspect of deriving criminal liability in a civil injury has also been elaborated. This has truly benefited the researchers for getting the present scenario of Courts in India.

II. NEGLIGENCE BY PROFESSIONALS

As per the English text, a professional is someone possessing special intricacies associated with a certain profession and also that person is practicing that as a full-time occupation to yield a living. The Supreme Court of India has elaborated on the conduct of professionals and what can or may lead to negligence in the case of *Jacob Mathew*.

It stated that in the realm of negligence, professional such as doctors, chartered accountants and others are included in the category of persons professing some special skill. Any reasonable man entering into a profession which requires special skill, explicitly gives assurance the person dealing with him that the skill which he possesses shall be exercised with reasonable

degree of care and caution. A professional never assures his clients of the result, so he may be held liable on two grounds: he may not have that requisite skill which professed to possess, or he did not perform with reasonable competence with the skill he possessed.

The perspective which judges develop while judging the case for whether the person charged has been negligent or not, would be that of an ordinary competent man exercising ordinary skill in that profession. It is not a requisite for every professional to possess the highest level of expertise in that branch which he practices, however this cannot be constructed for analyzing the performance of the professional in a negligence case[8].

The *Bolam* case made an imperative distinction between the negligence by an ordinary man and negligence by a professional, which stated that in case of negligence by professional the test is not that the man having is having the best of that skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill[9]. A man need not possess the highest expert skill; it is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art[10].

III. MEDICAL NEGLIGENCE BE MEDICAL PROFESSIONAL

To begin with, it is fundamentally important to know that the *professional* negligence is different from *occupational* negligence, an error of judgment or an accident, is not proof of negligence in the domain of medical negligence[11]. Whenever a doctor follows a practice acceptable to his field, he cannot be held liable just because of a different alternative course or a better method of treatment or a more specialized doctor might not have chosen that course. In case when there is failure of taking precautions, what is to be judged is whether those precautions were taken which the reasonable experience men finds sufficient; a non usage of special skill cannot directly amount to negligence. It has been implicitly elaborated by the Supreme Court that in case of a doctor, negligence means failure to act in accordance with the standards of reasonably competent men at that relevant time. In our humble opinion that is an accurate statement. But it is further explained that a doctor cannot pigheadedly carry on with technique which is proved to be contrary to the whole of informed medical opinion.

IV. DEGREE OF MEDICAL NEGLIGENCE

The degree of negligence in the civil law has been explicitly expounded by the Courts in India:

[8] ISHITA CHATTERJI, Medical Negligence and Consumer Protection Act.
[9] Supra at 6.
[10] Ibid.
[11] Supra at 8.

 [ISSN 2581-5369]

- *Lata culpa,* gross neglect
- *Levis cupla.* Ordinary neglect
- *Levissima culpa,* slight neglect

The doctors cannot attract punishment for every act of negligence. Slight neglect cannot be prosecuted and that same goes with ordinary neglect. The problem arises when the court finds it difficult to judge gross neglect. The Supreme Court has always backed upon the test laid down in the *Bolam* case.

For further clarity on the notion of the Supreme Court while adjudicating such cases, the researchers have analyzed the following cases:

1. Martin D'Souza's case

The case is regarding kidney transplant and medicines being administered post operation wherein there is a dispute about the medicine itself and the dosage. In 1991, the patient was suffering from chronic renal failure, so he went to Nanavati hospital for kidney transplant. He underwent hemodialysis twice a week. But he got his transplant done in Prince Aly Khan Hospital. There was no complain of deafness from the patient while getting his treatment at Nanavati Hospital. At Nanavati, he was prescribed Amikacin of 500 mg twice a day for 14 days. After some considerable time, the patient filed a complaint at the National Consumer Dispute Redressal Commission and claimed compensation of 12 lakhs as his hearing had been affected. As per him this was due to excessive dosage of Amikacin. This matter went to the Supreme Court and it was held that the doctor and hospital was not negligent.

This judgment was imperative because of the following observations:

- The court stated that medicine is an inexact science. Every case depends on the particular facts and circumstances of the case and also the personal notions of the judge.
- The Court observed that there were some left out intricacies in the *Jacob Mathew's* case. Firstly, it is completely an individual perspective as to what is reasonable and what is unreasonable. The experts may also differ on some aspects. So, degree of care also differs from person to person. Secondly, the 'gross negligence' as stated in *Jacob* amounts to criminal liability, now what is simple and gross is extremely difficult to determine.
- This case has explicitly stated that it is onerous to establish a particular definition as to what is 'reasonable', 'simple' and 'gross'. This case is basically a confession by the judges that in cases of medical negligence the judges are layman and they have to rely on expert opinion.

 [ISSN 2581-5369]

- An order was passed in this case which stated that police need not arrest doctors unless the facts are within the ambit of *Jacob's* case.
- Another order which was passed was that the consumer forums and the criminal courts shall first refer the matter to a committee of doctors before issuing a notice to a doctor or hospital.

There was a lot of ambiguity left after this judgment such as there were impediments being developed in the working consumer forums, criminal courts and for the police. Further, there was no provision for a committee of doctors to give a report. The balance now was been shifted in favor of the doctors for which the *Kishan Rao* judgement was passed.

2. Kishan Rao Case

Kishan Rao got his wife admitted to Nikhil Super Specialty Hospital as she was suffering from fever and complaining of chill. She was not given any treatment for malaria, instead she was undergoing treatment for typhoid. As there was no significant improvement in her condition, she was shifted to Yashoda Hospital where she died due to cardiorespiratory arrest and malaria. Kishan Rao filed a case in the district forum against Nikhil Hospital seeking compensation. The decision was passed in favor of Kishan Rao. Hospital made an appeal to State forum where the decision was overturned on the grounds that there was no expert opinion to the effect that the treatment given by the hospital was wrong. National forum upheld the decision. So, he made an appeal to the Supreme Court, which made an observation that this particular case was not so perplexed which required expert opinion as evidence.

The Court held that it was not necessary in all cases to seek expert opinion before proceeding with the matter. Thus, the guidelines as laid down in *Martin D'Souza's* case, regarding expert opinion before proceeding with any case do not hold good in consumer protection cases which are *prima facie* cases. Furthermore, the consumer protection law has been enacted to expedite the entire process and idea of expert opinion at the outset shall defeat the very purpose of the law.

V. MEDICAL NEGLIGENCE AND ITS RELATIONSHIP WITH CONSUMER PROTECTION ACT

Around 1960s, consumer rights gained momentum in USA as the former US president John F. Kennedy had declared consumer rights to the Congress[12]. This led to an international fulcrum for which the United Nations had to work upon. Subsequently, in 1985 The General Assembly

[12] MEDICAL NEGLIGENCE IN INDIA pg. 2

 [ISSN 2581-5369]

of the United Nations adopted "Guidelines for Consumer Protection" by consensus on 9 April 1985. Right after the enactment of the abovementioned guidelines, India also passed the Consumer Protection Act in 1986[13] with the stated objective to provide for better protection of the interests of consumers and for that purpose to make provisions for the establishment of consumer councils and other authorities for the settlement of consumers' disputes and for matters connected therewith. The Consumer Protection Act came into force on 1 July 1987, and subsequently quasi-judicial machineries known as Consumer Disputes Redressal Agencies were established at the District, State, and National levels to provide speedy and inexpensive judicial remedies to consumer disputes. The Act makes possible a claim for damages on proof of what the Act calls as "deficiency of service".

Initially when the consumer protection act was introduced it did not include the medical profession. There was this difference of opinion by various state regarding the addition of medical profession under section 2(1)(o) of the consumer protection Act, 1986, which includes and briefs about the types and list of services included and excluded. In 1992, there was an appeal from Kerala State Commission[14], the national consumer disputes redressal commission included the medical profession under the section 2(1)(o) of the consumer protection Act 1986. There was lot of rush in the Indian medical Association when it got enlisted for the consumer protection act 1986, they had this doubt as to whether the consumer dispute redressal agencies could adjudicate the complaints of medical negligence capably.

In 1995, the Supreme Court in *Indian Medical Association*[15] case, finally included the medical profession under the Consumer Protection Act. After this judgement it was explicitly clear that Consumer Protection includes all medical services offered by the private and government doctors and hospitals. It exempts only those hospitals and the medical practitioners of such hospitals, which offer free service to all patients at all times. Furthermore, through this judgement Supreme Court made the following facts clear which dwells in medical negligence and consumer laws:

- The Consumer Disputes Redressal Agencies are provided with the same powers as are vested in the civil Court under the Code of Civil Procedure while trying a suit[16].

[13] Act 68 of 1986, received the assent of the President of India on December 24, 1986 and published in the Gazette of India, Extraordinary, Part-II, Section I, dated 26 December 1986, pp 1–12.
[14] Vasantha P Nair v Cosmopolitan Hospital, (1991) 2 CPR 155
[15] Indian Medical Association v VP Shantha, (1995) 3 CPR 412
[16] Para 37

- The procedure followed for the determination of consumer disputes under the Consumer Protection Act is summary in nature involving trial on the basis of affidavits[17].
- The principle of "Bolam test" as laid down[18], is to be applied to determine the standard of care which is required by medical practitioner in an action for damages for negligence[19].
- Service rendered by the doctors and hospitals where charges are required to be paid by persons availing of services but certain categories of persons who cannot afford to pay are rendered service free of charges, would nevertheless fall within the ambit of the expression "service" as defined in section 2 (1) (0) of the Act[20].

At present, Consumer Protection exempts only those hospitals and the medical/dental practitioners of such hospitals which offer free service to all patients at all times. Similarly, all government hospitals except primary health centres where everybody is treated free of cost irrespective of their economic status do come under the purview of Consumer Protection[21].

(A) Parties to the proceedings

In medical negligence cases, along with the patient or on behalf of the patient as a claimant, a registered consumer protection council could initiate action. On death of the complainant, his or her legal representatives would be entitled to pursue the claim. Not merely the doctor who was responsible but also the hospital, if the doctor is an employee or a consultant in the hospital could be sued against on the basis of vicarious liability. In some instances, even apart from the application of this principle, the conduct of any other staff in the hospital than the treating physician may be responsible for the ultimate harm to the patient. In *Ashish Kumar Mazumdar* [22], the patient in a fit of delirium due to high fever had jumped out of the window without being conscious of what he was doing and broke his vertebrae. The Supreme Court held that the hospital would be liable not merely for the wrong diagnosis and the consequences thereof to the patient but also want of care for safety and security of patients. If the hospital or the doctor is insured for malpractice claims, the insurer will also be a party to the proceedings[23].

[17] id
[18] Bolam v Friern Hospital Management Committee, (1957) 1 WLR 582.
[19] Para 30
[20] Para 44
[21] MEDICAL NEGLIGENCE IN INDIA 3.
[22] Ashish Kumar Mazumdar v Aishi Ram Batra Charitable Hospital Trust, (2014) 9 SCC 256.
[23] Javed Alam v Inderjit Kaur, (2005) 11 SCC 550.

 [ISSN 2581-5369]

VI. MEDICAL NEGLIGENCE UNDER IPC

The general condition of penal liability is indicated by the Latin maxim- *Actus rea*- the act alone does not amount to guilt; it must be accompanied by a guilty mind (*mens rea*). The mental attitude of the medical practitioner would thus have to concur with the wrongful act before he could be prosecuted successfully under the criminal law. To attribute *mens rea* to a wrongful act it is necessary that the act be done either wilfully or recklessly. Where the act is wilful, *mens rea* would be easy to attribute to the wrongful act since the mind has acted in concert with the wrongful act. A reckless act is one where the person is responsible for consequences foreseen as the certain or highly probable outcome of his act. However, there are two qualifications- Firstly, criminal law may include provisions penalizing negligence even though this may result from mere inadvertence. Secondly, the law may create offences of strict liability. The focus of this paper is basically concerned with the first qualification since the Indian Penal Code creates this liability.

Therefore, if a medical practitioner, does an act which he did not intend or even foresee, but which a reasonable medical practitioner would have foreseen under similar circumstances as likely to cause death, he would be held guilty of the wrongful act. Here foreseen and foreseeable consequences are put on the same footing as consequences which are intended.

Section 304-A of the Indian Penal Code is the section under the criminal law which deals with professional negligence-the short title of Section 304-A reads 'Causing death by negligence'. The provisions of the section would come into play only when death occurs. No injury short of death would make a medical practitioner liable under this section. Also, the provision comes into effect when there is no intention to cause death, and no knowledge that the act done in all probability would cause death (culpable homicide). The section does not apply when death has resulted from some supervening event which could not have been anticipated, but will only apply when death is the result of the rash or negligent act as its direct or proximate cause.

Criminal negligence is the gross or culpable neglect or failure to exercise that reasonable or proper care and precaution to guard against injury, which was the imperative duty of the professional to adopt. The following test in the case of *R v Holloway*[24] is to establish charge of criminal negligence, which is also recognised by Indian Courts –

- the existence of duty to take care;
- a breach of duty causing death; and

[24] R v Holloway and Others [1993] 4 All ER 935.

- the breach of duty must be characterised as gross negligence. Whether the Doctor's breach of duty amounted to gross negligence, depended on the seriousness of the breach of duty committed by him in all the circumstances in which he was placed when the breach occurred.

The Supreme Court in the case *Dr Suresh Gupta*[25] quashed criminal proceedings against the plastic surgeon for allegedly causing death of a person whilst correcting a minor nose deformity. The Judges in the judgment said that for fixing criminal liability on a doctor or a surgeon, the standard of negligence required to be proved should be so high as could be described as "gross negligence" or "recklessness". The Judges further stated that where a patient's death results merely from an error of judgment or an accident, no criminal liability should be attached to it. Mere inadvertence or some degree of want of adequate care and caution might create civil liability, but will not suffice to hold him criminally liable.

VII. CONCLUSION

In the realm of negligence, courts have to depend on the advice of experts, except in the cases of blatant violation of protocol and doing things which are considered to be unreasonable and imprudent. The level of subjectivity in such decisions is quite high and the purpose of law to be certain and specific is defeated to a large extent. The abovementioned decisions are a good step in the direction of making this murky area a bit tidy, however, a lot needs to be done by the courts in the shape of clearer judgments so that the layman can benefit. As of now, the judgements leave a lot of room for discretion, which at times may be exercised by different persons, including doctors and judicial officers, in an undesirable manner. The law on the subject needs to be more precise and certain that will surely give a better understanding about the "reasonable man".

Lately, Indian society has got a bit experienced in growing awareness regarding patients' right. This trend is clearly discernible spurt in litigation concerning medical professional or establishment liability, claiming redressal for the suffering caused due to medical negligence. The patient-centered initiative of rights protection is required to be appreciated in the economic context of rapid decline of State spending and massive private investments in the sphere of the health care system and Supreme Court's painstaking efforts to constitutionalize a right to health as a fundamental right. However, it is equally essential to note that the protection of patient's right shall not be at the cost integrity and autonomy. There is definitely a need for striking a delicate balance, which the researchers feel that Supreme Court is implicitly doing it as

[25] Dr Suresh Gupta v. Government of NCT of Delhi (Crl.A.No.778 of2004).

pronounced in the above-mentioned cases.

VIII. SUGGESTIONS

The idea of negligence can be understood only when there is clarity about the duty of the doctor, assisting staff and the hospital as a whole. In several cases, there has been a problem of overlapping duties and thus, it becomes difficult to draw a line between duties. Both have a joint and several liability. Thus, it becomes advisable to have clear cut duties laid down for different persons. It is true that it would not easy as it cannot be done perfectly. However, it will provide a basic framework, which helps in deciding matters in situations of confusion and failures.

A number of problems arise when a general practitioner tries to treat a patient who requires services of a specialist or a super-specialist. On the other hand, there may be problems also in situation when the general practitioner could have treated a patient, however, forms an opinion that he cannot do anything, and the patient must be taken to a specialist. So, in these above discussed cases it has been seen that the general practitioner has a very crucial role to play in the treatment of a patient. Agreed that the general practitioner is not supposed to know everything, however in the opinion of the researchers, it is expected that he must guide the patient properly to the best of his ability. So, there must be some guiding factor laid down so that the Court gets some basic idea while making an interpretation.

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 [ISSN 2581-5369]

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